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THE
FEDERAL REPORTER.

VOLUME 117.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 117.

JUDGES

OF THE

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² Resigned, to take effect on appointment of successor.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

SWARTS v. FOURTH NAT. BANK OF ST. LOUIS.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1902.)

No. 1,695.

1. BANKRUPTCY—PREFERENCE—DEFINITION.

Section 60a furnishes the legal and controlling definition of the preference specified in section 57g and other parts of the bankrupt act of 1898.

2. SAME—TEST.

The test of a preference is the payment, out of the bankrupt's estate, of a larger percentage of the claim of a creditor than other creditors of the same class receive from that estate, and it is not whether or not, in view of the obligations of sureties to pay the claim, the payment benefited the preferred creditor.

3. SAME—PAYMENT ON INDORSED NOTES CONSTITUTES.

Payments by the bankrupt, while insolvent, within four months prior to the filing of the petition in bankruptcy against him, upon his indorsed notes, which the indorsers would have paid if he had not, constitute a preference, whether the creditor preferred derived any benefit from these payments or not.

4. SAME—SURRENDER.

A creditor who has several claims of the same class, upon one of which he has received a preference, must surrender the preference before any of his claims can be allowed.

5. SAME—STATUS AT DATE OF FILING PETITION FIXES CREDITORS' RIGHTS.

The status of their claims at the time of the filing of the petition in bankruptcy fixes the rights of the creditors to share in the estate of the bankrupt, under the bankrupt act of 1898.

6. SAME—CLASSES OF CREDITORS.

The meaning of the term "class" in the bankrupt act should be derived, and the classification of creditors thereunder should be made, from the provisions of that act.

7. SAME—TEST OF CLASSIFICATION OF CREDITORS.

The test of the classification of creditors under the bankrupt act of 1898 is the percentage of their claims they are entitled to draw out of the estate of the bankrupt, and not the relations of the creditors to parties other than the bankrupt. If they are entitled to receive the same percentage, they are in the same class; if different percentages, in different classes.

¶ 4. See Bankruptcy, vol. 6, Cent. Dig. § 500.

8. **SAME—CREDITORS WITH AND WITHOUT PERSONAL SECURITY IN SAME CLASS.**
Creditors whose claims are secured by the indorsement or guaranty of one or more third persons are in the same class as those whose claims are not thus secured, when they are entitled to draw out of the bankrupt estate the same percentage on their claims.

9. **SAME—PREFERENCE—CLASSES.**

A bank which held two series of notes of a bankrupt, one for \$35,000, secured by two insolvent accommodation makers, and one for \$25,000, secured by four accommodation makers, some of whom were solvent, received payments on the latter series, to the amount of \$14,600, from the bankrupt while he was insolvent, and within four months of the filing of the petition in bankruptcy against him. *Held*, the bank was in the same class of creditors as holder of the second series of notes as it was as holder of the first series, and its claim, based upon the first series, was not allowable unless it surrendered the preference it received by the payments upon the second series.

10. **SAME—DISQUALIFICATION OF CLAIM BY PREFERENCE.**

The disqualification of a claim for allowance created by a preference inheres in, and follows every part of, the claim, whether retained by the creditor or transferred to another, until the preference is surrendered. After the bank had received the \$14,600 on the notes for \$25,000, the solvent accommodation makers paid the balance remaining due upon them. *Held*, both the accommodation makers' claim for the \$10,400, and interest, which they paid, and the bank's claim for the \$35,000, were disqualified for allowance until the \$14,600 was surrendered to the trustee of the bankrupt estate.

11. **SAME—PREFERENCE—SURRENDER.**

If the bank surrenders the \$14,600, it will become entitled to the allowance of its claim for \$60,000 in full, and the solvent accommodation makers will be entitled to the allowance of no claim for the \$10,400 and interest which they have paid.

12. **SAME—SURETIES—DISCHARGE—ACCEPTANCE FROM THEIR PRINCIPAL AND SUBSEQUENT SURRENDER BY THEIR CREDITOR OF A PREFERENCE DO NOT DISCHARGE SURETIES.**

Accommodation makers, indorsers, or sureties upon the obligations of an insolvent debtor are not discharged from liability to pay them by the innocent acceptance, by their creditor, of payments thereon by the debtor, which the creditor is subsequently required to, and does, surrender to the latter's trustee in bankruptcy as a condition of the allowance of its claim under section 57g of the bankrupt act of 1898.

13. **SAME—CREDITOR HOLDING CLAIM PARTLY PAID BY SURETY MAY PROVE IN FULL.**

A creditor who holds the obligations of a bankrupt which have been partly paid by an accommodation maker, an indorser, or a surety, may prove and have his claim allowed, against the estate of the bankrupt, for the full amount owing by the bankrupt on the obligations. If the dividends on those obligations, plus the amount previously paid by the surety, amount to more than the obligations, the creditor will hold the surplus in trust for the surety.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern District of Missouri.

On February 6, 1900, the Siegel-Hillman Dry Goods Company, a corporation, was adjudged a bankrupt on the petition of its creditors, which was filed on December 30, 1899. Four months before the filing of the petition, the Fourth National Bank of St. Louis held a claim of \$60,000 against this corporation, which was evidenced by a series of promissory notes signed by the company, and indorsed by H. A. Loeb and B. Hillman, which amounted to \$35,000, and by another series of promissory notes signed by the corporation, and indorsed by H. A. Loeb, B. Hillman, L. Regenstein, and F. Siegel

& Bro., which aggregated \$25,000. All the indorsements were placed upon these notes before they were discounted for the accommodation of the corporation, and for the purpose of giving credit to the notes, so that the indorsers stood in the relation of makers to the bank, and of accommodation makers or sureties to the dry goods company. Within four months preceding the filing of the petition in bankruptcy, the dry goods company, while it was insolvent, paid to the bank, which did not have reasonable cause to believe that it was intended thereby to give a preference, the sum of \$14,600 upon some of the notes which were indorsed by Siegel & Bro. On February 21, 1900, Siegel & Bro. paid the \$10,400 and interest which remained unpaid upon the notes which they had indorsed, and subsequently proved up this payment as a claim against the estate of the bankrupt. The bank proved its claim against the bankrupt's estate for \$35,000 and interest, based upon the notes which had been indorsed by Loeb and Hillman, but which did not bear the names of Regenstein or Siegel & Bro. The trustee moved to expunge the claim of the bank unless it surrendered the \$14,600 which it had received from the estate of the bankrupt within four months preceding the filing of the petition. The referee granted the motion. The district court reversed this decision, and directed the referee to deny the motion. From the decree to this effect, the trustee has appealed to this court.

David Goldsmith (A. L. Abbott, on the brief), for appellant.

Lee Sale (M. N. Sale, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

May a creditor of a bankrupt whose claim is evidenced by numerous promissory notes secured by different indorsers or accommodation makers accept from the insolvent, within four months of the filing of the petition in bankruptcy against him, payment in part of the notes secured by the solvent indorsers, and then obtain the allowance of that portion of his claim against the bankrupt upon which the solvent indorsers were not liable, without a surrender of the payment he has thus obtained? This is the primary question which this case presents.

No one can become familiar with the bankrupt law of 1898 without a settled conviction that the two dominant purposes of the framers of that act were: (1) The protection and discharge of the bankrupt; and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors. All the earlier sections of the act are devoted to the security and relief of the bankrupt, and, when the distribution of his property is reached, the provisions relating to it are all drawn from the standpoint of the insolvent, and not from that of his creditors. The rights and privileges of the bankrupt, and the equal distribution of his property, dominate every provision, while the rights, wrongs, benefits, and injuries of his creditors are always incidental, and secondary to these controlling purposes. Section 60a contains the legal and controlling definition of the preference specified in section 57g and the other parts of the bankrupt act. 30 Stat. c. 541, pp. 562, 560; *Kimball v. E. A. Rosenham Co.* (C. C. A.) 114 Fed. 85, 7 Am. Bankr. R. 718, 719; *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. But this definition of

a preference was not written from the station of the creditor, but from that of the debtor. It is not the act of the creditor, but the act of the debtor, which gives it,—which produces it. The controlling thought is not the benefit or injury to the creditor, but the equal distribution of the property of the bankrupt among the holders of the provable claims against him.

It is contended that there was no preference by the payment by the bankrupt of the \$14,600 to the bank on the notes of its solvent indorsers, because the bank derived no benefit therefrom. It is said that the bank would have received the full payment of these notes from the indorsers of the bankrupt if nothing had been paid upon them by the corporation. The argument assumes a fact which does not really exist, for the presumption always is that cash in hand is more valuable and useful than the legal liability of any party to pay it. But, if the bank had derived no benefit from this payment, its legal effect would not have been different. When the authors of paragraph 60a prepared the legal definition of a preference, they were neither considering nor dealing with the promises, liabilities, payments, or acts of others than the bankrupt. They were treating of his property, and of the claims of his creditors against that property. The dominant purpose of the prohibition of a preference was not to benefit or injure, or to prevent the benefit or injury, of any creditor or class of creditors, but to prevent the debtor from making any disposition of his property which would prevent its equal distribution,—to prevent him from doing anything which would result in the payment out of his property of a larger percentage upon any claim than others of the same class would receive. The plain intention of congress, and the legal effect of the paragraph, were to make every transfer of any of the insolvent's property, by means of which a larger percentage would be paid out of his estate to any creditor, or on any claim, than every other creditor and every other claim of the same class would receive, a preference to be surrendered or avoided under the other provisions of the statute. The meaning and effect of section 60a are the same as though it declared every transfer of his property by an insolvent to be a preference which has the effect to "enable any one of his creditors to obtain a greater percentage of his debt" out of the property of the insolvent "than any other of such creditors of the same class." The test of a preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive, and not the benefit or injury to the creditor preferred. *Marshall v. Lamb*, 5 Q. B. 115, 126, 127.

Four months before the filing of the petition in bankruptcy, the bank had a claim against the estate of the insolvent for \$60,000. Within that four months, it received \$14,600 out of his estate, so that, when the petition in bankruptcy was filed, instead of a claim for \$60,000 against the insolvent, it held \$14,600 of his money, and a claim against him for \$45,400. The statement of these facts is itself a demonstration that if the bank can retain this money, and procure the allowance of the balance of its claim, it will receive a greater percentage of its debt out of the estate of the insolvent than other creditors of the same class who receive no such payments. The insolvent has in-

creased the funds of the bank \$14,600, and it has diminished by \$14,600 the property to be distributed among its creditors; and it is the depletion of the estate, to pay a larger percentage upon one claim against it than others of the same class will receive, against which the provisions of section 60a and section 57g are specifically leveled. The conclusion is irresistible that the payment to the bank of the \$14,600 gave it a preference over the other creditors of the bankrupt of the same class.

It is, however, strenuously argued that, if the payment of this \$14,600 created a preference, the bank should not be required to surrender it, because, after the adjudication in bankruptcy, Siegel & Bro., the solvent indorsers, paid the \$10,400 remaining unpaid on the notes which they had indorsed, and proved this payment as a part of their claim against the estate of the bankrupt, while the claim which the bank has presented consists entirely of notes upon which Siegel & Bro. are not indorsers. But how does the fact that, since the filing of the petition in bankruptcy, the bank has assigned a portion of its claim to Siegel & Bro., by operation of law or otherwise, relieve it from its disability to prove any of its claim until it surrenders its preference? The bankrupt act prohibits the allowance of any claim of a creditor who has received a preference unless he has surrendered that preference. "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Section 57g. The unequivocal language and the unquestionable legal effect of this section are to prohibit the allowance of any claim of a creditor who has received a preference, either upon that or upon any other claim he holds against the estate of the bankrupt, unless he has first surrendered his preference. *Strobel & Wilken Co. v. Knost* (D. C.) 99 Fed. 409; *Electric Corp. v. Worden*, 39 C. C. A. 582, 99 Fed. 400; *In re Conhaim* (D. C.) 97 Fed. 924; *In re Rogers Milling Co.* (D. C.) 102 Fed. 687; *Collier, Bankr.* (3d Ed.) pp. 318, 319.

Under the act of 1898, the rights of claimants to share in the distribution of the estate of the bankrupt are fixed by the status of their claims at the time of the filing of the petition in bankruptcy. Section 63; *In re Bingham* (D. C.) 94 Fed. 796. The petition in this case was filed on December 30, 1899. At that time the bank held a claim against the estate of the dry goods company for \$45,400, \$35,000 of which was evidenced by the notes of the bankrupt indorsed by Loeb and Hillman, while \$10,400 was evidenced by the notes of the bankrupt indorsed by Loeb, Hillman, Regenstein, and Siegel & Bro. Siegel & Bro. were the only solvent indorsers. Our attention is here challenged to a late decision of the circuit court of appeals for the Seventh circuit in *Doyle v. Bank*, 24 Nat. Corp. Rep. 406, 116 Fed. 295, in which it is held that a creditor who holds a promissory note of the bankrupt, secured by an indorser, is in a different class from one who holds the bankrupt's note without any indorser, within the meaning of paragraph 60a, so that the bankrupt may pay the former's note without creating any preference which must be surrendered by the creditor before his claim based upon the unindorsed note can be allowed. This decision is cited to support the position that the bank

is in a different class with its claim upon the \$35,000, from that in which it is with its claim for \$10,400. It must be conceded that, if a creditor holding the bankrupt's note with no indorser is in a different class from one holding it with one indorser, one holding his note with two indorsers must be in a different class from either of the others, because the third note is marked by exactly the same difference from the second note as the second is from the first, the difference of one indorser,—while the difference between the first note and the third note is twice as great. Nor, if it be conceded that a creditor with one indorser is in a different class from one with no indorser, can it be successfully contended that a creditor with four indorsers, some of whom, are solvent, as is the case in respect to the \$10,400 here in question, is in a different class from one with two indorsers who are insolvent, as in the case of the notes for \$35,000 under consideration. The character of the court which rendered this decision, the learning and ability of the judges who compose it, and the great respect its opinions always command, have impelled us to a careful consideration of the conclusion it announces, and of the opinion which supports it. But their logical effect is to create such a multitude of classes of creditors, to so confuse the administration of that portion of the bankrupt law which treats of preferences, and to open so plain a way to the nullification of paragraph 57g of the bankrupt act, that we hesitate to follow them. If a debtor may pay his indorsed paper within four months of the filing of the petition in bankruptcy against him, without creating a preference of the creditor so paid, that will bar the allowance of his claim on open account or on unindorsed paper, the way to payments and transfers by a bankrupt which will actually prefer creditors, but which will not fall under the ban of the bankrupt law, is plain and smooth. All that the debtor needs to do, to evade the provisions of this act for the surrender of preferences, is to give indorsed paper for the part of his debts which he proposes to pay, and the creditor may then receive the actual, and escape the legal, preference with impunity. We are not yet prepared to adopt a rule fraught with such consequences.

While it is true that the bankrupt act does not define the word "class," nor in terms state what creditors are in the same class, it creates some classes, and specifies others, and it seems to us that the meaning of the word "class" in the act should, if possible, be derived from the statute itself. Section 64, after directing the payment of certain expenses of administration, creates three classes of creditors,—parties to whom taxes are owing, employés holding claims for certain wages, and those who, by the laws of the states or of the United States, are entitled to priority. Sections 56b, 57e, and 57h provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each one of the creditors in the same class always receives the same percentage upon his claim, out of the estate of the bankrupt, that every other creditor of his class receives. Where the estate is insuf-

ficient to pay the claims of different classes in full, the classes receive, out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupt.

Here, again, in considering this question of classification, it is well to bear in mind that this act was drawn from the station of the bankrupt, and that its primary purposes were to relieve the bankrupt, and to distribute his property equally among his creditors. The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend, out of the estate of the bankrupt than that estate will pay on other claims of the same class. It is its effect upon the equal distribution of the estate of the bankrupt, not its effect upon the creditor, that determines the preference. The same dominant thought controls and determines the classification of the creditors. Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. Their relations to third parties, their right to collect of others, the personal security they may have through indorsements or guaranties, receive no consideration, no thought. It is the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences.

Now take the case in hand, or the simpler case of a creditor who has one of the bankrupt's notes with a solvent indorser and another without any indorser. He is entitled to receive the same percentage out of the estate of the bankrupt on his indorsed note that he is on that which is not indorsed. It is true that he has the right to collect the former of the indorser. But, if he does, the indorser may prove the note, and receive exactly the same percentage upon the claim that the original creditor would receive upon the note which was not indorsed. Section 57i. The two notes bear exactly the same relation to the estate of the bankrupt whether indorsed or not,—whether paid by the indorser or not,—and for this reason they and their holders stand in the same class. They are in the same class because it is the relation of the creditors, and their claims to the estate of the bankrupt, and not their relation to third parties, that determines their rights, and fixes their status, under the bankrupt act of 1898. We are not persuaded that a creditor who holds an indorsed note of a bankrupt is in a different class from one who holds his note without an indorsement, under section 60a of the bankrupt act, because the legal result of such a conclusion would lead to the creation of new and numerous classes of creditors not specified in the bankrupt act; because that conclusion would open a plain way to evade the provisions of section 57g; because the definition of the term "class" as used in the bankrupt act should be derived from that statute itself; and because the true test of the classification of creditors under that act is the percentage which, in the absence of preferences,

their claims are entitled to draw out of the estate of the bankrupt, and the holder of an unindorsed note is entitled to the same percentage from the estate as the holder of an indorsed note. Creditors who, in the absence of preferences, are entitled to receive the same percentage upon their claims out of the estate of the bankrupt, are members of the same class. Those who are entitled to different percentages are of different classes. The result is that the bank as holder of the notes for \$10,400, upon which there were four indorsers, was in the same class as it was as the holder of the notes for \$35,000, on which there were but two indorsers. On December 30, 1899, it had received a preference of \$14,600, and it was forbidden to prove any part of its claim until it surrendered this preference.

These facts fastened upon the entire claim of the bank an attribute of disqualification for allowance. The ban of the statute was upon the claim. The act declares that the claims of creditors who have received preferences shall not be allowed unless the creditors surrender their preferences. This disqualification inheres in every part, every dollar, of the claim of the bank. The holder of this claim could not qualify it for allowance by transferring the whole or a part of it to another, nor could Siegel & Bro. accomplish this result by paying the notes on which they were indorsers, and becoming their owners by subrogation. Every part of the claim, whether retained by the bank or assigned to another, remained, and will remain, disqualified for allowance until the \$14,600 whose payment constitutes the preference is surrendered. The claim of the bank, therefore, must be expunged unless it repays to the trustee the \$14,600 which it received from the insolvent within four months prior to the filing of the petition in bankruptcy.

The next question is what is the amount of the claim which may be allowed to the bank if it surrenders the \$14,600? It is conceded that it may prove its \$35,000, and the \$14,600 which it received on the notes for \$25,000, and repays to the trustee. May it also prove, and receive a dividend on, the \$10,400 that remained unpaid by the bankrupt, but which was subsequently paid by the indorsers, Siegel & Bro.? Before anything was paid on the notes for \$25,000 indorsed by Siegel & Bro., the latter were sureties for their payment by the bankrupt. Their contract was that they would pay them if their principal did not. If they had paid them, they could have recovered their amount from their principal, or could have proved them against his estate. Section 571. But the contract of the sureties was that the bank should first be paid before they should receive anything from the principal debtor. When this contract was made, the bankrupt act of 1898 was in effect, and the provisions of that act, so far as they were material to the obligations of the parties, became a part of their agreement. That statute provided that a preference given to a creditor by an insolvent within four months of the filing of the petition in bankruptcy against him should bar the allowance of any claim of the preferred creditor unless he surrendered his preference. The act did not either directly or inferentially forbid the creditor to accept the preference, when, as in the case at bar, he had no reasonable cause to believe that the transfer was intended to give a preference. The statute

permitted the giving and the receiving of the preference, and gave the creditor the option to return it, and secure the allowance of his claim, or to retain it, and forego the dividend from the bankrupt's estate. The receipt of the preference by the creditor was, therefore, neither *malum prohibitum* nor *malum in se*. In this state of the law and of their contract, the principal debtor, before the adjudication in bankruptcy, gave to the bank a preference by the payment of \$14,600 on the notes upon which Siegel & Bro. were accommodation makers, and after the adjudication the accommodation makers paid the balance due, \$10,400, and interest. Assuming that the bank pays the \$14,600 back to the trustee, does the claim against the bankrupt estate for the \$10,400 and interest, and the prospective dividend upon it, belong to the bank or to the indorsers, Siegel & Bro.? This question involves another: Will the receipt of the \$14,600 by the bank, and its subsequent return to the bankrupt estate, release the accommodation makers, Siegel & Bro., from their liability to pay the bank this \$14,600 upon the notes?

Under the bankrupt law of 1867, no legal or permissible preference was required to be surrendered either absolutely or conditionally. Every preference which fell under the ban of that statute was a fraudulent preference, and every creditor who received and retained such a preference forfeited his right to prove his claim, although the assignee recovered back the money or property thus transferred. 14 Stat. 534, § 35; *Cookingham v. Morgan*, Fed. Cas. No. 3,183; *Curran v. Munger*, Fed. Cas. No. 3,487; *Fairbanks v. Bank (C. C.)* 38 Fed. 630, 634. In *Bartholow v. Bean*, 18 Wall. 635, 641, 642, 21 L. Ed. 866, the question was whether the payment, by an insolvent, to the payee, who knew of the insolvency of the payor, of an overdue promissory note, on which there was a solvent indorser whose liability had been fixed, constituted a fraudulent preference under the act of 1867. The supreme court declared that that act expressly forbade the creditor to receive such a payment, that its receipt constituted a fraud, and that the assignees were entitled to recover back the amount so paid. This was the only question at issue, and the only question decided in that case. But there is a dictum of Mr. Justice Miller near the close of the opinion in *Bartholow v. Bean*, thrown in by way of argument, in these words: "While by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover either of the indorser or of the bankrupt's estate,"—which seems to have led to a decision to the effect that the acceptance of such a payment by the creditor would discharge the indorser or surety. The dictum is no authority for such a conclusion, or for any conclusion, because the question now under consideration was not before the supreme court in that case, and does not appear to have been either considered or decided. The case which follows, and rests upon this dictum, is *In re Ayers*, 6 Biss. 48, Fed. Cas. No. 685. It was a case in which the guarantors of a note, the original holder of which had forfeited his claim against the bankrupt's estate by accepting a fraudulent preference, were endeavoring to prove a claim based upon it. The court held: (1) That, as the claim on the note had been forfeited by the

original holder, it was forfeited by the guarantors also; and (2) that the latter had no claim based upon the note because the acceptance of the fraudulent preference discharged them from liability as sureties. There is another case in which Mr. Justice Miller's dictum seems to have had influence. It was decided by the supreme court of Kentucky, and is entitled *Bank v. Cooke*, 76 Ky. 340, 344. But that court held that the creditor might have accepted the preference, and still have held the surety liable if it had notified the surety of the offer by the debtor to make the payment, and had accepted it on the advice of the surety. These cases rest on the proposition that the acceptance of the preference discharged the sureties because it was a prohibited act,—a fraud upon the bankrupt law of 1867. No decision of this question under the bankrupt act of 1898 has been called to our attention. There is a sentence in the opinion of the circuit court of appeals in *Doyle v. Bank*, 24 Nat. Corp. Rep. 406, 116 Fed. 295, to the effect that the acceptance of a preference by the payment of an indorsed note by the maker would discharge the indorser, but it is a statement made *arguendo*, without citation of authorities, upon a question that was not before that court for decision, and it would not, we are confident, be considered either in that or in any other court a decisive ruling upon the question here at issue.

On the other hand, the supreme court of Iowa, in *Watson v. Poague*, 42 Iowa, 582, 583, announced what seems to be a more just and rational rule, and held that the receipt of a preference by a payment of an indorsed note, which was subsequently recovered by the assignee in bankruptcy, would not constitute a payment of the note or a release of the indorser. That court said: "It is true that the receiving of the payment under such circumstances is called, in the bankrupt act, accepting a fraudulent preference, but it was not an actual fraud, nor would it have been even a constructive fraud if an adjudication in bankruptcy had not taken place upon a petition filed within four months. Besides, whatever was done was not done with intent to wrong the defendants, but rather to protect them. If plaintiff had declined to receive the payment, especially if Griffith was insolvent, the defendants might justly have complained. There was at least a possibility that no adjudication in bankruptcy would take place upon a petition filed within four months. But it did take place, and now the plaintiff asks relief, not against his own fraud, but because the payment which he properly received has been held, by reason of what afterwards transpired, and under the peculiar provisions of the bankrupt law, to have been made to him in trust for all the creditors of Griffith. It is not impossible that the acceptance of a payment by a creditor from his bankrupt debtor might mislead a surety of the debtor to his injury, but that, we think, would be the surety's misfortune rather than a ground of defense in a case like this, where the creditor had acted in good faith towards the surety, and had been reasonably diligent to save him from loss. A surety cannot be discharged where the creditor is without fault."

In *Pritchard v. Hitchcock*, 6 Man. & G. 151, A. had guarantied the payment to B. of two bills of exchange accepted by C. C. afterwards paid the amount of the bills to B. The assignees in bankruptcy

of C. recovered the money from B. as a fraudulent preference. It was held that the payment did not satisfy the debt, and did not discharge the guarantor.

In *Petty v. Cooke*, L. R. 6 Q. B. 790, 794-796, the defendant Cooke, for the accommodation of Steele, signed a promissory note with him for 100 pounds, payable to the plaintiff. Steele paid it in contemplation of insolvency, and the plaintiff innocently accepted the amount. Afterwards, Steele's trustees in bankruptcy recovered back the amount which the plaintiff had received in payment of the note as a preference. The plaintiff then brought an action against the accommodation maker, Cooke, and he pleaded that the acceptance by the plaintiff of the payment which had been recovered back had discharged him from liability as a co-maker or surety. The court of Queen's bench held otherwise, and rendered judgment for the plaintiff. Judge Blackburn said: "Is there any case which says that an innocent act unconsciously done discharges the surety? * * * The creditor accepted the money, which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety. He therefore did no act injurious to the surety, and the surety is not discharged." Judge Lush said: "I am of the same opinion. The rule of law and equity with regard to the rights of a surety is the same. I do not entertain the slightest doubt that the act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the rights of a surety; an acceptance of money from the debtor, which the creditor thought at the time he accepted it was a good and valid payment, cannot, therefore, discharge the surety. The creditor, under present circumstances, could not have refused to accept the money; its acceptance was an advantage, not an injury, to the surety." Judge Hannen said: "I am also of the same opinion. Lord Eldon puts it that the surety is discharged when the creditor has done anything which is 'against the faith of his contract.' How can it be against the faith of his contract for the creditor to do that which it was his duty to do, namely, to receive payment? It turned out afterwards that the payment was not a good payment, and therefore the surety is not discharged."

These opinions are well grounded in reason, clear, and persuasive. They lead to just and equitable results, and they are exactly applicable to the facts of this case. The bank was guilty of no fraud or wrong when it accepted payment from the insolvent. The indorsers, as well as the bank, knew that any payments made upon the notes by the principal debtor were liable to be recalled as a condition of the allowance of the claim of the bank against its estate if the maker of the note was adjudged a bankrupt upon a petition filed within four months of the payments. Their contract was conditioned by this fact, and by the statute which called it into being. The acceptance of such payments was not forbidden by the moral or by the civil law. The bank did not know, and could not foresee, that the principal debtor on the note would become a bankrupt within four months from the payments. The holder of a surety's obligation may discharge it if he knowingly does any act to diminish his security or his oppor-

tunity to enforce it, or any act to increase his liability. But the acceptance of these payments did none of these things. A refusal to accept them might well have been held to be an act so likely to entail unnecessary loss upon the accommodation makers that it would discharge them. But the receipt of the money was an act of reasonable diligence,—an act in the rational discharge of the duty of the bank towards the sureties. It hoped and believed that the money it received would be a payment upon the debt. If it returns it, no payment has been made by the receipt of it. The debt remains unpaid because the money received turns out to be the property of the bankrupt estate, which the bank holds in trust for, and returns to, the estate under the law. The sureties are not discharged by the payment and satisfaction of any part of the notes, because no payment and satisfaction were effected. They are not discharged by any act or negligence of the creditor, because it has been guilty of none which either increased their liability or diminished their security or their opportunity to enforce it. The only just and equitable conclusion is that the accommodation makers, indorsers, or sureties upon the obligations of an insolvent debtor are not discharged from liability to pay them by the innocent acceptance, by their creditor, of payments thereon from the insolvent debtor which the creditor is subsequently required to, and does surrender to the latter's trustee in bankruptcy as a condition of the allowance of its claim under section 57g of the bankrupt act.

The result is that, when the bank returns the \$14,600, it will be the owner of the notes for \$25,000 indorsed by Siegel & Bro., and will be entitled to collect from the estate of the bankrupt, and from Siegel & Bro. the \$14,600 and interest which will still be due to it upon the notes. The contract of Siegel & Bro. was that they would pay these notes if the bankrupt did not. By that contract they are estopped from collecting or receiving anything upon or on account of them from the bankrupt estate, which still owes the full amount of them, until the bank has received the \$14,600 which is still due to it on the notes. In view of this state of the case, the bank may prove its claim, and that claim may be allowed for the full amount of the notes when it repays to the trustee the \$14,600. It has, however, received \$10,400 and interest upon them from Siegel & Bro. It is entitled to receive no more than the amount of the notes and interest. If, therefore, the \$10,400, and the dividends it receives from the estate of the bankrupt upon these notes for \$25,000, amount to more than the principal and interest of the notes, it will hold the surplus in trust for, and must pay it over to, Siegel & Bro.

A creditor who holds the obligations of a bankrupt which have been partly paid by an accommodation maker, an indorser, or a surety, may prove his claim, and have that claim allowed against the estate of the bankrupt for the full amount owing by the bankrupt upon the obligations, but if the dividends on that claim from the bankrupt estate, plus the amount paid by the surety, aggregate more than the entire amount of the obligations and interest, he holds the surplus in trust for the surety. In re Ellerhorst, 8 Fed. Cas. 522, 523 (No. 4,381); Ex parte Talcott, Fed. Cas. No. 13,184, 2 Low. 320, 323; In re Bingham (D. C.) 94 Fed. 796; In re Heyman (D. C.) 95 Fed. 800;

Collier, Bankr. (3d Ed.) p. 321; Bank v. Pierce, 137 N. Y. 444, 447, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. Rep. 751; In re Hollister (D. C.) 3 Fed. 452, 453; Downing v. Bank, 7 Fed. Cas. 1008, 1011 (No. 4,046).

The decree of the court below must be reversed, and the case must be remanded to that court with directions to make an order that the claim of the Fourth National Bank against the estate of Siegel-Hillman Dry Goods Company be expunged unless, by a day certain, it returns to the trustee the \$14,600 which it received from the bankrupt, with directions to so fix that day that, if the bank refuses to return this money, an opportunity may be subsequently given to Siegel & Bro. to do so before their claim is disallowed, and with further directions to allow the claim of the bank for the full amount of the principal of all the notes, to wit, \$60,000 and interest, in case it repays the \$14,600, and to take such further proceedings not inconsistent with the views expressed in this opinion as may to the court seem meet and proper. It is so ordered.

SWARTS v. SIEGEL et al.

SIEGEL et al. v. SWARTS.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1902.)

Nos. 1,696, 1,697.

1. PRINCIPAL AND SURETY—SUBROGATION—SURETY WHO PAYS ACQUIRES NO BETTER RIGHT THAN FORMER HOLDER OF CLAIM.

A surety who pays the debt of his principal is subrogated to the rights of the holder of the claim which he pays, but he takes it subject to its disqualifications and limitations. He acquires no higher or better rights than its prior holder.

2. BANKRUPTCY—INDORSER OR SURETY TAKING UP PREFERRED CLAIM—RETURN OF PREFERENCE.

An accommodation maker, indorser, or surety on the obligations of a bankrupt, who pays and takes them up after the principal debtor has given a preference to the original holder thereon, is debarred from an allowance of a claim against the estate of the bankrupt either for the amount owing by the bankrupt upon the obligations or for the amount that the surety paid to take them up until the amount paid to the original holder in preference is returned to the estate of the bankrupt.

3. SAME—INDORSER OR SURETY FOR BANKRUPT IS A CREDITOR.

An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor under the act of 1898, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt unless the amount so paid is first returned to that estate.

4. CONSTRUCTION—UNEQUIVOCAL LANGUAGE NOT SUBJECT TO.

There is no safer or better settled canon of interpretation than that where language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction.

(Syllabus by the Court.)

Appeals from the District Court of the United States for the Eastern District of Missouri.

David Goldsmith, for Swarts.

Edward C. Eliot, for F. Siegel & Bro.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. These are appeals from the decree of the district court directing that the claim of F. Siegel & Bro. against the estate of the Siegel-Hillman Dry Goods Company, a corporation and a bankrupt, be disallowed unless the claimants repay to the trustee the sums of \$14,600 and \$5,219.63, which the court held to constitute preferences given to the claimants which they were required to surrender under section 578 of the bankrupt act of 1898. The claimants appealed from this decree because it required them to restore the \$14,600 and the \$5,219.63 as a condition of the allowance of their claim. The trustee appealed from it because it did not require the claimants to repay to him \$20,000 more as a condition of the allowance of their claim.

1. The preference, amounting to \$14,600, which the court required the claimants to repay, is the same preference, and results from the same payments, which the Fourth National Bank of St. Louis has been required to surrender as a condition of the allowance of its claim against the estate of this bankrupt in *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, in which the opinion is filed herewith. Reference is made to the opinion in that case for a detailed statement of the facts out of which this preference arose, and for a discussion of the legal conclusions which determine the rights of the parties interested therein. They will not be repeated at length here. It will suffice to make a brief statement of the salient facts which constitute this preference and of the rules which determine its disposition, and to intimate the order which should be made in these cases.

Four months prior to February 6, 1900, when the dry goods company was adjudicated a bankrupt, the Fourth National Bank of St. Louis held the promissory notes of this corporation for \$25,000 upon which the claimants, F. Siegel & Bro., had indorsed their names before the notes were discounted for the purpose of giving them credit, so that they became accommodation makers thereon. Within four months preceding the filing of the petition in bankruptcy, the dry goods company, while it was insolvent, paid to the bank \$14,600 on some of these notes, and the bank innocently received these payments. On December 30, 1899, when the petition in bankruptcy was filed, the bank held a claim against the corporation for \$10,600 and interest upon some of these notes which had been indorsed by the claimants, and for \$35,000 upon other notes of the bankrupt which had not been so indorsed. After the adjudication in bankruptcy Siegel & Bro. paid \$10,535.46, the amount which remained due upon some of these notes which they had indorsed, and one of the items of their claim against the estate of the bankrupt is the amount which they so paid. Their claim consists of various items aggregating about

\$35,000. The court below directed the disallowance of their claim unless they refunded the \$14,600 which the bank had received on the notes which Siegel & Bro. had indorsed.

The rights of creditors are fixed by the status of their claims when the petition in bankruptcy is filed. A creditor who has received a preference upon one claim against the estate of a bankrupt is thereby debarred from the allowance of any claim unless that preference is first surrendered. When the petition in bankruptcy in this case was filed the bank held a claim against the estate of the bankrupt for \$10,400 and interest on some of the notes indorsed by Siegel & Bro., and that claim was disqualified for allowance unless the preference of \$14,600, which the bank had received from the dry goods company, was surrendered. The disqualification of a claim for allowance created by a preference inheres in and follows every part of the claim, whether retained by the original creditor or transferred to another, until the preference is surrendered. The payment of the \$10,400 and interest by Siegel & Bro., after the adjudication in bankruptcy, gave them no right to the allowance of the claim for this amount, based upon the notes which they took up, which the bank had not possessed before they made the payment. The claim was disqualified for allowance in the hands of Siegel & Bro. until the \$14,600 was repaid to the same extent that it was so disqualified in the hands of the bank. "Whenever a creditor, whose claim against a bankrupt is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." Section 57i, Bankr. Act 1898.

Subrogation is the substitution of one person or thing for another. Here it is the substitution of one holder of a claim for another. But one who holds the rights or claims of another by subrogation takes them subject to the limitations and disqualifications attached to them in the hands of his predecessor. He has no higher or better rights than those which the first holder possessed. *Houston v. Bank*, 25 Ala. 250, 257, 258; *Brandt*, Sur. p. 462, § 316. As no claim of the bank against the estate of the bankrupt could be allowed until it repaid the \$14,600 which it had received upon this claim based upon the notes indorsed by Siegel & Bro., so the latter have no claim against the bankrupt estate based upon these notes until the \$14,600 is returned.

In order to avoid this inevitable conclusion, Siegel & Bro. have not founded their claim for the \$10,400 and interest upon the indorsed notes, but they present it for \$10,535.46 cash paid by them to take up the notes, and argue that they are not subject to the principle of subrogation, but that they are entitled to the allowance of their claim for this amount as for money had and received, regardless of the doctrine of subrogation, upon the ground that they have paid a debt of the bankrupt at his request. This payment, however, was not made until after the adjudication in bankruptcy. It was made upon a claim that was disqualified for allowance unless the holder of it first returned to the trustee \$14,600. If the bankrupt had made a request

of his friends to pay this claim and they had complied with that request, after the adjudication in bankruptcy, these facts could not have transformed this demand from a claim for \$10,400 and interest, which draws back into the estate \$14,600 before it can be allowed, into a claim for the same amount which would be entitled to allowance without any repayment. The fact is, however, that the bankrupt never made any such request. The only request he ever made was made before the notes were discounted, and it was that Siegel & Bro. would sign them as accommodation makers. They did so, and thereby became liable to pay them. They have paid \$10,535.46, and taken them up. Now, they either paid this sum voluntarily or they paid it in discharge of their liability as sureties on the notes. If they paid it voluntarily, they have no claim against the bankrupt or its estate for reimbursement. They were mere volunteers. If they paid it in discharge of their liability as sureties, they cannot escape the effect which the law invariably attaches to such a payment. They cannot escape the result that they have not paid the debt of the bankrupt. They have not discharged it from liability, but they have bought from its holder, the bank, the claim based upon these notes, which it held against the bankrupt, subject to all its limitations and disqualifications. They have been subrogated and limited to the rights of the bank in the collection and enforcement of the claim, and they have no legal demand to the reimbursement of the money they have paid except through the enforcement of the claim which they have purchased from the bank, because under the law they paid their money, not to relieve the bankrupt from liability, but to buy the claim of the bank against it. A surety who discharges his liability by the payment of his principal's debt does not thereby relieve the principal from liability to pay it, but he subrogates himself to the rights of the former owner of the claim and stands in his shoes. *Morgan v. Wordell*, 178 Mass. 350, 354, 59 N. E. 1037, 55 L. R. A. 33. In equity, and in bankruptcy, which is a branch of equity, names and forms are unimportant where the truth is evident. It is not material that the sureties here call their claim one for the money which they have paid instead of a claim for the amount which the bankrupt owes upon the notes. The fact is undisputed that they made their payment in discharge of their liability as sureties upon the notes. Given that fact, the law fixes their rights. They have no claim against the bankrupt or its estate for the money they paid. Their only claim is for the amount the bankrupt owes upon the notes, and they take this claim subject to its disqualification in the hands of its former holder, the bank. It cannot be allowed until the preference of \$14,600, which the insolvent debtor gave upon it, has been restored to the trustee. An accommodation maker, indorser, or surety on the obligations of a bankrupt, who pays them and takes them up after the principal debtor has given a preference thereon to their original holder, cannot present an allowable claim against the estate of the bankrupt either for the amount owing by him upon the obligations or for the amount that the surety paid to take them up, unless the amount paid to give the preference is first returned to the estate of the bankrupt. *Bartholow v. Bean*, 18 Wall. 635, 641, 21 L. Ed. 866; *In re Schmechel*, 4 Am. Bankr. R. 719, 721, 104 Fed. 64; *Landry v.*

Andrews, 6 Am. Bankr. R. 281, 284, 48 Atl. 1036; In re Waterbury Furniture Co. (D. C.) 114 Fed. 255; In re Bingham (D. C.) 94 Fed. 796; Morgan v. Wordell, 178 Mass. 353, 354, 59 N. E. 1037, 55 L. R. A. 33.

There is another reason why Siegel & Bro. are not entitled to the allowance of their claim unless the \$14,600 is repaid. It is that they were creditors of the dry goods company when that amount was paid to the bank. A creditor is "one who gives credit in business transactions." Cent. Dict. p. 1341, tit. "Creditor." Siegel & Bro. gave credit to the dry goods company in a business transaction. They signed its notes, became absolutely liable to pay them, and thereby gave it credit. If they had simply indorsed them, and thus become only contingently liable, the same result would have followed. One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is "one who has the right to require the fulfillment of an obligation or contract." Bouv. Law Dict. p. 435. An indorser, an accommodation maker, or a surety on an obligation of a debtor has a right to require the fulfillment of the obligation or contract of that debtor. "'Creditor' shall include any one who owns a demand or claim provable in bankruptcy." Section 1, subd. 9, Bankr. Law 1898. "Debts of a bankrupt may be proved and allowed against his estate which are (1) a fixed liability * * * (4) founded upon an open account or upon a contract express or implied." Section 63. Provision is here made for the proof of two classes of debts,—those which evidence fixed liabilities of the debtor, and those founded upon contracts which evidence contingent or uncertain liabilities. The debt of a principal debtor to his indorser, his accommodation maker, or his surety before the latter has paid the obligation is a contingent liability founded upon contract, and falls directly within the terms and meaning of subdivision 4 of this section. To make assurance doubly sure, however, congress expressly provided that "whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." Section 57i. An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a person whose individual undertaking secures the claim against the bankrupt estate of the holder of that obligation, and by the terms of this section he may prove that claim whenever the creditor fails to do so. The language is broad, comprehensive, and without exception. He has the same right to prove it before as after he discharges the obligation in whole or in part, and if he is an indorser he has the same right to make his proof before as after his liability ceases to be contingent and becomes fixed. The last clause of the paragraph, "and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor," neither limits the class who may prove their claims under this paragraph to those who have discharged their undertakings entirely or partly, nor in any way restricts the class which the earlier portion of the paragraph permits to establish their demands against the estate of the bankrupt. On the

other hand, it adds emphasis and certainty to the patent meaning of the earlier portion of the paragraph that the indorser or surety may prove the claim in the name of the holder of the bankrupt's obligation whenever the creditor fails to do so, and before, as well as after, the surety discharges his undertaking, because, while such proof in the name of the creditor would send the dividends to the original holder of the claim, the latter portion of the paragraph adds the provision that if the surety discharges his undertaking he shall then be subrogated to the rights of the original holder, and hence to the right to receive the dividends. Sections 57i and 63 (4) were obviously intended to prevent the injustice that would be inflicted upon indorsers and sureties for the bankrupt whenever the holders of their obligations should elect to make no proof of their claims against the bankrupt estates, and to rely exclusively upon the liabilities of the sureties if the latter were not allowed to prove the claims. These sections have accomplished their purpose. The remedy they provided is as broad and comprehensive as the evil which they were passed to prevent, and an indorser or a surety has a provable claim against the estate of a bankrupt, and is his creditor under the act of 1898 before, as well as after, his liability becomes fixed.

An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor under the act of 1898, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt unless the amount so paid is first returned to that estate. Bankr. Act 1898 (30 Stat. 544) §§ 1 (9), 57i, 63a (1, 4); *Landry v. Andrews*, 6 Am. Bankr. R. 281, 284, 48 Atl. 1036; *In re Rea*, 82 Iowa, 231, 239, 48 N. W. 78; *Cutler v. Steele*, 85 Mich. 627, 632, 48 N. W. 631; *Dunnigan v. Stevens*, 122 Ill. 396, 401, 404, 13 N. E. 651, 3 Am. St. Rep. 496; *Ahl v. Thornor*, 1 Fed. Cas. 220, 222 (No. 103); *Sill v. Solberg* (C. C.) 6 Fed. 468, 474, 477; *Scammon v. Cole*, 21 Fed. Cas. 627, 628 (No. 12,432); *Cookingham v. Morgan*, 6 Fed. Cas. 454, 455 (No. 3,183); *In re Gerson* (D. C.) 105 Fed. 891; *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *In re Waterbury Furniture Co.* (D. C.) 114 Fed. 255.

This conclusion has not been reached without a careful comparison of the pertinent provisions of sections 38 and 39 of the bankrupt act of 1867 (14 Stat. 535, 536), and a thoughtful perusal of the opinions in *Singer v. Sloan*, Fed. Cas. No. 12,899; *Thomas v. Woodbury*, Fed. Cas. No. 13,916; *Bean v. Laffin*, Fed. Cas. No. 1,172; *Corbett v. Woodward*, Fed. Cas. No. 3,223; and *Swarts v. Siegel* (C. C.) 114 Fed. 1001. This portion of our labors, however, has been fruitless chiefly for the reason that the language of the act of 1898 upon this subject appears to us to be too plain for exegesis or interpretation. Attempted judicial construction of the unequivocal language of a statute or of a contract serves only to create doubt and to confuse the judgment. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to

mean what it plainly expresses, and no room is left for construction. *Knox Co. v. Morton*, 15 C. C. A. 671, 673, 68 Fed. 787, 789; *Railway Co. v. Sage*, 17 C. C. A. 558, 565, 71 Fed. 40, 47; *U. S. v. Fisher*, 2 Cranch, 358, 399, 2 L. Ed. 304; *Railway Co. v. Phelps*, 137 U. S. 528, 536, 11 Sup. Ct. 168, 34 L. Ed. 767.

The accepted and customary definition of the term "creditor," its definition in the act of 1898, the clear terms and patent meaning of the provisions of that act upon the subject under discussion, the better reasons and the greater weight of authority, all converge to establish and sustain the conclusion that an indorser, an accommodation maker, or a surety for a bankrupt is his creditor; and the result is that whether we are governed by the general definition of the term, or by the specific provisions of the statute, *Siegel & Bro.* held a provable claim against the estate of the dry goods company, and were its creditors when the \$14,600 was paid to the bank; and as that payment depleted the estate, and its enforcement will enable *Siegel & Bro.* to obtain a larger percentage of their claim out of the estate of the bankrupt than other creditors of the same class will receive, their claim against the estate cannot be allowed unless the \$14,600 is first returned to the trustee.

2. In all essential respects the facts which condition the alleged preference of \$20,000 are the same as those which control the preference of \$14,600, which has already been considered. Four months before the filing of the petition in bankruptcy the Corn Exchange Bank of New York held the promissory notes of the bankrupt for \$37,500, upon which *Siegel & Bro.* had indorsed their names before the notes were discounted, to give them credit, so that they were in reality accommodation makers. Within four months before the filing of the petition the dry goods company, while insolvent, paid to this bank \$20,000 upon some of these notes. These payments left two of the notes, one for \$10,000 and one for \$7,500, unpaid. After the adjudication in bankruptcy *Siegel & Bro.* paid and took up these notes. One of the items of their claim is for cash paid to the Corn Exchange Bank of New York to take up these two notes. The objection to their claim is that it was disqualified for allowance unless the \$20,000, which was paid to the Corn Exchange Bank within four months of the filing of the petition in bankruptcy upon notes of the bankrupt of like character which had been indorsed by *Siegel & Bro.*, is first returned to the trustee. On the day when the petition in bankruptcy was filed the Corn Exchange Bank held a claim against the estate of the bankrupt for \$17,500. This claim was disqualified for allowance by the fact that this bank had received a preference of \$20,000 within four months of the filing of the petition in bankruptcy. The subsequent payment by *Siegel & Bro.* of the \$17,500 owing upon this claim and its transfer to them did not free it of this disqualification. It was no more allowable in their hands without the return of the \$20,000 than it was in the possession of the bank. The court below should have disallowed the claim unless *Siegel & Bro.* first restored the \$20,000 which had been paid upon it within four months of the filing of the petition in bankruptcy.

3. The alleged preference of \$5,219.63 arises out of this state of

facts: On October 24, 1899, a broker or his customer held a promissory note for \$5,219.63 made by the dry goods company, payable to the order of Siegel & Bro., and indorsed by them, which fell due on October 25, 1899. By agreement between the dry goods company and Siegel & Bro. this note was paid by the dry goods company in this way: On October 24, 1899, the corporation sent from St. Louis to Siegel & Bro. at Chicago its three checks,—one for \$2,000, dated October 24, 1899; one for \$1,619, dated October 28, 1899; and one for \$1,600.63, dated November 1, 1899; and requested permission to draw upon Siegel & Bro. for \$5,219.63 to pay the note. On October 25, 1899, the dry goods company drew a draft on Siegel & Bro. for the amount of the note, deposited it with a bank in St. Louis to its own credit, and paid the note with the proceeds of the draft. On the next day, October 26, 1899, the draft was paid by Siegel & Bro. at the Union National Bank in Chicago. On that day, October 26, 1899, the check for \$2,000, dated October 24, 1899, was paid at the Fourth National Bank in St. Louis. On October 30, 1899, the check for \$1,619 was paid at the same place, and on November 2, 1899, the third check, for \$1,600.63, was paid in the same way and at the same bank. The referee and the court below both held that the effect of this transaction was to create an indebtedness from the dry goods company to Siegel & Bro. on October 25, 1899, when the draft was deposited and its proceeds applied to the note, which was subsequently discharged by the payment of the checks of the dry goods company on October 26th, October 30th, and November 2d, respectively. It is earnestly contended that the check for \$2,000 was practically paid at the same time with the draft, and hence that its payment constituted no preference. The effect of the transaction, however, was that the dry goods company received the amount of this and all the other checks by means of its deposit of the draft in its bank at St. Louis one day before it paid its check for \$2,000. From the time it received that money, on October 25th, until it paid its check, on October 26, 1899, it was indebted to Siegel & Bro. in the full amount of the draft. This indebtedness was subsequently discharged by the payment of the checks. There is no doubt that the payment of the two checks of the later dates gave a preference to Siegel & Bro. upon their claim for the money which they advanced upon the draft. The presumption is that the opinion of the referee and of the court below relative to the effect of the use of the check of earlier date is correct, and, while the question may be susceptible of some doubt, it is our opinion that there was no error in this conclusion.

The result is that the claim of F. Siegel & Bro. against the estate of the bankrupt cannot be lawfully allowed unless before its allowance the claimants pay to the trustee in bankruptcy \$20,000 and \$5,219.63, nor unless the sum of \$14,600 is paid back to the trustee either by the Fourth National Bank of St. Louis or by Siegel & Bro. In the case of the Fourth National Bank this court has directed that the claim of the bank be disallowed unless, within a time to be fixed by the court below, that bank repays to the trustee this sum of \$14,600, and that in case it repays this amount its claim be allowed for the entire \$25,000 evidenced by the notes indorsed by Siegel & Bro. If the bank repays

this sum, the claim of Siegel & Bro. must be diminished by the sum of \$10,535.46, which they claim to have paid upon their indorsed notes held by the Fourth National Bank. The orders should be so drawn that, in case the Fourth National Bank refuses to repay the \$14,600, an opportunity may be given to Siegel & Bro. to prove their claim for this \$10,535.46 as well as the balance of their claim, and to repay the \$14,600 before their claim is disallowed. The decree which is challenged by these appeals is reversed, and the case is remanded to the court below, with directions to enter orders and take further proceedings herein not inconsistent with the views expressed in this opinion and in the opinion in the case of Swarts v. Fourth Nat. Bank, which is filed herewith.

BAN v. COLUMBIA SOUTHERN RY. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1902.)

No. 752.

1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—SUIT BY ASSIGNEE.

A federal court is without jurisdiction of a suit on a cause of action existing in favor of a partnership, brought by one partner in his own right and as assignee of the interest of his copartner, unless the bill shows that the citizenship of the assignor is such that the suit might have been maintained in that court by the firm.

2. SAME—JURISDICTIONAL AVERMENTS—NECESSARY PARTIES.

Plaintiff and another contracted as partners to do certain work in the construction of a railroad as subcontractors. By a contract between themselves, previously made and known to the principal contractor, it was agreed that plaintiff should furnish the materials and do the work, and receive and disburse the money received therefor, accounting to his associate only for a share of the net profits of the contract. After the completion of the work plaintiff brought suit in a federal court to enforce a mechanic's lien, filed in the name of the partnership, for the balance due therefor under the contract, alleging such facts in his bill and that no net profits were earned under the contract. *Held*, that it was competent for plaintiff to allege, for jurisdictional purposes, the contract between him and his nominal partner, and that under such agreement the citizenship of such partner did not affect the jurisdiction of the court, since he had no interest in the recovery and was neither an indispensable nor necessary party.

3. MECHANICS' LIENS—CONSTRUCTION OF STATUTE—"STRUCTURES."

The mechanic's lien law of Oregon of 1885 (Laws 1885, p. 13), which gives a lien for labor performed upon or material furnished to be used in the construction of "any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure," under the rule of construction applied to it by the supreme court of the state, includes a railway by the term "other structure."

4. SAME—OREGON STATUTES—APPLICATION TO RAILROADS.

Under the rule that repeals by implication are not favored, and that two statutes on the same subject shall stand together, and both be given

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

See Courts, vol. 13, Cent. Dig. § 867.

¶ 2. Averments of citizenship to show jurisdiction in federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

effect, if practicable or possible, the general mechanic's lien law of Oregon (Laws 1885, p. 13), as applied to railroads, was not repealed by implication by the special act of February 25, 1889 (Laws 1889, p. 75), which gives liens to a class of creditors not embraced within the terms of the general act, as well as to the same class, and provides a different method of procedure for their enforcement, but both statutes may be sustained as giving to the latter class a cumulative remedy as against railroads.

5. SAME—PROPERTY AFFECTED—RIGHT TO ENFORCE AGAINST RAILROAD EXTENSION.

Under the mechanic's lien law of Oregon a subcontractor who performs work in building an extension of a railroad may claim and enforce a lien therefor upon such extension only, and the fact that he does not include in his claim the entire road of the company does not violate any public policy of the state, nor give the company any ground to object to his claim.

Appeal from the Circuit Court of the United States for the District of Oregon.

For opinion below, see 109 Fed. 499.

The portions of the amended bill of complaint, referred to in the opinion of the court, are substantially as follows:

"That the defendant the Columbia Southern Railway Company now is, and at all times hereinafter mentioned was, a private corporation, incorporated and existing under and by virtue of the laws of the state of Oregon; that the defendant the New York Security & Trust Company now is, and at all times hereinafter mentioned was, a private corporation, incorporated and existing under and by virtue of the laws of the state of New York; that complainant now is, and at all times hereinafter mentioned was, a citizen of the empire of Japan and a subject of the emperor of said empire; that the amount in controversy between the complainant and defendants exceeds the sum of two thousand dollars (\$2,000), exclusive of costs and interest; that defendants the Columbia Southern Railway Company, A. E. Hammond, and Archie Mason, and each and all of them, are citizens of the state of Oregon; that the defendant the New York Security & Trust Company is a citizen of the state of New York"; that the defendant the Columbia Southern Railway Company is the owner of that certain piece or parcel of land, together with all appurtenances thereto and structures thereon, known as the right of way of said Columbia Southern Railway Company, and being in the counties of Wasco and Sherman, in the state of Oregon (the same being particularly designated, and described in the amended bill); that about the _____ day of _____, 1899, the Columbia Southern Railway Company entered into a contract with the defendant A. E. Hammond for the construction of an extension of its railway from the town of Moro to Shaniko, to be constructed and built on said right of way; that on the 11th day of October, 1899, the said A. E. Hammond entered into a contract with the defendant Archie Mason for the construction of all grading, bridging, culverts, ditches, change of creek channels, track-laying, surfacing, and such other work connected therewith; that thereafter, on the 30th day of October, 1899, the defendant Archie Mason sublet to the complainant and one N. G. Seaman the track-laying and surfacing of said railway; that the defendant A. E. Hammond was the original contractor in charge of the construction of said railway; that the defendant Archie Mason was a subcontractor under defendant Hammond, and as such was the agent of the defendant the Columbia Southern Railway Company for the construction of said portion of said railway; that about the _____ day of _____, 1899, the complainant and Seaman commenced to perform the work and labor provided for and required to be performed in and by the said contract, and continued to perform work and labor in the construction of said railway thereafter until on or about the 10th day of July, 1900, at which time complainant and Seaman fully completed the work provided for and agreed to be done by them, and they then ceased to perform work and labor under said contract; that said complainant

and said Seaman between the 30th day of October, 1899, and the 10th day of July, 1900, duly performed all the terms and conditions of the said contract between them and the said Archie Mason, and on said last-named date the work provided for by the terms of said contract was fully completed; that the agreed and reasonable price and value of the work and labor performed was and is the full sum of \$32,365.86, of which said sum there had been paid in cash the sum of \$7,000, leaving a balance of \$25,365.86 due and owing from said defendant Archie Mason on account of work and labor performed in the construction of said railway; that after the completion of said contract as aforesaid, and within 30 days after said complainant and said Seaman ceased to perform work and labor in the construction of said road, and within 30 days after the completion of said railway, to wit, on the 8th day of August, 1900, said plaintiff and Seaman prepared and filed with the county clerk of Sherman county, in the state of Oregon, a claim containing a true statement of their account and demand against the said defendant Archie Mason, after deducting all just credits and offsets and alleging facts showing that the law as to the filing of such a lien had been fully complied with; that said complainant and said Seaman, in order to perform and complete the work specified in their said contract with said defendant Archie Mason, among other things did the following particular kind and amount of work [here follows a specification of the laying and surfacing of 46 miles of track and itemized accounts of the extra work done and the amounts due therefor]; that although said complainant and said Seaman repeatedly requested said defendant Archie Mason and the chief engineer of said railway company to measure and estimate the work done by them as required by the terms of said contract as hereinabove specified, yet said defendant Mason and said chief engineer refused and neglected, and have ever since refused and neglected, so to do, and have wholly disregarded their duty in that regard; that said defendant Mason and said engineer still refuse and neglect to comply with the terms and provisions of said contract; that a reasonable time within which to make and determine the final estimate of the entire work done by said complainant and said Seaman under said contract has long since elapsed; that said refusal, neglect, and failure of said chief engineer and his assistants was fraudulent and in bad faith, and in willful violation of the terms and conditions of said contract, and was collusively contrived with said defendants; that defendant the New York Security & Trust Company has or claims to have some lien or incumbrance upon or interest in the property hereinabove described, but complainant alleges that such interest, if any, is subordinate and inferior to the claim and lien of this complainant; that prior to entering into said contract, a copy of which is attached hereto, marked 'Exhibit A,' for track-laying and surfacing of said railway, with said Archie Mason, said complainant and said Seaman entered into an agreement by the terms of which, among other things, it was mutually agreed and understood that the said complainant, S. Ban, should furnish all labor and advance all money required to perform the work provided for and contracted to be done under said contract, and in consideration thereof should receive and disburse all money belonging to said partnership, and, when said work should be finally completed and settled for, should render to said Seaman a statement of all money received and disbursed, and pay over to him one-half of the net profits of said work; that said defendant Mason had due notice and knowledge of said agreement at the time he entered into said contract with complainant and said Seaman; that there are and will be no profits arising from said work or contract, and there will be no profits or money to be turned over to said Seaman; that heretofore, and since the filing of said mechanic's lien, and prior to the commencement of this suit, the said N. G. Seaman for value relinquished and transferred to complainant all his right, title, and interest in and to said mechanic's lien, and in and to the claim and demand against said defendant Mason, on account of the work and labor performed under said contract, as hereinabove set forth, and this complainant ever since has been, and now is, the sole owner and holder of said mechanic's lien, and of said claim and demand against said Columbia Southern Railway Company, said A. E. Hammond, and said Archie Mason."

Section 1 of the act of 1885, giving liens to mechanics, laborers, and others, reads as follows:

"Section 1. Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same, for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building, or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person, having charge of the construction, alteration or repair, in whole or in part, of any building, or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act." Laws Or. 1885, p. 18.

Section 1 of the act of 1889 reads as follows:

"Section 1. That any and all person or persons who shall hereafter as subcontractor, materialman or laborer furnish to any contractor to any railroad corporation any fuel, ties, materials, supplies or other article or thing, or who shall do or perform any work or labor for such contractor in conformity with any terms of any contract, express or implied, which said contractor may have made with any such railroad corporation, shall have a lien upon all property, real, personal and mixed, of said railroad corporation: provided, such subcontractor, materialman or laborer shall have complied with the provisions of this act." Laws 1889, p. 75.

The appellant's assignment of errors is as follows:

"(1) That the court erred in holding that the lien upon railroads given under the general mechanic's lien law of the state of Oregon was repealed by implication by the act of the legislature of the state of Oregon approved February 25, 1889; (2) that the court erred in holding that the complainant, S. Ban, had no lien upon the railroad of the defendant Columbia Southern Railway Company for the money furnished by and the labor performed by him as stated in the complaint; (3) that the court erred in holding that the complainant's lien is or would be subsequent to and inferior to the lien of the defendant New York Security & Trust Company; (4) that the court erred in holding that the amended bill of complaint did not state facts sufficient to entitle the complainant to the equitable relief prayed for; (5) that the court erred in holding that the court was without jurisdiction to entertain the suit brought as alleged in the amended bill of complaint by the complainant, Ban, as assignee in part of Seaman; (6) the court erred in sustaining the demurrer to the amended bill and dismissing the amended bill of complaint; (7) that there is manifest error in this, to wit, in dismissing the bill for lack of equity, for the reasons as given in the opinion, or at all; (8) there is manifest error in this, to wit, in awarding to the defendants the Columbia Southern Railway Company and A. E. Hammond, or either of them, their costs and disbursements."

The contention of appellees is that the decree of the lower court dismissing the bill of complaint can be justified on four grounds:

"(1) The lower court had no jurisdiction. (2) The Oregon mechanic's lien act of 1885 does not authorize a mechanic's lien on a railway. (3) If the act of 1885 ever did authorize a mechanic's lien on a railway, it has been impliedly repealed by the railway lien act of 1889. (4) The effort of appellant is to secure a mechanic's lien on a portion only of the railway line of the Columbia Southern Railway Company."

A. C. Emmons and Williams, Wood & Linthicum, for appellant.
Snow & McCamant, for appellees.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

HAWLEY, District Judge, after stating the foregoing facts, delivered the opinion of the court.

This is a suit to foreclose a mechanic's lien upon an extension of a line of railroad from Moro, Sherman county, Or., to Shaniko, Wasco county, Or., belonging to the Columbia Southern Railway Company, defendant herein. The record shows that a demurrer to the original bill of complaint, which was filed by complainant, Ban, was sustained by the court upon the ground that the statute of Oregon, which it was claimed authorized a lien for work and labor done was repealed by implication by a subsequent statute approved February 25, 1889. It was also held that Seaman, who was interested with Ban, should have been made a party complainant in the suit. Complainant thereafter filed an amended bill of complaint, to which the railway company and the defendant Hammond interposed a demurrer upon the ground that "it affirmatively appears from the complainant's bill that there is no equity therein, and the complainant is not entitled upon the facts alleged to the equitable relief prayed for, or any relief." This demurrer was also sustained by the court. The amended bill was dismissed, and judgment rendered in favor of defendants for their costs. From this judgment the appeal herein is taken. The material portions of the amended bill are set forth in the foregoing statement of facts, as are certain portions of the mechanic's lien laws of 1885 and 1889, and also the assignment of errors on behalf of appellant and the points relied on by appellees to sustain the judgment of the court below.

1. Did the court, under the facts stated, have any jurisdiction of this case? Section 629, Rev. St., among other things, provides:

"No circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made."

The object and intent of this restriction as to suits brought by assignees were evidently to prevent and prohibit the making of assignments of choses in action for the purpose of giving jurisdiction to the national courts. The language of this statute must be interpreted by the purpose to be effected and the mischief to be prevented. In *Bushnell v. Kennedy*, 9 Wall. 387, 391, 19 L. Ed. 736, the court, speaking of the eleventh section of the judiciary act, said:

"The denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee, though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. *Bullard v. Bell*, 1 Mason, 259, Fed. Cas. No. 2,121; *Bank of Kentucky v. Wister*, 2 Pet. 321, 7 L. Ed. 437. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. *Clappedelaine v. Dechenaux*, 4 Cranch, 308, 2 L. Ed. 629. And it has also been determined that the assignee of a chose in action may maintain a suit in the circuit court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. *Deshler v. Dodge*, 16 How. 631, 14 L. Ed. 1084."

This line of exceptions illustrates the general character of cases to which the statute would not be applicable.

In *Shoecraft v. Bloxham*, 124 U. S. 730, 735, 8 Sup. Ct. 686, 31 L. Ed. 574, the court held that a suit to enforce the performance of a contract is a suit to recover the contents of a chose in action, within the meaning of section 629 of the Revised Statutes, and in the course of the opinion the court said:

"The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin v. Black Hawk Co.*, 105 U. S. 659, 26 L. Ed. 1136, where the subject is fully considered and the decisions cited. There a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a chose in action, and therefore not maintainable, under the statute in question, in the circuit court of the United States, by an assignee, if it could not have been prosecuted there by the assignors, had no assignment been made."

We agree with the court below that:

"Unless Seaman's citizenship was such as to entitle him to bring this suit, Ban, as his assignee, cannot maintain it. If, without the assignment, in an action brought by Seaman and Ban, the court would have been without jurisdiction, it is equally without it when the action is brought by Ban in his own right under the contract and as the assignee of Seaman."

In other words, complainant, Ban, under the provisions of the statute cannot rely upon any rights under the assignment from Seaman in so far as the question of jurisdiction is concerned. But the question whether Ban, upon the facts alleged in the amended bill, can maintain the suit in his own name without the assignment from Seaman, presents other questions for our consideration. Upon the facts of the agreement with Mason the rights of Ban and Seaman were the same. They were equally interested in the contract and equally responsible under it, and if that condition existed at the time of the commencement of the suit Ban would not be able to maintain the suit in his own name. Seaman would be not only a necessary, but an indispensable, party complainant. It is, however, claimed that the agreement between Ban and Seaman was made prior to the contract with Mason and of which Mason had knowledge. This shows that at the time of the commencement of this suit Seaman had no interest whatever in the matter in controversy; that Seaman's interest, at best, was only in the profits; that there were no profits, and would be none if Ban should succeed and recover the entire amounts sued for.

The crucial test on this branch of the case depends upon the question whether, upon the facts stated in the amended bill Seaman was an indispensable party to the suit. The general principles relied upon by appellees are that a complainant seeking equity must bring before the court all such parties as are necessary to enable it to do complete justice, and that he should so far bind the rights of all parties interested in the suit as to render the performance of the decree which he seeks safe to the party called upon to perform it by preventing his

being sued or molested again respecting the same matter, either at law or in equity. 1 Daniell, Ch. Prac. 192; 1 Bates, Fed. Eq. Proc. §§ 39, 40. These general principles are well settled, and furnish more or less aid in determining whether or not any of the indispensable parties to the suit have been omitted. If Seaman is not an indispensable party, he need not be made a party complainant herein; but, if he is an indispensable party, he must be brought in, wherever he may reside, and, if bringing him in deprives the court of its jurisdiction, complainant must abide by the consequences.

In *Barney v. City of Baltimore*, 6 Wall. 281, 284, 18 L. Ed. 825, the court, in discussing the subject of parties to suits in chancery, formal, necessary, or indispensable, said:

"There is a third class, whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

The court also quotes with approval the language of the court in *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, where, speaking of this third class, the court said:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

The authorities upon this point are quite numerous. See *Ribon v. Railroad Co.*, 16 Wall. 450, 21 L. Ed. 367; *Williams v. Bankhead*, 19 Wall. 571, 22 L. Ed. 184; *Kendig v. Dean*, 97 U. S. 425, 24 L. Ed. 1061; *Hicklin v. Marco*, 6 C. C. A. 10, 56 Fed. 549, 553.

The question then arises whether or not the suit can be tried, heard, and determined without the presence of Seaman. He has no interest whatever in the suit. Mason, who sublet the contract to Ban and Seaman, knew that Seaman's interest was conditional upon profits being received. Ban was to do the work, receive and disburse the money, and, if there were any profits, Seaman was to have one-half thereof. There are no profits. Why, then, is it necessary to make Seaman a party complainant herein, when the only effect his presence would have would be to defeat the jurisdiction of the court? It affirmatively appears from the averments in the amended bill that none of the parties to the suit could possibly be injuriously or prejudicially affected by having the suit maintained by Ban, who is the real party in interest, as complainant herein. The whole subject-matter of the suit could be determined without Seaman being brought in, and settled with justice to all parties concerned without detriment or prejudice to either.

Complainant had the right to allege the facts showing the relations which Seaman had with the subject-matter of the suit, that he had no interest therein, and was not an indispensable party thereto. If brought in, he would only be a nominal party. The jurisdiction of the court can be maintained upon the general principles announced in *Holmes v. Goldsmith*, 147 U. S. 150, 161, 13 Sup. Ct. 288, 37 L. Ed.

118, where the suit was based upon a note executed by M. B. Holmes, John Dillard, and R. Phipps, citizens of Oregon, payable to the order of W. F. Owens, a citizen of Oregon, and by him indorsed to L. Goldsmith and Max Goldsmith, citizens of the state of New York. Suit was brought in the United States circuit court in the district of Oregon by the Goldsmiths against Holmes, Dillard, and Phipps; it being averred in the petition that the defendants executed the note for the accommodation of Owens to enable him to procure a loan thereon; that Owens was in fact the maker of the note, and never had any cause of action thereon against the defendants. The court held that upon the question of jurisdiction it was permissible to show by parol testimony what relation the parties really held to the contract sought to be enforced; that the spirit and purpose of the restrictive clause in the statute were to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the federal court, where such jurisdiction would not exist as between the original parties to the contract, and finally, after quoting many decisions, the court said:

"We think that the jurisdiction of the circuit court in the case before us was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers."

See, also, Equity Rule 47; *Payne v. Hook*, 7 Wall. 425, 431, 19 L. Ed. 260; *Wachusett Nat. Bank v. Sioux City Stove Works* (C. C.) 56 Fed. 321; *Insurance Co. v. Svendsen* (C. C.) 74 Fed. 346, 348; *Smith v. Lee* (C. C.) 77 Fed. 779; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124.

In *Baxter v. Hart*, 104 Cal. 344, 345, 37 Pac. 941, the action was brought to recover \$391.39 for services performed by plaintiff in threshing wheat and barley for defendant. The testimony tended to show that plaintiff Baxter and one Flanigan owned a threshing machine and were engaged as partners in threshing grain for farmers. Flanigan and defendant were also partners in the crop of grain threshed. Flanigan arranged with defendant for the threshing, and each of them was to pay separately for one-half of the threshing. But Baxter and Flanigan then agreed that they would not thresh the crop as copartners, but that the pay coming from defendant should all go to plaintiff, and that Flanigan's grain should be threshed for him free to offset the other half. It did not appear that this arrangement between plaintiffs was known to defendant until after the grain was threshed. Upon these facts the court said:

"The only question in the case is, does the testimony support the finding that defendant is indebted to plaintiff in the sum of \$391.93 for the threshing of defendant's crop of wheat and barley, etc.? No reason is perceived why plaintiff and Flanigan could not, as between themselves, although copartners, agree that, as to a given venture or contract, plaintiff should have the entire benefit, as they might have assigned the demand arising therefrom one to the other after completion of such venture or contract. Had defendant presented a counterclaim against the firm held by him before notice of this arrangement, it would have been valid to defeat the claim; but, in

the absence of such a cross-demand, it is not perceived that he can be injured by a judgment for that which he was bound to pay. The case, then, stands thus: Plaintiff and Flanigan entered into a contract jointly with defendant, and then by an agreement between themselves stipulated that plaintiff should be the recipient of the entire benefit thereof. This constituted him the real party in interest as between himself and his copartner, and as a result he was the proper and only proper party plaintiff."

Ban and Seaman were not copartners in the full sense of that term. A partner must ordinarily bear the burden of the losses, as well as share in the profits. The authorities cited by appellees, as to the obligations of parties jointly interested or as copartners, have no controlling effect when applied, or sought to be applied, to the particular facts of this case.

2. Did the court below err in holding that the mechanic's lien law of 1885 was repealed by implication by the lien law of 1889? This is not free from difficulty. Much can be said, and has been ably said, on both sides of the controversy. The act of 1889 contains provisions with reference to the enforcement of the liens under it which are radically different from the procedure under the act of 1885. The suit is brought under the provisions of the act of 1885. If the act of 1889 is given controlling effect, complainant is "out of court" upon his own statement of facts, or lack of statement of material facts. He must stand or fall upon the provisions of the act of 1885. The title of the act of 1885 is, "An act for securing liens for mechanics, laborers, materialmen, and others and prescribing the manner of their enforcement." Laws 1885, p. 13. The title of the act of 1889 is, "To protect contractors, subcontractors, and laborers in their claims against railroad companies or corporations, contractors, or subcontractors." Laws 1889, p. 75. The act of 1885 provides:

"Sec. 3. A lien created by this act upon any parcel of land shall be preferred to any lien, mortgage, or other incumbrance which may have attached to said land subsequent to the time when the building or other improvement was commenced."

Complainant asks for a priority of his lien over that of the New York Trust Company, defendant herein. The act of 1889 provides:

"Section 1. That no such lien shall take priority over existing lien."

The act of 1885 provides:

"Sec. 10. No payment by the owner of the building or structure to any original or subcontractor, made before thirty days from the completion of the building, shall be valid for the purpose of defeating or discharging any lien created by this act in favor of any workman, laborer, lumber merchant or materialman, unless such payment so made by the owner of the building or structure to such original or subcontractor has been distributed among such workmen, laborers, lumber merchants or materialmen, or, if distributed in part only, then the same shall be valid only to the extent the same has been so distributed."

This enables a lien claimant under certain conditions to collect the whole amount from the owner regardless of what has been paid by it. The act of 1889 contains a proviso (section 1) that:

"The aggregate of all liens hereby authorized shall not in any case exceed the price agreed upon in the original contract to be paid by such corporation to the original contractor, nor shall such corporation be liable for any greater

sum than the amount then actually due by such corporation to said original contractor."

The complaint in this case is silent upon the question whether there is anything due from the railway company to Hammond or to Mason. There are other differences in the acts that need not be specially noticed. The closing section of the act of 1889 says:

"Inasmuch as there is now no law upon this subject, and it is of importance to laborers and materialmen, this act shall take effect from and after its approval by the governor."

What did the legislature mean when it said "there is now no law upon this subject"? It is the contention of appellees that the act of 1885 does not authorize any mechanic's lien on railroads, and that section 7 of the act of 1889 is a legislative declaration that there was no law in Oregon providing for any liens on railroads, and that, if the act of 1885 "might by any possibility be construed to provide for a lien on railways," then it is conclusive evidence of the legislative intention that the act of 1889 should operate as a repeal of the act of 1885. In *2 Jones, Liens*, § 1624, the author says:

"Under the general terms 'structure,' 'erection,' or 'improvement,' it is, of course, possible to establish a lien for almost anything that can be attached to the realty. * * * Under such a statute, a lien has been established against a railroad for ties furnished the company (*Neilson v. Railroad Co.*, 44 Iowa, 71), and doubtless a lien might be established for almost any part of a railroad, such, for instance, as the grading of the line of road as an 'improvement' upon land."

In the consideration of the questions herein involved we must naturally look, at least in the first instance, to the decisions of the supreme court of Oregon, if there are any, touching the construction of the statutes of that state, for they would be binding upon this court.

In *Forbes v. Electric Co.*, 19 Or. 61, 23 Pac. 670, 20 Am. St. Rep. 793, which was a suit to enforce a number of liens for labor under a contract which one Stronach had with the corporation to dig holes and place the poles therein, and stretch the necessary wires on the same, from the city of Portland to a point near Oregon City. The said wires were to be used by the defendant corporation for the purpose of transmitting light and power from the company's works at the falls of the Willamette river to the city of Portland and for other electrical purposes. The plaintiff rested his claim to enforce his lien on the fact that Stronach had a contract with the defendant corporation to do the work which they performed, and that he employed each of said parties at a fixed rate of wages per day to assist in its performance. The court said:

"The plaintiff's right to the remedy which he seeks must depend on the statute. * * * The principal question litigated on this appeal is whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles, planted in the ground, connected together by wires and insulators, constitute a structure within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other states, for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think

It may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a structure within the meaning of the statute, and that the same is subject to a lien for labor performed thereon."

It is true that this case is not identical with the case in hand. The lien given is not upon a railroad; but from the principles stated by the court it necessarily follows that if the posts and wireways, therein referred to, are "structures," within the meaning of that word as used in the statute, a railroad would also be included.

In *Giant Powder Co. v. Oregon Pac. R. Co.* (C. C.) 42 Fed. 470, 8 L. R. A. 700, the direct question was presented to Judge Deady, and he held that the words "any other structure," as found in the act of 1885, did apply to railroads. His opinion is instructive, and covers several other points directly applicable to the present case. He declared that the act of 1889 was a most extraordinary one, and pointed out the fact that by its provisions the lien of the materialman or laborer is declared to exist against all the property of the railroad corporation, "real, personal, and mixed," without any limit as to situation or place of existence on furnishing of materials for the performance of labor without any record being made of the same, or notice to any one of the claim, except in the case of a laborer, when notice is required to be given to the corporation that he will hold its property for his "pay." That case, like this, was presented upon demurrer, and there, as here, it was contended by counsel for the demurrer that the passage of Act 1889, § 7, amounts to a legislative declaration that the act of 1885 did not include or apply to railroads. In the course of his opinion Judge Deady said:

"The subsequent act might have been passed out of abundance of caution, and not upon any well-grounded or serious impression that the former was wanting or insufficient in this respect. Be this as it may, the opinion of the legislative assembly of 1889 as to the scope and purpose of the act of 1885 is of very little moment, and can have no weight in the construction of the later one concerning rights and transactions which were vested or transpired before its existence. The intention of the legislature of 1889 in passing the act of that year is a proper subject of judicial inquiry and determination; but its opinion of the scope and effect of the act of 1885, if it had any, is not material in this case. Considering the peculiar provisions of the act of 1889, the most obvious reason for its passage is that the legislature thereby intended to take the subject of claims against railway corporations for materials and labor furnished out of the operation of the general lien law of 1885 and put it under this special act, which does not require any notice of the claim to be filed with any clerk or other officer, and provides a special proceeding in which all such claims must be enforced as in one suit. It must be admitted that, if the legislature intended to include railways in the act of 1885, it is not apparent why so important a subject was not mentioned in the long list of those expressly named. Still the language of the act is certainly broad and comprehensive enough to include a railway. It is certainly a 'structure,' if not a 'superstructure.' A lien can as conveniently be imposed upon it as upon a 'ditch,' 'flume,' or 'tunnel.' These instances of lienable property are expressly mentioned in the statute; and the scope and operation of this general term, 'structure,' immediately following this specific enumeration, must be ascertained by reference to the latter. The doctrine of *'noscitur a sociis'* applies; and the significance of the word 'structure,' in this statute, is indicated by the company it is found in,—'ditch,' 'flume,' and 'tunnel.' If the language of the act was 'building or other structure' only, then it might not be construed as including railway. But the words, a 'ditch or any other structure.'

cannot, consistently with this established rule of construction, be held to exclude a railway. A railway is literally and technically a 'structure.' It consists of the bed or foundation, which may be of earth, stone, or trestle work, on which are laid the ties and rails. These, taken together, constitute a 'structure,' in the full sense of the word,—a something joined together, built, constructed."

He then refers to the opinion of the supreme court in *Forbes v. Electric Co.*, supra, and adds:

"A railway is certainly a structure within the authority of this decision. The railway and the wireway, notwithstanding the different uses to which they are subject, are both structures, upon which a lien may be had as security for the labor and materials that entered into their composition."

We think the decision in the supreme court of Oregon, above quoted, in principle, at least, is decisive upon the question under consideration, and, supplemented as it is by the opinion of Judge Deady, will be treated as conclusive. In connection with these decisions we call especial attention to *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.*, 11 C. C. A. 11, 63 Fed. 11, 14, where the court held that no lien attached upon a railroad under the language of the lien law of Michigan. It is very instructive, and may be examined with profit, as to the necessity of courts in their respective states being governed by the language of the statute giving a lien. The views therein expressed are unquestionably sound, and are certainly as favorable to appellant as to the appellees herein.

Returning to the main question whether the statute of 1885 is repealed by the act of 1889, we find certain well-settled canons of interpretation applicable to this question that should not be overlooked: (1) The law does not favor repeals by implication. (2) The legislative intent should, when ascertained, be given controlling effect. (3) When there is a difference in the whole purview of two statutes relating to the same subject, the former is not repealed. (4) Statutes which are not inconsistent with one another and which relate to the same subject-matter are in *pari materia* and must be construed together, effect being given to all, though they contain no reference to one another and were passed at different times. (5) That two statutes on the same subject shall stand together, and both be given effect, if practicable or possible. (6) A statute ought never to be held to repeal by implication another previous statute on the same subject, unless the terms of the two statutes are so repugnant that they cannot be reconciled or stand together.

In *Wood v. U. S.*, 16 Pet. 342, 362, 10 L. Ed. 987, the court, having under consideration the question whether the sixty-sixth section of the act of 1799 (1 Stat. 677), had been repealed or remains in full force, said:

"That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication; for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

In *Chicago, M. & St. P. R. Co. v. U. S.*, 127 U. S. 406, 408, 8 Sup. Ct. 1194, 32 L. Ed. 180, it was contended that there was no statute in force which authorized deductions from compensation claimed by railroads during a certain period, and in replying thereto the court said:

"There is a brief and conclusive answer to this contention. Section 3962 of the Revised Statutes is not repealed by section 5 of the act of 1879. 20 Stat. 358. Section 3962 authorizes a deduction from the pay of contractors, whether they be natural persons or corporations, of the price of the trip in all cases where the trip is not performed, and not exceeding three times the price if the failure be caused by the fault of the contractor or carrier. Section 5 of the act of 1879 applies only to railroad companies, and has special reference to failures of delivery within schedule time, and makes a difference between them and failures to make the trips, leaving the provision for the latter substantially as it is in the Revised Statutes. When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the later will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says, it 'may be merely affirmative, or cumulative, or auxiliary.'"

In *Winters v. George*, 21 Or. 251, 257, 27 Pac. 1041, the court held that the act of the legislature providing for the consolidation of the cities of Portland and Albina did not repeal and was not in conflict with the Muessdorffer act, which provided for the maintenance by those cities of bridges across the Willamette river, and in the course of its opinion said:

"It is elementary law that repeals by implication are not favored. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is said to be a rule, founded in reason as well as in abundant authority, that in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and the earlier law, so positive as to be irreconcilable by any fair, strict, or liberal construction which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law, and construing both together in harmony with the whole course of legislation on the subject."

In *Raudebaugh v. Shelley*, 6 Ohio St. 316, the court said:

"The maxim, '*Leges posteriores priores contrarias abrogant*,' does not apply except where the inconsistency or repugnancy is such that the two provisions cannot stand as cumulative or concurrent rules of action, so that the later statute by its necessary operation abrogates the former. Repeals by implication are not favored, especially under our present constitution; and it is a well-settled rule of construction, applicable to all remedial laws, that where a new remedy or mode of proceeding is authorized, without an express repeal of a former one relating to the same matter, it is to be regarded as merely cumulative, creating a concurrent remedy, and not as abrogating the former mode of procedure."

See, also, *McLaughlin v. Hoover*, 1 Or. 31, 33; *Bower v. Holaday*, 18 Or. 491, 496, 22 Pac. 553; *Mount v. Mitchell*, 31 N. Y. 356, 360; *Goddard v. City of Boston*, 20 Pick. 407, 410; *Harford v. U. S.*, 8 Cranch, 45, 3 L. Ed. 504; *Ex parte Yerger*, 8 Wall. 85, 105, 19 L. Ed. 332; *State v. Stoll*, 17 Wall. 425, 431, 21 L. Ed. 650.

These cases sufficiently illustrate the general principles we have announced. In the present case it will be observed by a careful reading of section 1 of the act of 1885, set out at length in the statement of facts, that it only applies to persons performing labor upon or furnishing material "to be used in the construction, alteration or repair" of the building, ditch, flume, or other structure. This is the sole object and purview of the whole section. Then, turning to section 1 of the act of 1889, it will be discovered, upon careful inspection, that it has a different object in view. It first gives to persons who, as subcontractors, materialmen, or laborers, furnish to any contractor or to any railroad corporation "any fuel, ties, material, supplies, or article or thing," and then provides that any laborer, for any work or labor performed for such contractor, shall also have a lien upon "all property, real, personal and mixed, of said railroad corporation." Is it not evident from a comparison of these acts that it was the intent of the legislature of 1889 to give a lien to persons who were not included in the provisions of the act of 1885? We think it was. Such a conclusion gives sense and meaning to section 7 of the act, wherein the legislature said, "as there is now no law upon the subject." No repeal was necessary. There was no intention on the part of the legislature of 1889 to repeal by implication or otherwise the act of 1885. Any other view would convict the legislature of an absurdity. The fact of the different methods of procedure contained in the two acts also furnish evidence in support of this view, for it might be, within the wisdom of the legislature, that it thought such differences would be just and proper to fairly meet the justice of the case; and it certainly was not unreasonable for the legislature to make different provisions as to the character of the lien which the supply men and laborers were given under the act of 1889 from those specified in the act of 1885 with reference to the subcontractors and others "having charge of the construction, alteration or repair of a railroad." This makes both acts perfect in themselves and amounts to a complete system which different persons might enforce under the law, which gives them a lien, whether it be the general act of 1885 or the special act of 1889.

In *Robinson v. Rippey*, 111 Ind. 112, 12 N. E. 141, the court had under consideration the question whether the gravel road law of March 3, 1877, was repealed by implication by the act of April 8, 1885. The court, in the course of its opinion, said:

"There are very material differences in the provisions of the two acts. In many respects they are inconsistent, while in others they are substantially the same. Each act, taken in itself, constitutes a complete scheme or system for the construction of gravel roads and for the method of procedure in making and collecting assessments. The question presented is a very perplexing one, but, after the most careful study we have been able to give it, we have reached the conclusion that it was the intention of the legislature to create two systems, and not to repeal the former law. The fact that both

of the statutes are directed to the attainment of the same end does not warrant the conclusion that the later repeals the former. Statutes constructing two systems for the government of the same subject may both stand. *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *Wood v. U. S.*, 16 Pet. 342, 363, 10 L. Ed. 987; *Davies v. Fairbairn*, 3 How. 636, 11 L. Ed. 760; *Raudebaugh v. Shelley*, 6 Ohio St. 307. Mr. Bishop thus states the rule: "Two or more separate laws may establish the same right, or provide redress for the same wrong; and the person seeking to enforce the right or avenge the wrong may proceed on the law he chooses." *Bish. Written Laws*, § 163d. In the legislation upon the subject of drainage we have an example of the creation of two distinct schemes for the attainment of the same end, and these statutes have been sustained and enforced. * * * There is, therefore, no intrinsic difficulty in maintaining the theory that two systems were created by the legislature, and the fact that the statutes relate to the same subject and seek the same end does not necessarily require it to be held that the later supersedes the earlier. It does not follow that, because two statutes contain similar provisions, the earlier is abrogated; for, if the intention to construct two systems is manifested, the similarity in the provisions of the two statutes will not supply a valid reason for declaring the earlier to be repealed by implication. The principle which controls this phase of the question was decided in *Powers v. Shepard*, 48 N. Y. 540. * * * It was there held that 'the re-enactment of certain of the sections of one act in a subsequent one providing for a different scheme is not a repeal by implication of those sections in the first act.' * * * It may, perhaps, be true that confusion will result from framing two systems for the government of one subject, and that it is an unwise exercise of power; but the wisdom or expediency of a statute is a question for the legislature, and not for the court. *Eastman v. State*, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400. The courts can do no more than determine the validity of the statute, and, having adjudged it valid, ascertain and enforce the legislative intention. They cannot, as Judge Cooley says, 'run a race of expediency with the legislature.' Nor will mere inconvenience, worked by the similarity of two statutes, justify the courts in declaring that the earlier is impliedly repealed by the later. *Waldo v. Bell*, 13 La. Ann. 329; *Mitchell v. Duncan*, 7 Fla. 13; *Raudebaugh v. Shelley*, supra; *State v. Berry*, 12 Iowa, 58; *Wilson v. Shorick*, 21 Iowa, 332. The addition to an existing system does not necessarily imply its abrogation."

3. Can a lien be secured upon an extended line of railroad upon which the work was done without including the entire railroad owned by the defendant corporation? In a certain sense it may be said that there is endless confusion upon this subject. Some of the authorities are diametrically opposed to others. Many of the cases are based upon the particular language of the state statutes; some upon the grounds of public policy supposed to exist in certain states against giving a lien upon different sections of a railroad, that the railroad is an entirety, and that there can be no severance or dislocation of the road as a unit. There is a direct conflict upon the main question involved herein. In Missouri it has been expressly held that under the provisions of the statutes of that state a lien for labor and materials cannot be enforced against that portion or section of a railroad only for which they were furnished. To be enforceable the lien must be against the whole railroad situated in that state. *Knapp v. Railway Co.*, 74 Mo. 374, 378; *Id.*, 6 Mo. App. 205. In 2 *Jones, Liens*, § 1619, it is said:

"Where a part only of a railroad lies within the state under the laws of which the lien is enforced, the lien cannot, of course, be enforced against that part of the road not within the state; but it must be enforced against the whole of that part within the state, and not against a section or portion of it only."

The only authorities cited in support of this text are from Missouri. We are not aware of any general public policy existing in Oregon which forbids the enforcement of a lien given by the statute of that state against the property of a railroad or other corporation. If a railroad company gives a mortgage upon certain portions of its road, it can be enforced by law in a foreclosure suit without embracing the whole road, subject, of course, to the general principles that in such foreclosure suits the property mortgaged cannot, for obvious reasons, be sold in separate parcels or portions and made subject to the right of redemption as given by the statutes of the state where the property is situated. We are of opinion that these general principles apply with equal force to mechanics' and other liens given by the statute of the state wherein the property is situated. We know of no sensible reason why any different principle should be applied in one case and not applied in the other. True it is that the mortgage is given by the free and voluntary act of the corporation, while the lien of a subcontractor or laborer is filed by virtue of the statute; but this distinction does not, in our opinion, demand the application of any different principle.

Conceding, for the purposes of this opinion, that the lien claimant might have filed his lien against the whole railroad as a unit, it does not necessarily follow that he must enforce his lien against that portion only upon which he performed his work. Can the corporation complain because he took his lien upon less than he was entitled to? If so, upon what grounds? In several of the states the statute gives a lien on buildings and so much land around the same as may be convenient or necessary for its use or occupation. Others provide for a specified quantity of land. Suppose the lien claimant only filed his lien on the building and the ground upon which it stood; would the lien claimant lose the right to enforce his lien because he did not include all the land to which he was entitled under the law? He could not, of course, take his lien on the roof of the house, nor of the parlor or kitchen. These could not be separated from the main building. Such comparisons, made for the purpose of showing that the lien cannot be taken except on the whole road, beg the real question at issue. It will be time enough to consider illustrations of this character when a lien claimant seeks to enforce his lien upon detached sections of that portion of the road upon which the work was done. We must not lose sight of the facts of this case. The defendant corporation had completed its railroad from Biggs to Moro. This part of the road was completed and in full operation prior to the time when the contracts were entered into for the extension of the road from Moro to Shaniko. Appellees contend that the lien should have been upon the whole railroad owned by the defendant from Biggs to Shaniko. There is no segregation of any part of the road on which the work was done. That portion is not divided into sections. The lien in this case is upon the whole railroad to which it applies.

Brooks v. Railroad Co., 101 U. S. 443, 25 L. Ed. 1057, cited by appellees, is not in opposition to the views above expressed. There it was held that where a contractor performs labor and furnishes

material upon a section or division of a railroad in Iowa then in the process of construction, and there was a pre-existing and duly recorded mortgage executed by the company upon its entire line of road to secure its bonds, the lienholder, on filing his claim within the time and in the mode prescribed by the statute, has, as against the mortgagees, a paramount lien upon the entire road. The assignments of error were that the court erred in decreeing a lien on the property in Davis, Van Buren, and Lee counties, the first division of the road, for work done in Appanoose county, the next division, on a contract which was dated and work begun after recording the mortgage in the latter county. The court said:

"As we understand this objection, it is founded on the idea that while, if the whole road had been uninterruptedly built under one contract, the lien of the contractors and subcontractors would have been good against the whole road, though they had contributed only to the building of a limited portion of it, yet because these subcontractors were only employed on one division of the road, after another had been finished, and under a distinct contract with the company made after that completion, the lien can only attach to the last section of the road, and even this is subordinate to the mortgage of the appellants. One branch of the question here raised was very fully considered in the case of *Neilson v. Railway Co.*, 44 Iowa, 71. That was a case where, after the building of a railroad had been commenced, a mortgage was executed on its whole line, both where work had been done and where none had been done. After this the building of the road was continued under new contracts by persons who did work on the other parts of the road, and the question was whether they had any lien prior to that of the mortgage, and, if so, whether it extended to all the road, or only to that part built under the new contracts. The court, after mature deliberation, decided both these questions in favor of the contractors."

The most that can be claimed for this case is that it holds that a lien could be claimed for the whole road. It does not intimate that it could not be claimed only for the portion upon which the lien claimants performed the work; nor does this case destroy the force of the opinion in *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894, in favor of the views contended for by appellant. It says:

"In that case, as was said in the opinion, we had no aid from any decision of the courts of the state. In the one before us we have several decisions of the Iowa court. * * * If *Canal Co. v. Gordon*, supra, is at variance with the decisions of the courts of Iowa construing her own statutes, we must follow the latter."

Judge Deady, in *Giant Powder Co. v. Oregon Pac. R. Co.*, discusses the question herein involved at some length. Among other things, he said:

"It is easy to say a thing is against public policy, but that does not make it so. Public policy is manifested by public acts, legislative and judicial, and not private opinion, however eminent. I have no knowledge of any such public policy prevailing in this state. A railway is nothing but private property devoted to public use, the same as a warehouse, and is so far, and no further, the subject of public policy. The owner, be he a natural person or a private corporation, can disuse or dispose of it, in whole or in part, at his or its pleasure. * * * But there is a public policy of this state, as shown by its legislation, that should be considered in this connection, which is that persons who furnish labor or materials to be used in the construction of railways shall have a lien thereon as a security for the value of such labor and materials. To promote this policy, and to produce the practical results intended by the legislature, the statute giving this lien should be

construed as far as in reason and right it may, and all mere doubts as to the extent and manner of its application should be so resolved."

In *Purtell v. Bolt Co.*, 74 Wis. 132, 135, 42 N. W. 265, the court, after citing many of the Wisconsin cases, said:

"But there is no public policy prevailing in this state against enforcing a laborer's lien upon any bridge or other structure of a railroad company for work performed thereon, no matter whether such structure is or is not part and parcel of the railway, or to what extent the enforcement of a lien thereon may interfere with or impede the operation of the railway or the exercise by the company of its corporate franchises. On the contrary, the public policy of this state is to enforce such a lien, and the company operates its railway and uses its franchises subject to the obligation to pay the claim of the lienor as established by the judgment. All this was settled by this court in *Hill v. Railroad Co.*, 11 Wis. 214, and the rules there established were not abrogated or shaken by the judgment in *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816, and have not been disturbed by any other adjudication of this court."

In *Railway Co. v. Wilcox*, 122 Ind. 84, 94, 23 N. E. 506, it was contended that the lien claimant could only claim his lien upon that portion of the road which was confined to one county, but the court held that "the lien fastens upon an entire and continuous line of unfinished road, and may be enforced in any of the counties through which the road runs." The opinion, like the one in hand, is quite lengthy, and its reasoning is based on the statute of that state which gives "a lien upon a railroad not in operation, and in doing this makes explicit what was before clearly implied." In that case the railroad was completed from Anderson to Noblesville, and no further, so that there was an uncompleted part extending from Noblesville to the line of Hamilton county, and on that part the lien fastened. In the course of the opinion, the court, among many other things, said:

"The purpose of the statute is evident, and that purpose is to give laborers, contractors, and materialmen a lien upon the railroad which their labor constructs and for which their property is used. The legislature, it is manifest, did not intend to confine the lien to a line of road within a single county, and we cannot so construe the statute. * * * It is our duty to give effect to the intention of the legislature, and this we do by adjudging that a lien fastens upon an entire and continuous line of unfinished road, and may be enforced in any one of the counties through which the road runs. * * * Where a corporation, having a line of railroad in operation to a town or city within a county, contracts for the construction of a part of the road leading from such town or city to a point beyond the county limits, the contractors may acquire a lien upon the part which they construct, or aid in constructing, although a portion of it lies within the county in which a part of the road is completed and in operation."

If the rule of public policy prevents a lien being filed, except on the whole road, finished as well as the unfinished portions thereof, then the statute which gives a lien on the uncompleted portion on which the work was done, upon the reasoning of some of the cases relied upon by appellees, would be unconstitutional because against public policy. No act authorized by the constitution can be said to be against the public policy of the state. *State v. Preble*, 18 Nev. 251, 2 Pac. 754.

In *Creer v. Canal Co.*, 38 Pac. 653, the supreme court of Idaho held that a party constructing a branch or section of a main canal, or performing labor thereon in its construction, under a contract with the owner, is entitled to a lien upon such branch or section for any balance due him for such labor. In the course of the opinion the court said:

"The appellants claim that, if the plaintiffs had asked a lien upon the whole system of canals, they might have obtained it; complaining that the plaintiffs did not ask of the court all they were entitled to, and therefore they should not have a lien upon any part of the canal. The appellants demand that the case should be reversed because the plaintiffs did not claim all they should have. The appellants can hardly be heard in such a complaint. * * * All the work for which plaintiffs claim this lien was done on these branches, and under a contract to construct these branches, which does not mention the main canal. This had been theretofore constructed. We think this lien can be obtained on this part of the system."

In *Canal Co. v. Gordon*, supra, it was urged that the decree of the lower court was erroneous, because the lien given by it extended the entire length of the canal, instead of limiting it to the upper section, where all the work was done. The court said:

"Is this objection well taken? Liens of this kind were unknown in the common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law. Domat, Civil Law, §§ 1742, 1744. Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise. These statutes vary widely in different states. Hence we have found no adjudication in any other state which throws any light upon the question before us, and there has been none in California. We are therefore compelled to meet the case as one of the first impression. We have already shown that the upper and lower sections were distinct works in several essential particulars, to which we need not again advert. The lower one having been finished and in use before the upper one was contracted for, if those having a lien upon the former had insisted that it became extended over the latter as soon as the latter was completed, no legal mind, we apprehend, could have doubted that the claim could not be sustained. If it could, Gordon's lien might have been rendered valueless. We think the converse of this proposition applies with equal force. If a lien upon the lower section could not have been extended over the upper one, upon what principle can it be maintained that Gordon's lien embraced the lower section? A lateral feeder, constructed and intersecting the main line after it was completed, would certainly not be subject to a previous lien upon the main line, if such a lien existed. We can see no substantial difference between that case and the one before us. The upper section was only an additional feeder. That it was an elongation of the main line, and not a lateral work, does not affect the principle involved. The controlling circumstances and the object in both cases would be the same. * * * The work of Gordon was all done upon the upper section. He had nothing to do with the lower section. So far as he was concerned, and for all the purposes of this litigation, they were distinct and independent works. A different principle would produce confusion and lead to serious evils."

We have given this case unusual care, thought, and attention. In the examination and discussion of the several points many diverse views have been encountered. The authorities in many instances have been allowed "to speak for themselves." It has been the aim of the court to accept those which were deemed to be founded upon solid ground and based upon the better reason. The result of all our investigations leads us to the conclusion that the court erred in

sustaining the demurrer to the amended bill of complaint and entering judgment of dismissal thereon.

The judgment appealed from is reversed, with costs, and the cause remanded. The court below will fix a reasonable time within which defendants may plead or answer.

DUPEE v. CHICAGO HORSE SHOE CO.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 804.

1. CORPORATIONS—STOCK SUBSCRIPTIONS—SIGNING ARTICLES OF ASSOCIATION—INTENT.

A signature to the articles of association of a projected corporation, followed by the words "250 shares," is a sufficient subscription to that number of shares of stock, provided the subscriber intended that it should so operate.

2. SECONDARY EVIDENCE—SEARCH FOR LOST ORIGINAL—SUFFICIENCY OF SHOWING.

Proof of search for a lost subscription paper to corporate stock, which is otherwise sufficient to let in secondary evidence, is not impaired by the testimony of the corporation's attorney, into whose hands the original first passed, that he believed it was forwarded to the general manager, followed by the general manager's testimony denying that the paper had ever been given to him.

3. SAME.

Nor was it impaired by the testimony of the president, elicited on cross-examination, that he had seen the paper in the hands of a former secretary of the corporation, though such secretary was not summoned or called as a witness, it appearing that his whereabouts at the time of trial was unknown.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The suit in the Circuit Court was by defendant in error, a citizen of the State of Indiana, incorporated under the laws of that State, against the plaintiff in error, a citizen of the State of Illinois, to recover twenty-five thousand dollars upon plaintiff in error's subscription to the capital stock of the defendant in error.

The declaration, original and amended, set forth two papers as constituting the subscription upon which liability was based. The first of these papers embodied in the original declaration is in the terms following:

"Articles of Association of Chicago Horse Shoe Company.

"We, the undersigned, hereby associate ourselves together pursuant to the Statutes of the State of Indiana for the organization of corporations, by the following written articles:

"Article I.—Name. The name shall be Chicago Horse Shoe.

"Article II.—Capital Stock. The capital stock of this Association shall be one hundred thousand dollars (\$100,000.00) divided into one thousand (1,000) shares of one hundred dollars (\$100) each.

"Article III.—Object. The object of this Association shall be to purchase, manufacture and sell any and all objects in the construction of which iron, steel, copper, brass, or other metals are required, including horse shoes, and to purchase, lease or otherwise acquire such real or personal property as may be necessary to a successful prosecution of said business.

"Article IV.—Place of Operation. The business of this Association shall be carried on in East Chicago, Lake County, Indiana.

¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 197, 201.

"Article V.—Number of Directors and Directors for First Year. There shall be five (5) directors for this Association. The following directors shall manage the affairs and prudential concerns of this Association for the first year of its existence: Shedd S. Shields, John D. Hibbard, Horace N. Dupee, George F. Hughson and Christopher Pfeiffer.

"Article VI.—Terms of Existence. The Association shall have an existence of fifty (50) years from the date hereof.

"In Witness Whereof we have hereunto set our hands and seals this eighth day of August, A. D. 1896.

"John D. Hibbard, (Seal) 500 Shares.
75 Michigan St.,
Chicago, Ills.

"Horace M. Dupee, (Seal) 250 Shares.
4824 Woodlawn Ave.,
Chicago, Ills.

"Geo. F. Hughson, (Seal) 250 Shares.
75 Michigan St.,
Chicago, Ills."

To this declaration the defendant below pleaded, among other things, that while consenting to assist in the incorporation of said company he had refused to become a stockholder therein; that he did not subscribe, or intend to subscribe, in putting his name to such articles of corporation, to the capital stock of such corporation; that the words "250 Shares" added after his signature were not intended or understood to be a subscription for stock, but were added, as he was advised at the time and as he believed, as being necessary for the purpose of incorporating such company; that it was understood that he was to act as director of said company only until the stock was subscribed for and sold; and that said articles of incorporation have never been treated as a subscription for stock; nor did any person buy stock in said corporation, or give said corporation credit on the faith thereof. Other facts are set up in the pleas tending to show the improbability of plaintiff in error intending his signature to the articles of incorporation, as a subscription paper.

It is admitted that this paper was signed by the plaintiff in error and that, with his own hand, he wrote in, following his signature, the words "250 Shares." Little other evidence was introduced at the trial upon the issue of fact thus raised. Upon this issue the court instructed the jury as follows: "Now, gentlemen, leaving out all consideration of another paper which has been testified to as being an actual subscription upon that transaction. If you are satisfied from the preponderance of the testimony in this case that he (plaintiff in error) wrote over his name '250 Shares' with the understanding that that meant that he agreed to take 250 shares in this company which was then being organized, that made him a subscriber; that constitutes a subscription and was binding upon him; it was equivalent to saying, 'I will pay \$25,000 for the 250 shares', because the articles named the price of the shares, that they shall be of the value of \$100 each. So, if the writing was put there with an understanding on his part that he was then agreeing with the other subscribers that I will take 250 shares, that was a subscription."

At the request of the plaintiff in error, the court further charged: "You are instructed, gentlemen, that there being no express agreement in the articles of incorporation that the signers thereto should take or agree to take stock in the same, the signatures of the same having a certain number of shares after their signatures, are subject to explanation by parol evidence, and if it should be shown that such words added to their names were not intended or understood as a subscription to stock, the defendant is not liable. You are further instructed that the plaintiff in this case sues upon a written article of incorporation and a written subscription alleged to be signed by the defendant, Horace M. Dupee, by which he agreed to take 250 shares of stock of the par value of \$100 each and to entitle the plaintiff to recover it must be established by a preponderance of the evidence that the said defendant did sign the subscription agreement, as alleged in the declaration, or that it was agreed and understood by said Dupee and the other stockholders that his signature to the articles of incorporation was intended to be and was a subscription for 250 shares in the plaintiff corporation. The articles of incorpora-

tion containing no agreement that the subscribers were to take the stock, the articles of incorporation and signature of said Dupee do not of themselves constitute sufficient evidence to entitle the plaintiff to recover."

Adding, at the request of the defendant in error, the further charge:

"On the other hand, gentlemen, you are instructed that the Chicago Horse Shoe Company, the plaintiff, was legally incorporated under the laws of the State of Indiana and that if the defendant when he signed the articles of association of the plaintiff and placed opposite his name the words '250 Shares' intended thereby to subscribe for 250 shares of the capital stock of the plaintiff, your verdict must be for the plaintiff. For the purpose of arriving at the intent of the defendant, you may consider the fact admitted by him of writing the 250 shares over his name and the further fact of his subsequently participating at a stockholders' meeting of the company, as well as being elected a director and the treasurer of the company. Under the laws of Indiana no one has a right to serve as a director unless he is a stockholder."

To each of these instructions exceptions were reserved.

The second paper on which liability for subscription is based, embodied in the amended declaration, is as follows:

"Chicago, Illinois, August 8, 1896.

"We, the undersigned, hereby subscribe for the number of shares of capital stock of the Chicago Horse Shoe Company (a corporation to be organized under the laws of the State of Indiana), set opposite our respective names, and agree to pay for each share the sum of \$100 upon the demand of the board of directors of said company when organized."

To this the defendant below pleaded the general issue, nul tiel corporation, and three special pleas, setting forth the facts of the incorporation of the company, as above stated.

The original of this paper, if it ever existed, was not put in evidence and the copy does not bear the signature of the plaintiff in error.

There was evidence tending to show that a separate subscription paper, such as is set forth, was signed by the plaintiff in error in the presence of the legal adviser of the corporation, who took it into his possession; that the original had passed out of his possession; that search through his office failed to find it; but that the copy put in evidence was a carbon copy of the original made at the time.

The counsel thus testifying did not know what had become of, or to whom he had given, the original, but believed it had gone to one Caleb about January 13, 1897, along with the articles of association and the certificates of the Secretary of State, for which last named paper he held Caleb's receipt of that date.

The treasurer of the defendant in error, who, at the time of the trial and since 1897 had custody of the papers, records and books thereof, gave testimony tending to show that he had made diligent search for the supposed original subscription agreement, but that the same was not among the papers in his hands.

It transpired on the trial that one Shields was secretary of the company at the time of its organization and, upon cross-examination at the trial, the president of the company stated that he had seen the papers in Shields' hands; but Shields, at the time of the trial, being no longer secretary and his whereabouts being unknown, was not either summoned or called as a witness; and his evidence either as to making a search or as to the possession of the original paper was not obtained.

Caleb, the general manager, to whom the attorney thought he had given the subscription paper, denied that the paper had ever been given to him.

Upon this state of the proof the carbon copy was admitted with the following instructions to the jury: "You are instructed, gentlemen, that should you find from the evidence that the defendant, Dupee, signed the subscription agreement testified to by the witness Vincent, then in such case you must find for the plaintiff in the sum of \$25,000 with 6 % interest thereon from the 3rd day of April, 1899. In such case all the evidence introduced which touches the question as to whether the defendant Dupee intended to subscribe for said stock or not is irrelevant and should not be considered," to which exception was taken by the plaintiff in error.

The jury having returned a general verdict in favor of the defendant in error for the sum of \$27,741.65, and a motion for a new trial having been overruled, judgment upon the verdict was entered, from which judgment this writ is prosecuted.

John S. Miller, for plaintiff in error.

W. S. Oppenheim, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement, delivered the opinion of the court.

The verdict being general, it is not apparent on the record upon which alleged subscription the finding of the jury was predicated. Error, therefore, in respect to the trial of either of the issues thus presented, would be fatal to the judgment of the Circuit Court. We are of the opinion, however, that there was no such error.

There is nothing in the statute of Indiana (1 Horner's Rev. St. §§ 3851-3869) which calls for or contemplates that subscriptions to the stock of a company about to be incorporated shall be embodied in the certificate of incorporation; nor is there anything in the statute forbidding the embedding of a subscription in the articles of incorporation. The liability of the defendant in error, in that respect, therefore, is to be governed, not by any Indiana statute, but by the general rule relating to such contracts.

The general rule is that in contracts of this character, as in others, the paper submitted to the court and jury is to be interpreted according to its intent. No particular formality is requisite. A signature to the articles of incorporation required by statute, with the number of shares placed opposite to the signature, may be a sufficient subscription to bind both the corporation and the subscriber. The real question is, Was such paper intended and accepted as a subscription? Cook, Stock & S. (3d Ed.) § 52; Nulton v. Clayton, 54 Iowa, 425, 6 N. W. 685, 37 Am. Rep. 213; Warehousing Co. v. Badger, 67 N. Y. 294. In the case last cited, the subscription was contained in the certificate of incorporation and was embodied wholly in the words "250 Shares" placed opposite to the party's signature. It was held to be sufficient in form and substance and to take effect simultaneously with the filing of the certificate.

In this view of the law the issue made upon the original declaration was properly submitted to the jury. The instructions submitted to the jurors the question, Whether the plaintiff in error intended thereby to subscribe for the stock; and there is no reason why the verdict of the jury upon such submission should be disturbed.

Upon the issue raised by the second paper, it is insisted, principally, that the court erred in admitting secondary evidence of the contents of the original subscription, there being no sufficient proof of the loss or destruction of the original.

In this contention we cannot concur. There was evidence sufficient to go to the jury, tending to show the execution of the original, and there was evidence of sufficient search through both the papers of the company in the custody of the treasurer and the papers of the attorney into whose possession it had originally come. The proof

of search would, unquestionably, be regarded as sufficient, were it not for two items of evidence cropping out on the trial, viz: (1) that in the attorney's opinion the paper had been transferred to the general manager, and the general manager's denial of having ever received it; and (2) the statement of the president that he had seen the papers in the hands of the former secretary, such former secretary not being called as a witness.

The first of these occurrences is clearly of no force. The attorney did not testify that the paper was turned over to the general manager. Such was his guess or opinion only. The expression of such guess, followed by the denial of the general manager, can have no effect upon the competency of the other testimony, or upon the adequacy of the search, except as it may affect the credibility or accuracy of the attorney's testimony.

Nor is the second of the occurrences fatal to the verdict. The papers of a corporation are presumably in the possession of the officer presently charged with their custody. But, had it been known that this particular paper was not to be found, though it had once been in the possession of Shields, a former custodian, and were Shields within reach of the parties, it might very reasonably have been incumbent upon the defendant in error, before introducing the secondary evidence, to have exhausted Shields' memory of the whereabouts of the original and required him to make such search as would have satisfied the court that it was no longer in his possession. But Shields' possession of the paper was only disclosed on the trial and in a cross examination. The witness was not then within the reach of the court, and his whereabouts was not known. Under such circumstances there was no duty to arrest the progress of the trial until the testimony of Shields could be procured. The incident is one of those that occur frequently in trials and must be dealt with only according to the exigencies of the situation. We see in neither of these occurrences any substantial reason why the secondary evidence should not have been admitted and the whole question, as one of fact, submitted to the jury, as it was.

Other exceptions, relating to the admissibility of the resolution of the board of directors of October 30, 1898, and the record of the minutes of the stockholders' meeting of September 28, 1899, have been brought to our attention, but may be disposed of with the statement that, in our judgment, there was in those respects no error.

The judgment will be affirmed.

CURRIER v. TRUSTEES OF DARTMOUTH COLLEGE.

(Circuit Court of Appeals, First Circuit. May 29, 1902.)

No. 380.

1. APPEAL—REVIEW—DIRECTION OF VERDICT.

Whitney v. Railroad Co., 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615, applied to the effect that a defendant in whose favor a verdict has been rendered by direction of the court is entitled to support such verdict.

¶1. See Appeal and Error, vol. 3, Cent. Dig. § 3406.

on a writ of error, upon any ground which was fairly presented in his motion therefor, regardless of the particular ground which determined the action of the court.

2. PLEADING—ACTION FOR PERSONAL INJURY—VARIANCE.

A declaration in an action against a college corporation to recover for a personal injury, which alleges as the basis of the suit that plaintiff contracted with defendant to furnish him a collegiate education, and a safe and suitable lodging place, and safe and suitable grounds, buildings, and appliances for obtaining healthful recreation, in consideration of certain payments by plaintiff to defendant, necessarily grounds the right of recovery on a breach by defendant of some duty it owed plaintiff as a collegiate student; and such declaration is not supported by evidence showing that plaintiff was injured by the falling of a large chimney on the grounds of defendant, which was being torn down by its orders, that plaintiff was not present at the place in the course of his collegiate duties nor by defendant's invitation, but that it was a holiday, and he was there, with others, as a voluntary spectator, to see the falling of the chimney.

8. NEGLIGENCE—TEARING DOWN OF STRUCTURE—LIABILITY FOR INJURY OF SPECTATOR.

Neither would such evidence warrant a recovery by plaintiff on any state of pleading, unless it was further shown that his injury was caused by wanton or willful acts of defendant.

4. SAME.

Whether *Powers v. Hospital*, 109 Fed. 294, 47 C. C. A. 122, applies to defendant corporation, *quære*.

In Error to the Circuit Court of the United States for the District of New Hampshire.

For opinion below, see 105 Fed. 886.

Edward C. Niles and Edmund S. Spalding (Harry G. Sargent, on the brief), for plaintiff in error.

Frank S. Streeter, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. In *Powers v. Hospital*, 47 C. C. A. 122, 109 Fed. 294, this court held that that action, based on the alleged negligence of a nurse employed by the hospital, could not be maintained in behalf of one of its patients. The case now before us the defendant claims is within the principle of our former decision. The plaintiff undertakes to distinguish the two on the alleged ground that in *Powers v. Hospital* there was no negligence on the part of the defendant in employing the nurse, while in the case at bar there was negligence in employing the person through whose want of skill the plaintiff maintains the injuries arose.

The plaintiff alleges as the basis of his suit that at the time of the injury out of which the action arose he was "a student in the institution conducted by the defendant corporation,"—that is, its college,— "having contracted with the defendant to furnish him a collegiate education, and a safe and suitable lodging place, and safe and suitable grounds, buildings, and appliances for obtaining healthful recreation, in consideration of certain payments of money made to the defendant by the plaintiff." These allegations necessarily involve the proposition that the plaintiff's suit grows out of his relation as a

collegiate student. In this respect, although there is a subsequent departure in the declaration, yet it is clearly so framed that the action would not lie unless the plaintiff proved a breach of an alleged contract to furnish him with a collegiate education, with a safe and suitable lodging place, and with safe and suitable grounds, buildings, and appliances for healthful recreation. In other words, the declaration lays no basis for a suit unless there was a breach of the duties the defendant owed the plaintiff as its collegiate student.

The case went to a jury, and, after it had been closed on both sides, the defendant moved that the court direct a verdict in its favor on several grounds, which were stated at length in its motion. We need specify only four. One was that on all the evidence the jury could not properly find a verdict for the plaintiff. Another was that there was no evidence that the injury was caused by the violation of any legal duty which the defendant owed the plaintiff. Another was that the plaintiff was present at the place of the injury without invitation, and by mere permission, and for the gratification of private curiosity; and that under such circumstances the defendant was under no obligation to exercise ordinary care for his protection, and was merely holden to refrain from willful or wanton injury, while there was no evidence that the injury was willfully or wantonly inflicted. Several other grounds stated were substantially to one effect, namely, that the defendant is an eleemosynary corporation, "organized and managed solely for the administration of a public charity, and doing no business for private gain," and that, therefore, it "is not liable for negligence in the distribution of its charity to the person who accepts its bounty." The court directed a verdict for the defendant, which the jury returned in the following form: "By direction, and under order of court, the jury find that the defendant college is not guilty in the manner and form as the plaintiff has declared." To all this the plaintiff seasonably excepted, and his exceptions were allowed. The learned judge, in the order allowing the exceptions, stated as follows:

"Bill of exceptions allowed, and, as the defendant desires to have all the evidence printed, to the end that it may present the question whether there is any evidence of negligence in warranting a verdict for the plaintiff, and as I do not understand that I ruled upon that question, or that the defendant has an exception, it is ordered that the defendant pay the increased expense of recording, copying, and print, viz., one-half."

It is to be noted that the defendant, in its motion for a verdict in its behalf, did not, in terms, call the attention of the court to that portion of the pleadings which we have extracted; but the proposition which this makes the necessary basis of the suit was sufficiently brought to its attention by that part of the motion which insisted that the plaintiff was present at the place of injury without invitation.

This brings us at once to a proposition which we must consider at the outset. Although the circuit court apparently assumed that the only question which came up on the writ of error was whether the character of the defendant as an eleemosynary institution would defeat the action, and, although the plaintiff maintains that that is the only issue on appeal, yet the defendant claims that all the defenses

brought out in its motion are before us, and that it is entitled to hold its verdict, provided either of them was well laid. It is true that this court does not hesitate to seize upon anything in the nature of a waiver to bar us from adjudicating any question not considered in the court below, and that it refuses to broaden the case when so doing might lead to injustice. Therefore, with reference to a motion to direct a verdict, if the party in whose behalf it is directed specifically limits the grounds of his motion, he is ordinarily held, on appeal, to have waived everything else, unless it is clear that the new grounds on which the verdict is sought to be sustained on error could not have been in some way covered if they had been called to the attention of the adverse party at the time the motion was heard. In the present case there was no waiver, because, in the light of the explanation which we have made of the claim, made at the trial, that the plaintiff was present at the time of the injury without invitation, the propositions which we will have occasion to consider were seasonably brought to the attention of the court and the plaintiff. Therefore there is no reason why we should not apply the general rule that on a writ of error the only things before the appellate court are the verdict and the order directing it, while the reasons which operated on the mind of the court below are no part of the record.

We went over this matter in *Whitney v. Railroad Co.*, 43 C. C. A. 19, 102 Fed. 850, 50 L. R. A. 615, and we there showed that such was the settled practice. *Bolles v. Outing Co.*, 175 U. S. 262, 268, 20 Sup. Ct. 94, 44 L. Ed. 156, would be misleading on this point unless carefully examined. That case came up on exceptions on account of the exclusion of evidence. Under these circumstances the court held that the propositions raised before it by the defendant could not be considered, because it had sued out no writ of error. The court showed no intention of overruling or qualifying its prior decisions, which guided us in *Whitney v. Railroad Co.* Appeals are governed by different rules, for which the authorities cited in *Bolles v. Outing Co.*, at page 268, 175 U. S., page 96, 20 Sup. Ct., 44 L. Ed. 156, furnish examples. Our position is precisely in harmony with the expressions in *Peck v. Heurich*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302.

In *Powers v. Hospital*, *ubi supra*, we considered an eleemosynary institution in the strict sense of the expression, and we showed that the defendant in that case must be held to belong to that class, notwithstanding under some circumstances it received partial compensation from some of those who accepted its charity. It seems difficult to conceive of any foundation for a proposition that, aside from the exceptional liability which the common law has long imposed on surgeons and physicians, any relation involving a legal liability for negligence can grow out of the acceptance by either individuals or institutions of the sick, or of orphans, or of the poor, solely for the purpose of doing charity. To hold, however, institutions like this at bar as in the same class might be to go further than we went in *Powers v. Hospital*. The provincial charter, from which the trustees of Dartmouth College derive its corporate existence, is found at length in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629. An examination of it will show that the corporation had, at its origin, a

double purpose: First, that of "spreading Christian knowledge among the savages of our American wilderness," and "the education and instruction of the youth of the Indian tribes,"—which may be regarded as strictly eleemosynary; and, second, "the education of English youth and any others." The latter purpose is, perhaps, the only one that survives. At any rate, it is in the light of that purpose that we are asked to consider the case before us.

The charter provided "that Eleazer Wheelock, doctor in divinity, the founder," should be the president, "to have the immediate care of the education and government of such students as shall be admitted into said Dartmouth College for instruction and education." This expression not only aids to illustrate the fundamental purposes of the institution, but may throw some light upon other questions presented to us. The charter also recognizes the expectation, which the history of the college has realized, that it would be largely, if not wholly, endowed by private charity. In this respect the defendant takes on one phase of an eleemosynary institution. It also comes within that class recognized by the statutes of Elizabeth as public charities. Therefore, in the course of the several opinions which were delivered in *Dartmouth College v. Woodward*, *ubi supra*, the college was styled a "charity school," an "eleemosynary institution," and a "private charity," although, so far as its purposes had relation to the statutes of Elizabeth, it was also recognized as a "public charity." All these expressions might well be used, and yet be far from determining that the defendant, for the purpose of legal liability with reference to the ordinary rules of negligence, is of the same class as an institution founded for the care of the sick or insane, or of orphans or foundlings. The fact that the plaintiff enjoyed, by way of scholarships, the munificence of its endowment, does not determine the fundamental question involved, any more than did the fact that the plaintiff in *Powers v. Hospital* was what is known as a "paying patient." In one case, as in the other, the general purposes of the institution must ordinarily be the determining feature, and not the varying circumstances peculiar to particular inmates.

While, with reference to the ordinary relations between an inmate of a hospital for the sick and the hospital, there may be nothing which the law recognizes as rising to the nature of a contract, the reverse may be true, ordinarily, with educational institutions. On the one side is the institution; on the other the student, or his parent or guardian, stipulating for his education for a valuable consideration to be paid therefor. Nevertheless, there are difficulties of a serious character, as suggested by the learned judge in connection with the disposition of this case in the circuit court, which render it apparently contrary to the fundamental notions of justice to apply to institutions of the character of the defendant the ordinary rules with regard to negligence and reasonable care to their full extent. As well suggested by him, is the institution liable for some mistake of some professor in conducting a difficult experiment in the chemical laboratory, or of an assistant to the professor, when, by the very nature of things, assistants are somewhat largely inexperienced? Does the law require that all the appurtenances of a gymnasium attached to an educational institu-

tion shall be regarded with the same strict rules as those of a manufacturing establishment? Our institutions of learning are commonly known as often poorly endowed, and in the receipt of no profits, and, at the most, of only a moderate income, and therefore often disenabled from making use on their premises of modern appliances for safety. Are they liable to one who enjoys their beneficence, knowing that such is their frequent condition, as ordinary business corporations are liable?

On the one hand and the other, these considerations press on us, leaving the solution a difficult one, whether it be as to the proposition that the rule of *Powers v. Hospital* applies, or as to some modified proposition that at least the ordinary tests of reasonable care must be qualified in some way to meet the peculiar conditions pertaining to institutions of this character.

However, the consideration of the particular facts of this case will show that they will not permit us to determine the difficult questions which we have suggested. The pith of the occurrences, as put by the plaintiff, is that one McKenzie, at the time of the injuries which the plaintiff suffered, was employed by the defendant as inspector of buildings, the title being subsequently changed to superintendent of buildings; that in this capacity he had general supervision of the college grounds and buildings, under the general and special instructions of the trustees; that the defendant had purchased a tract of land adjoining its grounds, on which stood a disused high chimney, the same having been partly acquired for the purpose of erecting a heating station to supply various buildings, including chapel, library, gymnasium, recitation halls, and dormitories, and also a building owned by the defendant, and leased for hotel purposes, and two business blocks owned by the defendant as a matter of investment; that the destruction of the chimney was a necessary preparation for the erection of the heating station; that a committee, of whom the president was one, had been intrusted by the defendant with the general supervision of its lands and buildings, and had instructed McKenzie to take down the chimney, but left the manner of his doing it entirely to his discretion; that McKenzie was not a man of proper skill to do work of that character; that that fact was known to the defendant, or should have been; that he was taking an undergraduate course in the college of the defendant; that the chimney was 68 feet high, and weighed about 60 tons; that it stood in close proximity to a number of the college buildings, and near several paths commonly traveled by students and others, and frequently passed over by the plaintiff; that the students were free to go wherever they pleased about the college grounds, and that the plaintiff so understood it; that the method of taking down the chimney by McKenzie was unsuitable and unsafe; that, when preparations had been made to take it down, he had caused to be posted on the college bulletin boards the following notice, signed by him: "The old gas-house chimney will fall at about 1:30. Come, and bring kodaks!" and that the plaintiff saw this notice, and, relying on it, he went to the place where the chimney stood. It is clear that he was there merely as a matter of curiosity, and in response to the notice. The afternoon was a holiday, and college duties were suspended. When the plaintiff

reached the place, he found there 200 or 300 people, including the president, professors, and townspeople, moving about from place to place; and, while he was observing the work of taking down the chimney, it fell, scattering some portions an unexpected distance, some of which struck him.

There is much which suggests that the injury came about in such a peculiar manner that it could not be said to be the proximate consequence of any want of skill on the part of McKenzie, if there was such; and the record before us is full of denials that McKenzie lacked skill, or that the defendant was lacking in reasonable care in employing him. Some of these issues may properly be before us; but, as the case is easily disposed of otherwise, we need not consider them.

We should observe that the presence of the president in the neighborhood of the chimney at the time it was taken down is an immaterial fact. While, as we have seen, the charter provided that he should have immediate care of the education and government of the students, yet his presence on this occasion had no relation thereto. He attended merely as one of the mass of spectators. He had no connection with the invitation given by McKenzie. Had it been otherwise, or if the record had shown that he had any reason to apprehend danger, the provision which we have cited from the charter might have required us to go into the case further, because the powers, and the consequent duties, which it vested in and imposed on the president, are so unqualified that the defendant might be especially affected by the exercise of them, or the want of exercise of them, under circumstances we have now no occasion to consider.

The invitation was a gratuitous act on the part of McKenzie, and it had no relation whatever to his employment by the defendant, or to his agency in its behalf. It was addressed to members of the governing boards, professors, students, and townspeople, to all as individuals, without regard to the peculiar status of any of them. The plaintiff was on the premises without invitation, express or implied, from the defendant, the same as all others were there, having no more right growing out of the matters before us than the townspeople. So far as this issue is concerned, he bore no relation to the defendant as a student, any more than McKenzie, in his employment of taking down the chimney, stood as a mere undergraduate. Therefore the facts have no relevancy to the matters set out in the declaration. Moreover, on no amended state of the pleadings could we hold the defendant legally responsible for the plaintiff's injuries, because, under well-settled rules of law, too often stated to need to be repeated here, he was a mere looker-on, of the class of those who must take care of themselves, except as against wantonness or willfulness, or except under peculiar circumstances of some undisclosed danger, none of which things are suggested in the case at bar.

The judgment of the circuit court is affirmed, and the defendant in error recovers the costs of appeal.

CITY OF FT. SCOTT, KAN., v. W. G. EADS BROKERAGE CO.

(Circuit Court of Appeals, Eighth Circuit. August 4, 1902.)

No. 1,711.

1. MUNICIPAL CORPORATIONS—POWERS LIMITED BY STATUTORY GRANT.

The powers of municipal corporations are limited to those expressly granted and those fairly implied therefrom or incidental thereto, and a reasonable doubt of the existence of a power is fatal to its being.

2. SAME—POWER—PRESCRIPTION OF MANNER OF EXERCISE NEGATIVES RIGHT TO USE OTHERWISE.

The prescription, by the statutes, under which a municipality is organized or acting, of the manner in which it shall exercise one of its powers, limits the right to exercise it to that method, and its use in any other way is ultra vires of the corporation, and void.

3. SAME—STATUTORY METHOD OF INVESTING SINKING FUNDS EXCLUSIVE.

When a municipal corporation of Kansas has a sinking fund in excess of \$2,000 for investment in the purchase of its bonds, the statutes of that state require it to advertise for bids and to invest the fund in the bonds of those parties who offer them at the lowest price. Gen. St. Kan., 1899, §§ 6284, 6294. A city in such a situation made a contract with a brokerage company to repay it the amount it should expend in the purchase of the city's bonds, not exceeding their par value and 10 per cent. premium, and to pay the company for its services in addition more than 16 per cent. of the par value of the bonds it bought. *Held*, the statute prescribing the method of investing the sinking fund was exclusive, the contract with the brokerage company was ultra vires of the city and void, and a contract to pay the reasonable value of such services was void for the same reason.

4. SAME—ESTOPPEL FROM DENIAL OF LAWFUL EXERCISE OF ITS POWERS.

A municipal corporation, which has retained the benefits of a contract invalid not because it was beyond the scope of its powers but because in the making or performance of the agreement the power of the municipality was illegally exercised, may be estopped from denying the validity of the contract as against an innocent party, who has changed his position in reliance upon the action of the municipality. But no such estoppel can arise in favor of one who knowingly agrees to assist the municipality in the illegal exercise of its power.

5. EQUITABLE ESTOPPEL—MISREPRESENTATION AND IGNORANCE.

A false representation by one party of a material fact of which the other party is actually and permissively ignorant is essential to the existence of an equitable estoppel.

6. JUDGMENT NOTWITHSTANDING VERDICT.

Where the pleadings disclose the right of a party to a judgment in his favor, such a judgment may be entered by the court, under Gen. St. Kan. 1899, § 4675, notwithstanding the fact that an adverse verdict has been rendered.

7. CONTRACT OF PURCHASE VOID IF QUANTITY UNDETERMINABLE.

A contract for the purchase of personal property is void for want of consideration and mutuality if the quantity to be bought is conditioned by the will, wish, or want of one of the parties.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

This writ of error was sued out to reverse a judgment for \$4,722 against the city of Ft. Scott and in favor of the W. G. Eads Brokerage Company, a corporation, for a breach of a contract. The judgment rests on a peremptory instruction to the jury based upon these facts: The city of Ft. Scott had a bonded debt of \$234,000 and a sinking fund of about \$45,000. The bonded

debt was drawing about 6 per cent. per annum, and the sinking fund only $1\frac{1}{2}$ per cent. per annum. The city and the brokerage company supposed that none of the bonds of the city were redeemable until the expiration of 9 $\frac{1}{4}$ years from the time the contract was made, although the fact was that bonds to the amount of \$20,000 were then payable upon call. Thereupon the brokerage company wrote to the city that it thought it possible that it might be able to buy bonds enough to at once apply the sinking fund, and that, if it was able to do this, it would charge the city one-half of the net saving resulting to it from the purchases. On September 25, 1899, the city accepted this proposition on the conditions that it would take from the brokerage company and pay for its bonds to the amount in par value of \$40,000, that the premium on them should not exceed 10 per cent., that the compensation of the brokerage company should be paid in city warrants, that the interest on the bonds bought should be reckoned on the theory that they would mature 9 $\frac{1}{4}$ years from October 1, 1899, that the brokerage company should render a true account of the bonds it bought by means of canceled drafts and receipts which should show absolutely and definitely the purchase price of the bonds, and that the term of the contract should end on January 15, 1900. After this contract was made the brokerage company discovered the fact that bonds of the city to the amount of \$20,000 were subject to call, prepared a notice calling them, caused the mayor and the clerk of the city to sign this notice, and published it in a daily newspaper. This notice stated that these bonds were called for payment at the Kansas state fiscal agency in the city of New York on January 1, 1900. The city sent the necessary funds to that agency to pay the bonds and the interest upon them, and these bonds were paid with these funds of the city, and were canceled. The brokerage company never bought any bonds of the city under the contract. On December 19, 1899, the term of the contract was extended to February 15, 1900. The brokerage company incurred traveling expenses of its officers and agents, and rendered services in searching out the holders of the city bonds and endeavoring to obtain them, which one of its witnesses testified were worth \$4,275. On January 23, 1900, the city notified the company to take no further steps to secure bonds in addition to those aggregating \$20,000, which had been called, and on February 15, 1900, the parties agreed that the contract between them should cease and terminate upon the delivery to the brokerage company of warrants of the city to the amount of \$4,275. No warrants were ever delivered, and the company brought this action to recover the \$4,275 on the ground that by the contract of February 15, 1900, its claim against the city had been compromised, and the city had agreed to pay this amount to settle it, and on the further ground that its services in procuring the surrender of the bonds for \$20,000 and its endeavors to obtain other bonds were reasonably worth \$4,275. The court below sustained its claims, and directed a verdict and judgment for the amount it demanded.

B. Hudson and W. R. Biddle, for plaintiff in error.

T. F. Garver (J. B. Larimer, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The foundation of the judgment in question in this case is an alleged agreement of compromise and settlement of a claim against the city of Ft. Scott for compensation for services rendered about the investment of the sinking fund of the city under a contract between the brokerage company and the municipality. This judgment is challenged on the ground that the original contract was beyond the powers of the city. If the city was without power to make any contract to employ or pay any one for purchasing or procuring bonds for

the investment of its sinking fund, it was equally without power to make a valid agreement to compromise or to settle a claim founded on such an agreement. It could not, by an agreement to compromise a baseless claim, subject itself to liability that it could not create by contract. Hence the charge that the agreement to pay for services rendered to assist the city in procuring bonds in which its sinking fund might be invested was void lies at the root of the whole matter. When the original contract between the city and the brokerage company was made to pay to the latter one-half of the difference between the premiums it should expend for the purchase of the bonds of the city and the amount of interest thereon for $9\frac{3}{4}$ years, the city had a sinking fund of about \$45,000, and this contract was made for the sole purpose of purchasing bonds in which this fund might be invested. The city then had bonds outstanding to the amount of \$20,000 which were redeemable at its pleasure. The statutes of the state of Kansas expressly provided that, when there were sufficient funds in the hands of the city treasurer of this city belonging to the sinking fund, he should call in and pay as many redeemable bonds as that fund would liquidate, and that at the expiration of 30 days from the date of the last publication of his call the bonds called should cease to bear interest. Gen. St. Kan. 1899, § 5722. Both of the parties to the original contract supposed, when it was made, that none of the bonds were redeemable in less than $9\frac{3}{4}$ years, so that, as far as this agreement related in any way to the bonds that were then redeemable upon call, it was made under a mutual mistake of fact, and was voidable. They made their agreement under the mutual understanding that bonds must be and were to be purchased for the investment of the sinking fund. Upon this subject the statutes of Kansas provided:

"Each city governed by the provisions of this act shall be a body corporate and politic and shall have power: * * * 4th. To make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers." Gen. St. Kan. 1899, § 702.

"The mayor and council shall have the care, management and control of the city and its property and finances and shall have power to enact ordinances for the purposes hereinafter named not repugnant to the constitution and laws of this state. * * * 40th. To appropriate money and provide for the current expenses of the city: provided, that no indebtedness shall be incurred, or order or warrant or evidence of indebtedness of the city shall be drawn or issued on the treasurer in payment of any indebtedness to exceed the amount of funds on hand in the treasury at the time." Section 710.

"It shall be the duty of county, township and city treasurers in this state to invest all moneys in their hands belonging to any sinking fund in the manner provided for in this act." Act April 25, 1874, § 1 (Gen. St. Kan. 1899, § 6284).

"The county treasurer of any county shall, by and with the consent of the board of county commissioners, invest all moneys in his hands which have been levied and collected as a sinking fund to redeem the outstanding bonds of the county as follows: First, in the bonds of the county for which such sinking fund has been levied: provided the same can be purchased at a price not exceeding their market or par value." Act April 25, 1874, § 2 (Gen. St. Kan. 1899, § 6285).

"The treasurer of any city in the state shall, by and with the consent of the mayor and common council of such city, invest all moneys which shall be paid into his hands belonging to the sinking fund of such city in the same manner as that prescribed for investment made by county treasurers,

except that bonds of the city shall be first purchased, if they can be obtained at a price not exceeding their market or par value." Act April 25, 1874, § 4 (Gen. St. Kan. 1899, § 6287).

"Whenever the amount of the sinking fund for investment belonging to any county, city, township or school district shall exceed the sum of two thousand dollars there shall first be an advertisement inviting sealed bids for such sinking fund or any part thereof, said advertisement to be signed by the clerk of the county, township, city or school district, as the case may be, and published three times successively thirty days previous to the award of such funds in the official paper of the county; and such sinking fund shall be awarded to the party or parties offering bonds at the lowest price." Act April 25, 1874, § 12 (Gen. St. Kan. 1899, § 6294).

Conceding, now, without deciding, that the mutual mistake of the fact that bonds of the city to the amount of \$20,000 were redeemable when the original agreement was signed did not avoid that contract, and treating the case as though these bonds had not been redeemable until $9\frac{3}{4}$ years after the agreement was made, let us consider whether or not, under these statutes, this city had the lawful authority to make the agreement in question. Municipal corporations are the creatures of the statutes under which they are organized and operated. By those statutes their powers are granted, measured, and limited. Beyond the limits of the powers there expressly granted and those fairly implied therefrom or incident thereto they cannot lawfully act or agree to act, and a fair and reasonable doubt of the existence of a corporate power is fatal to its being. Contracts for the lawful exercise of the powers of a corporation are binding and enforceable. But agreements of municipalities beyond the scope of their granted powers are null, and as though they had not been. They are void against the state, because they are unlawful usurpations of powers which it has reserved. They are void between the parties to them, because those parties are charged with knowledge of the statutes, and of the limits of corporate powers there fixed; and no formal assent of corporations or officers, no alleged estoppel, can give validity to such agreements, or induce the courts to enforce them. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 316, 2 C. C. A. 174, 230; 1 Dill. Mun. Corp. (3d Ed.) § 89; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *McCormick v. Bank*, 165 U. S. 538, 549, 17 Sup. Ct. 433, 41 L. Ed. 817; *Bank v. Kennedy*, 167 U. S. 362, 367, 17 Sup. Ct. 831, 42 L. Ed. 198; *Bank v. Hawkins*, 174 U. S. 364, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007; *Putney Bros. Co. v. Milwaukee Co. (Wis.)* 84 N. W. 822, 823; *Trester v. City of Sheboygan (Wis.)* 58 N. W. 747; *Mousseau v. Sioux City (Iowa)* 84 N. W. 1027; *Von Schmidt v. Widbur (Cal.)* 38 Pac. 682; *Dube v. Peck (R. I.)* 48 Atl. 477, 479; *Gaslight & Coke Co. v. City of New Albany (Ind. Sup.)* 59 N. E. 176, 178; *James v. City of Seattle (Wash.)* 62 Pac. 84, 79 Am. St. Rep. 957.

Again, the designation by the statutes which grant a corporate power of the way in which it shall be exercised limits the right to exercise it to the manner thus prescribed, and renders its use in any other way ultra vires of the corporation and void. In *Putney Bros. Co. v. Milwaukee Co. (Wis.)* 84 N. W. 822, 823, the statutes empowered the county to support and care for inebriates in county asylums and county poorhouses, and the supreme court of Wisconsin

held that a contract by a county to pay for the care and cure of an inebriate in a Keeley institute was beyond the powers of the county, and subjected it to no liability for the board which had been furnished or for the medical services that had been rendered under the agreement. That court said:

"Thus it appears that the legislature has provided certain methods by which inebriety or habitual drunkenness may be dealt with, and we think it plain that by prescribing certain methods it has excluded other methods, and that the general provisions requiring the county or town to care for and relieve paupers refer to necessary food, clothing, ordinary medical treatment, and the like, and not to medical treatment looking towards the cure of inebriety as a disease. There was, therefore, no authority resting in any officer or public body to incur the liability here claimed in the first instance. Such being the case, there can be no ratification by the county. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers. *Frederick v. Douglas Co.*, 96 Wis. 411, 71 N. W. 798."

On the same principle the supreme court of Wisconsin also held in *Trester v. City of Sheboygan*, 58 N. W. 747, where the statutes authorized the city to procure an easement for a street by condemnation, that the municipality had no power to buy such an easement, and that an agreement to pay the purchase price thereof was void. And in *Gaslight & Coke Co. v. City of New Albany*, 59 N. E. 176, 178, the supreme court of Indiana decided that a contract for lighting a city for a term of 23 years was ultra vires of the municipality, and void under statutes which authorized the city to make agreements for lighting it for terms not exceeding 10 years.

The application of these established principles of the law of corporations to the facts of this case leaves no doubt of the conclusion which they compel. The statutes of the state of Kansas from which this city derives its powers will be searched in vain for any provision which grants it any authority to contract with any party to purchase or to procure its bonds for the investment of its sinking fund. On the other hand, the act of 1874 expressly forbids the making of any such contract. It declares in its first section that it shall be the duty of the city treasurer to invest all moneys of the city in his hands in the manner provided in that act (section 6284), and it provides in its twelfth section that whenever the amount of the sinking fund belonging to any city exceeds \$2,000, that fund shall be invested in the bonds of those parties who, after the publication of a prescribed advertisement for sealed bids, offer their bonds at the lowest price (section 6294). When this contract was made, the amount of the sinking fund of the city of Ft. Scott, ready for investment, exceeded \$2,000, and that city fell within the express provisions of these sections. It was authorized by section 6294 to invest its sinking fund in bonds of parties who, after the publication of the prescribed advertisement, offered them at the lowest price; and it was prohibited by section 6284 from investing its sinking fund by the purchase of bonds in any other way. In the face of these statutes it made an agreement with the brokerage company, without any advertisement inviting bids, to invest its sinking fund in its bonds at any price not exceeding 10 per cent. premium that the company might pay for them, and to pay that corporation for its services in buying them one-half of the difference between the amount

of the premium it paid and the interest on the bonds for $9\frac{3}{4}$ years. The maintenance and enforcement of such a contract would be a disregard of established principles of the law of corporations and a practical repeal of the sections of the statutes to which we have just adverted. The very evil at which these sections were leveled was the foolish and reckless expenditure of the sinking funds of municipalities by such thriftless contracts as that before us. The plain purpose and manifest intention of the legislature in enacting the provisions of these sections were to prevent cities from making private purchases or private contracts about the purchase of their bonds for the investment of their sinking funds, and to limit them to the purchase of the bonds at the lowest price offered after a public advertisement inviting bids. The case at bar is a striking illustration of the wisdom of this legislation. Here is a contract between this city and the brokerage company, under which, if it were valid, the defendant in error might have bought bonds of the city for investment in its sinking fund of the par value of \$40,000 at 10 per cent. premium, and then have compelled the municipality to purchase them at that price, and to pay it for its services more than 16 per cent. of their par value in addition, when the city had the right, and it was its duty, under the statutes of the state of Kansas, to call and cancel one-half of this amount of bonds without the payment of any premium whatever. To enforce such a contract would be to strike down the wise and salutary provisions of the statutes of Kansas relative to the investment of sinking funds of cities, and to fly in the teeth of the settled rules which measure the powers of corporations. The authority to make this agreement was not granted to, but was expressly withheld from, this city by the plain provisions of sections 6284 and 6294, and the validity of the agreement cannot be sustained.

Counsel for the defendant in error contend, however, that, although the contract was invalid, the city is estopped from defeating this action upon that ground because it has received and retained the benefits of the agreement. They concede that, if the agreement had been without the scope of the powers of the corporation, an estoppel from denying its validity could not have arisen. But they invoke the conceded rule that, where a corporation has received and retained the benefits of a contract, which was invalid not because it was beyond the scope of its power, but because in the creation or the performance of the contract its power was not exercised in the manner prescribed by the law, it is estopped from denying its validity for the purpose of defeating the action of an innocent party for a breach of it. There are, however, many reasons why this principle is inapplicable to the case in hand. One reason—and an all-sufficient one—is that the brokerage company was not permissively ignorant of the fact that the city was without power to make the agreement, and the city never made any false representation or concealment of that fact. A misrepresentation by one party of a fact of which the other party is actually and permissively ignorant is a *sine qua non* of an equitable estoppel. Bigelow, Estop. § 552. The city did not solicit, persuade, or induce the brokerage company to enter into this agreement, or to expend its money, or to render its services by any misrepresentation

of its authority. The brokerage company solicited this contract from the city. It was the actor, and it was its duty to ascertain at its peril and to know whether or not the agreement which it requested and induced the city to make was within the statutory powers of the municipality. The laws to which reference has been made in this opinion, and which made that agreement void, were spread upon the records of the legislation of Kansas, and were printed in its statute books. They disclosed the fact that the city was without authority to make this contract, and in the eyes of the law the brokerage company knew that fact when it entered into the agreement, because it was legally charged with a knowledge of the law.

Again, while a corporation is sometimes estopped as against an innocent party from denying the validity of a contract which has resulted from the irregular or illegal exercise of some of its powers, it is never estopped as against one who knowingly assists in the illegal exercise of the power from denying the validity of an agreement whereby such a party agrees to aid the corporation in the unlawful use of its authority. The city had the general power to purchase its bonds for the investment of its sinking fund. But it was prohibited from buying them in any other way than from the lowest bidder after public advertisement. If any innocent bondholder had sold and delivered his bonds to the city through the brokerage company, the city might well have been estopped by its retention of the bonds from defeating an action by the vendor for the purchase price of the property he had delivered to it. But the brokerage company is in no such position. It solicited and procured a contract with the city whereby it undertook to assist that municipality in the exercise of its power to purchase its bonds in an illegal—in a prohibited—manner. No estoppel from denying the validity of such an agreement can arise in favor of the brokerage company, because the law charges it with knowledge that the agreement and its execution were mala prohibita, and because it actively and knowingly participated in the attempted violation of the statute. The contract of these parties cannot be sustained on the ground of estoppel, because there was no ignorance of any material fact by the brokerage company, and because there was no misrepresentation of any such fact by the city.

As the agreement was void, and the brokerage company was charged with knowledge of that fact when it entered into it, the subsequent agreement to compromise and settle the claim founded upon this invalid contract was equally void, and for the same reason, and no judgment for a breach of either of these agreements can be supported.

Nor can this judgment stand upon a quantum meruit, upon the ground that the services rendered by the company in endeavoring to secure the purchase or the surrender of the city's bonds were worth the amount of the judgment, because the city had no more power to employ and pay the company the reasonable value of its services to aid it in violating the law and in investing its sinking fund in an illegal manner than it had to make the original written agreement for that purpose. The truth is that there is no tenable ground upon which this judgment can be supported, and this fact appears as clearly from the pleadings as it does from the evidence. In such a case the

defendant in the trial court is entitled to a judgment under the statutes of Kansas notwithstanding an adverse verdict. Gen. St. Kan. 1899, § 4675.

Many other questions have been discussed in the arguments and briefs of counsel, but none which tend in any way to modify the inevitable conclusion which results from the statutory limitation of the powers of the city. No good purpose would be served by prolonging this opinion to discuss these questions. If, however, the equities of this case were to be considered, they would be found not irreconcilable with the conclusion that the law compels. The original agreement was unilateral, and void in its inception. The brokerage company was not bound by it to purchase or secure any bonds, and consequently the city was not bound to take or pay for any bonds or any services. A contract for the future delivery of personal property is void for want of consideration and mutuality if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. A.) 114 Fed. 77, 81. The purchase and delivery of the bonds for the sinking fund were conditioned by the will or wish of the brokerage company. Its agreement went no farther than this sentence: "We think it is possible we may be able to buy enough bonds from the holders to at once apply the sinking funds, and stop the entire interest by the cancellation of the bonds." It contained no obligation to purchase or secure a single bond. Again, the contract was an agreement that the brokerage company should buy bonds, deliver them to the city, and the city should pay for bonds which the brokerage company bought. But the company never bought a single bond. Hence the city never became liable to purchase or pay for a bond, or for the services of the company in purchasing them. The company did induce the city to call in the bonds to the amount of \$20,000 which it had the right to call, and did doubtless render services in endeavoring to secure other bonds. But it never complied with the terms of its original agreement, and, if it rendered any services, they were not of the character which it there proposed to render, and its action did not fulfill any of the terms of its original contract. These considerations are not determinative of the case, but they tend to show that the result is not altogether unjust or inequitable. The city derived no benefit from the services of the company which it would not have derived from an examination of the statutes and a compliance with the law. The company purchased no bonds and rendered none of the services which, under its original proposition, conditioned its right to compensation. The judgment below must, however, be reversed on the ground that the original contract, the agreement of compromise, and the implied agreement to pay the reasonable value of the services of the company in procuring the bonds of the city for the investment of its sinking fund were all alike beyond the powers of the corporation, and void.

The judgment below is accordingly reversed, and the case is remanded to the circuit court, with instructions to render a judgment in favor of the defendant notwithstanding the adverse verdict.

HANLEY v. BEATTY, District Judge.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1902.)

No. 820.

1. SUIT TO QUIET TITLE—MINING CLAIM—SUBJECT-MATTER IN ISSUE.

Under Rev. St. Idaho, § 4538, which provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims, where a suit in equity is brought in a federal court in that state for the cancellation of deeds to interests in a mining claim, for a decree determining the adverse claim of defendants to such interests and establishing complainant's title thereto, and in which a receiver is prayed for to take control of the mine and workings on said claim, and an injunction restraining defendants from taking ore therefrom pending the suit, the court has jurisdiction to determine the entire controversy between the parties respecting the mine and the ore therein, and it is the duty of the defendants to set up all defenses they may have to complainant's claim thereto.

2. JUDGMENT—MATTERS CONCLUDED—DEFENSES NOT PLEADED.

A suit in equity was brought in a federal court for the cancellation of deeds to certain undivided interests in a mining claim on the ground of fraud and to establish complainant's title to such interests. The bill alleged that the property was of no value except for the mineral it contained, but that such mineral was of a value exceeding the jurisdictional amount; that defendants had extracted and removed ore from the claim exceeding in value \$150,000. An accounting was prayed for, the appointment of a receiver to take charge of the mine, and an injunction restraining defendants from removing ore pending the suit. Defendants did not deny the jurisdictional value of the matter in dispute, nor the allegation that the sole value of the property was in the minerals it contained, and the suit was tried on its merits. *Held*, that the subject-matter of such suit was not merely an interest in the surface of the claim in dispute, but included also an interest in the ore being mined therefrom, the value of which alone gave the court jurisdiction under the pleadings; that a decree of the appellate court therein, which had become final, reversing a decree of the circuit court dismissing the bill, and based upon an opinion finding that a deed from complainant conveying an interest in the property was voidable and that he was the owner of such interest, was conclusive between the parties as to his rights in the ore; and that the circuit court was not justified in refusing to proceed to a final decree establishing such rights of complainant in accordance with the mandate of the appellate court, and in conformity to the issues joined and litigated, because of the pendency of a new suit brought by defendants asserting their sole ownership of such ore on the ground that the vein in which it was found had its apex in other property owned by them, such claim, if true, being one which they were bound to assert in the prior suit.

Petition for Writ of Mandamus.

John R. McBride and M. A. Folsom, for petitioner.

W. B. Heyburn and E. M. Heyburn, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The case of Kennedy J. Hanley, complainant, against Charles Sweeny, F. Lewis Clark, and the Empire State-Idaho Mining & Development Company, a corporation, defendants, was a suit in equity, brought in the circuit court of the United

States for the district of Idaho, Northern division, on the 18th day of March, 1899. The suit involved complainant's claim to the ownership of eleven twenty-fourths of certain mining ground described as the "Skookum Mining Claim," located in the Yreka mining district, in the county of Shoshone, in the state of Idaho. The complainant's right to eight twenty-fourths, or an undivided one-third interest in the Skookum mining claim, was based upon certain proceedings which complainant claimed amounted to a purchase of that interest from one Cunningham, the administrator of an estate, who sold the interest in settling up the estate in the course of probate proceedings in the state court of Idaho; but the administrator had conveyed this interest to a mining company, which also claimed to be a purchaser from the administrator, and had received a deed of conveyance of this interest in the course of such probate proceedings, and had conveyed the same to the defendant the Empire State-Idaho Mining & Development Company. Complainant's title to the remaining three twenty-fourths, or an undivided one-eighth, interest in the Skookum mining claim was derived through mesne conveyances from the original grantee by patent from the government of the United States. This latter title had been conveyed by the complainant to the defendants Charles Sweeny and F. Lewis Clark by deed dated April 30, 1898, deposited on that day in the Exchange National Bank of Spokane, in the state of Washington, in escrow, to be delivered to the defendants Sweeny and Clark upon certain stipulated conditions. Complainant claimed that the defendants Sweeny and Clark had obtained possession of this deed wrongfully and contrary to the terms of the escrow agreement. It appears from the bill of complaint that on the 30th day of April, 1898, the complainant was the owner of 100,000 shares of the capital stock of the Chemung Mining Company, a company whose mining claims were located in Yreka mining district, in the state of Idaho; that prior to April 30, 1898, some negotiations had passed between complainant and Clark and Sweeny involving the sale to them of complainant's 100,000 shares of the capital stock of the Chemung Mining Company and his one-third and one-eighth interests in the Skookum mining claim; that complainant offered to sell to Clark and Sweeny his 100,000 shares in the Chemung Mining Company, at 20 cents a share, or \$20,000; that he also offered to sell his one-third and one-eighth interests in the Skookum mining claim at the rate of \$30,000 for the whole claim; this would have amounted to \$13,750 for his two interests in that claim. The complainant claimed that in these negotiations he receded from the latter proposition, and agreed to take \$10,000 for his one-third and one-eighth interests in the Skookum claim, but adhered to his proposition to sell his 100,000 shares in the Chemung Mining Company for \$20,000. He claimed that both of these offers were accepted by Clark and Sweeny, and that at their request he made two separate deeds for his one-third and one-eighth interests in the Skookum claim; that the 100,000 shares of the Chemung Mining Company stock were to be placed in one envelope under an escrow agreement of sale, and the two deeds for one-third and one-eighth interests in the Skookum claim in another envelope, also under an escrow agreement to sell, and both of these

envelopes were to be deposited with the Exchange National Bank at Spokane, Wash., to be taken up at specified dates and upon the conditions therein named. He claimed that the final agreements under which the deeds for his two interests in the Skookum claim and the 100,000 shares of stock in the Chemung Mining Company were deposited in escrow were that he should sell, and Clark and Sweeny would purchase, his 100,000 shares of the Chemung mining stock for \$20,000, and his one-third and one-eighth interests in the Skookum claim for \$10,000, making two separate and distinct transactions. He claimed that accordingly the 100,000 shares of stock were placed in escrow in one envelope, to be delivered to Clark and Sweeny on the payment of \$20,000, and the two deeds for his interests in the Skookum claim were placed in escrow in another envelope, to be delivered to Clark and Sweeny upon the payment of \$10,000. Clark and Sweeny, on the other hand, claimed in their answer that the agreement was that Hanley was to sell his 100,000 shares in the Chemung Mining Company and his one-eighth interest in the Skookum claim for \$20,000, and his one-third interest in the Skookum claim for \$10,000; that two envelopes were accordingly prepared, and the deeds and stock placed therein in escrow, in accordance with the terms of the agreement as understood by Clark and Sweeny. The complainant claimed that this arrangement of these two agreements in escrow was without his knowledge and was a fraud upon him. When the terms of this escrow expired, the complainant found that Clark and Sweeny had paid the \$20,000, and taken up the escrow agreement for the 100,000 shares of stock in the Chemung Mining Company, and the deed for the one-eighth interest in the Skookum claim, and had left the deed for the one-third interest in the Skookum claim in the other envelope; this latter deed not having been accepted by Clark and Sweeny because in the meantime litigation respecting this one-third interest had proceeded so far that Clark and Sweeny considered that complainant's claim to that interest was of no value. It was alleged in the bill of complaint that the defendants Clark and Sweeny procured the agreement from complainant to sell his interests in the Skookum mine by covin and fraud, the particulars of which were set forth in the bill. It is alleged that the said Skookum mine had been reached for working purposes by certain workings known as "Last Chance," which were in the exclusive control of the defendants Clark and Sweeny; that they had declared at the time of the making of the agreement by which they took the option to purchase complainant's interests that the workings of the Last Chance mine had penetrated to the said Skookum claim, and that they knew the ground was of little value and contained no ore. It was alleged that they had stated that they desired to purchase complainant's interests in the Skookum claim, not because the claim was of any value for ore, but because it was surrounded by other claims which were of value, and would be useful to them for combining it for working purposes with the said other ground, and give breadth, bulk, and character to their plan to put the consolidated land on the market. It was alleged that the complainant had no means of personal knowledge as to the value of said ground except its situation with reference to other claims of which he had

some knowledge; and, relying upon these representations made by the defendants Clark and Sweeny that they had not in their workings penetrating the said claim found any ore or ore body, and that they had no more information about the same than the complainant had, he fixed the price of his entire interest in said Skookum claim at \$10,000. It was alleged that the actual facts were that the defendants' works penetrating said Skookum ground had disclosed an immense body of ore of great value, and that the said Clark and Sweeny had willfully falsified and misstated the facts to the complainant, that they might procure said contract with him and defraud him into making the agreement to sell the said interests, well knowing that he was ignorant of the truth. It was further alleged that the ores contained in the Skookum mine were of such value that there has been taken out from such body then disclosed ore to the value of not less than \$150,000 net, over and above the cost of mining, treating, extracting, and marketing the same. It was alleged, further, that the defendants had given out and asserted that they owned the Skookum claim and that complainant had no interest therein; that they had many millions of dollars' worth of ore in sight, and intended to take the same to their own use. The complainant alleged, further, that the said property was of no value except for the ores contained therein, and that the defendants were rapidly exhausting the same, to the utter destruction of complainant's rights. The bill further alleged that the defendants Clark and Sweeny organized the corporation defendant under the laws of the state of New York, and since the 15th day of May, 1898, the said corporation defendant has been engaged in working the ores contained in the said Skookum claim, under the general supervision and direction of the said defendants, who were alleged to be the officers of the said corporation and the owners of the majority of the capital stock thereof. The relief prayed for in the bill was that the conveyance by the complainant to the defendants Clark and Sweeny be set aside and declared null and void from its date; that the defendants be held to account for the complainant's share of the proceeds of the said Skookum mine taken therefrom by the defendants after the time the escrow deeds were made and prior to the filing of the bill of complaint; that the defendants should be required to set forth the nature of their claim to said premises, and that all adverse claims thereto should be determined by decree of court; that by the decree it should be declared and adjudged that the defendants and each of them had no estate or interest whatever in or to complainant's interest in said Skookum claim, and that the title of the complainant was good and valid thereto and therein; that the court should appoint its receiver to take into his possession and control the said Skookum mine and workings, and continue the operation of said mine under such rules and directions as the court might decree necessary for the preservation of the rights of the complainant and those of the defendants; that the defendants and each of them should be enjoined and prohibited by the court, and all and each of their agents, servants, and employes, from in any wise working and extracting any ore therefrom pending the trial on the merits, and until the final determination of the rights of the parties therein.

The defendants in their answer denied that the complainant had at the time of the commencement of the action any title or interest, claim or right, in or to the said Skookum mining claim, or any part thereof. They denied that the complainant became the purchaser of a one-third interest in the Skookum mining claim, as alleged in the bill of complaint, but asserted that such interest was purchased by the Chemung Mining Company. They also denied the fraud charged in the transactions relating to the deposit of complainant's deeds and stock in escrow, as alleged in the bill of complaint. They alleged that by virtue of good and sufficient mesne conveyances the defendant the Empire State-Idaho Mining & Developing Company was then the owner of the said Skookum mining claim and every part thereof. They denied that the ores contained in the Skookum mine were of such value that there had been taken out of the ore bodies then disclosed in said mining ground up to the time of the commencement of the suit ore of the value of not less than \$150,000, over and above the cost of mining, treating, extracting, and marketing the same, or in which the complainant was entitled to any share or interest thereof, but alleged the fact to be that there had not been taken from any of the ore bodies that were disclosed in the said ground at the time of the placing of said deeds in escrow and the making of the contract therefor any ore of any value, and that no ore bodies of known value had been disclosed in said ground at the time of making said contract and the placing of said deeds in escrow. They admitted that they gave out and asserted that the complainant had no interest therein, and alleged that said assertion was true. As officers and agents of said corporation defendant, the defendants Clark and Sweeny admitted that they intended on behalf of said corporation to extract the ores from said Skookum mine and property, and appropriate the same to the use of said corporation, the owner of said claim.

The complainant having filed his replication to the answer of the defendants, the parties proceeded to take testimony upon the issues presented by the bill and answer, and upon a hearing the circuit court rendered its opinion on December 30, 1899, in which it was ordered that the prayer of the complainant be denied, and that defendants be dismissed, with their reasonable costs. The complainant thereupon brought the case to this court upon appeal. After a review of all the facts in the case, this court determined that the complainant was not entitled to any relief with respect to the claim that he was a purchaser of a one-third interest in the Skookum mine in the probate proceedings in the state court, but with respect to the one-eighth interest in that mine this court held that the deed conveying that interest to the defendants Clark and Sweeny was not by the terms of the agreement of the parties coupled with the Chemung mining stock; that it was improperly placed in escrow in the envelope containing that stock, and that the defendants had received it without consideration and in fraud of complainant's rights. The judgment of the circuit court was therefore reversed, and the case remanded to the court below for further proceedings not inconsistent with the opinion of the appellate court. *Hanley v. Sweeny*, 48 C. C. A. 612, 109 Fed. 712. A petition for a rehearing having been filed

in this court by the defendants, and having been denied, the mandate of this court was issued to the circuit court on the 21st day of November, 1901, reciting the order of the court reversing the decree of the circuit court, and commanding "that such further proceedings be had in said cause, not inconsistent with the opinion and decree of this court, and as according to right and justice and the laws of the United States ought to be had, the said decree of said court notwithstanding." The mandate further contained the costs of the appellant, amounting to \$947.50, in accordance with paragraph 5 of rule 31 of this court (31 C. C. A. cxxix., 90 Fed. cxxix.).

It appears from the petition for a writ of mandamus filed by Hanley, the complainant in the court below, that the mandate of this court was presented to the circuit court on November 26, 1901, and filed therein and entered of record; that on November 29, 1901, an order was made in the circuit court for the district of Idaho, directing the defendants to appear on December 23, 1901, and show cause why the court should not proceed in accordance with the mandate of this court to grant an injunction and receiver, to refer the cause to a master for an accounting, and to grant other relief. It is alleged that the defendants appeared on that day in obedience to said order, and made the showing, and after the hearing the petitioner, by leave of the court, withdrew his motion for an injunction and receiver without prejudice to a renewal of said motion should the supreme court of the United States deny the petition of the defendants then pending for a writ of certiorari from the supreme court to review the decree of this court; and said circuit court then and there ordered the cause to proceed, and referred the same to the master in chancery to take an accounting of the ores extracted from the said Skookum mine and mining claim. It is alleged that on January 13, 1902, the supreme court denied the defendants' application for a writ of certiorari. It is further alleged in the petition that on February 8, 1902, the petitioner, after giving due notice to the defendants, applied to the Honorable James H. Beatty, United States district judge of Idaho, acting as judge of the United States circuit court for Idaho, for an injunction to restrain the defendants from extracting ore from said Skookum mine to the exclusion of the petitioner, and for a receiver for said mine, and for an order permitting the petitioner to enter said property to the ore bodies therein, and for an execution to collect the costs of appeal. It is further alleged that the application for an injunction, receiver, and for order to enter, and for execution, was denied by said judge on February 11, 1902. It is alleged that on February 24, 1902, a time and place of hearing having been theretofore fixed, and notice thereof having been regularly given as directed by the order of reference, the parties appeared before said master in chancery for the purpose of taking an account of the ores extracted; that the petitioner filed with said master a statement of claim and charge in the form of a debit and credit account, showing that petitioner's share of the ore extracted by defendants from said Skookum mine amounted to \$315,000; that the defendant corporation filed an answer with said master in which it stated that it had extracted no ores from said Skookum mine subsequent

to April 30, 1898, and therefore it could file no debtor and creditor statement. Thereupon said defendant filed a petition that it be given until March 15, 1902, in which to file its account of ores extracted from underneath the surface of the Skookum claim. It is alleged that this petition was granted by the master. It is further alleged that testimony was then offered by the petitioner and received by the master in support of the petitioner's statement of claim; that on March 15, 1902, the Honorable James H. Beatty, acting as judge of the circuit court, by order made at Boise, Idaho, suspended the previous order for accounting made December 23, 1901, and refused to proceed with said accounting or to permit the master to do so. It is alleged in said petition that the order of said circuit court made by the said Honorable James H. Beatty, judge, suspending said accounting, and the order denying the motion for an injunction and receiver, and the order denying a writ of execution for the costs of appeal, and the act of refusing to proceed with the cause, are, and each of said orders is, and such refusal is, contrary to law, oppressive to the petitioner, inconsistent with the decree of this court, irregular, and unauthorized, and in disobedience of the command of the mandate of this court; that the petitioner has no way of protecting his property unless this court interferes; that the ores contained in said mine are being rapidly exhausted, and the petitioner is informed and believes that the property will be entirely destroyed and exhausted within five or six months unless protected by order of court; that defendants are all nonresidents of the state and district of Idaho, and the petitioner has no method of enforcing his rights against defendants, and has no way of perfecting the said cause for final decree until said accounting shall have been completed, save by his present application and petition. Upon this statement the petitioner prays for a writ of mandamus to be issued from this court, commanding and requiring the Honorable James H. Beatty, sitting as judge of the United States circuit court for the district of Idaho, without delay, to execute the mandate of this court in said cause in accordance with the opinion of this court, and to set aside the order made by him on the 15th day of March, 1902, staying said accounting, and to grant a proper writ for the enforcement of the decree of this court for costs, and to grant an injunction restraining the defendants from working and extracting ores from said Skookum mine and mining claim, and to order that the petitioner be let into possession of said property, or, on failure thereof, to show to this court, on the return day of the said writ, why the same has not been done, and for costs of this proceeding.

In answer to this petition Judge Beatty has made a return or answer, in which he suggests, among other things, that the orders complained of in the petition are in character judicial, involving the exercise of discretion and judgment, and not merely ministerial; that, if he is in error in this position, the writ of mandamus is not the proper remedy; that the cause was heard in the Northern division of the district of Idaho, and since the mandate of this court was sent down no term of the circuit court has been held in that division, and no judgment or action of any kind has been entered or taken in said

circuit court in pursuance of said mandate. In addition to these technical objections to the present proceedings in this court, it is represented that one of the defendants in the original suit, the Empire State-Idaho Mining & Developing Company, has commenced an action against Hanley, the complainant in the former suit, alleging, among other things, that in the former action only the surface rights of the Skookum mining claim were involved or determined, and that the apex of the ledge which covered or included in its descent the ore bodies under the surface of the Skookum claim was not put in issue or in any way litigated in the former action. It is further alleged that in the new action such apex of the ledge or vein found in the Skookum claim was in the San Carlos mining claim, and that, therefore, such ore bodies in the Skookum claim do not belong to either the Skookum claim or to the said Hanley, but do belong to said San Carlos claim and its owner, the plaintiff in the new action, and that plaintiff asks in this new action that the former order for an accounting be set aside until the determination of this new issue between the parties. A copy of the bill of complaint in the new action is attached to and made a part of the return or answer of Judge Beatty.

It is contended on behalf of the respondent that, so far as the original action relating to the one-eighth interest in the Skookum mine claimed by the complainant, Hanley, is concerned, it was merely an action to cancel the deed, and possessed none of the elements of a suit to quiet title; that this court held that said deed was wrongfully obtained, and should be canceled; and that the mandate was in accordance with this opinion. The suit was in equity. Its purpose was to determine a controversy concerning an interest in a mining claim containing valuable ore and for an accounting for the value of the ore that had been taken out of the mine by the defendants, and for an injunction prohibiting the defendants, their agents, servants, and employes, from in any wise working and extracting ore from said mine pending the trial of the case upon the merits and until the final determination of the rights of the parties thereto. The jurisdiction of the United States circuit court was invoked upon allegations of diverse citizenship in the parties to the action, and that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of \$2,000; that the amount in dispute did exceed \$2,000 was shown by allegations that the premises in controversy were of the value of more than \$10,000; that the ores contained in the said Skookum mine were of such value that there had been taken out of said ore body then disclosed in said ground up to the time of the commencement of the action ore of the value of not less than \$150,000 net, over and above the cost of mining, treating, extracting, and marketing the same, of which complainant was entitled to a share represented by his interest; and that the defendants gave out and asserted that they had millions of dollars' worth of ore in sight in said Skookum claim. To show that the controversy was with respect to complainant's interest in the mine and the ore it contained, he further alleged that said described property was of no value except for the ore it contained. Defendants in their answer admitted that they

had given out and asserted that the complainant had no interest in said claim, and they alleged that said assertion was true. The defendants Clark and Sweeny also admitted that they intended on behalf of the corporation defendant to extract the ores from the said mine and appropriate the same to the use of said corporation, the owner of the claim, but they did not deny that the claim had no value except for the ore it contained. These allegations in the complaint as to the value of the ore and the lack of value in the mining claim, aside from the ore, stood admitted, and became one of the established facts of the case for the purpose of jurisdiction as well as upon the merits of the case.

The allegation that the mine had no value except for the ore it contained did not bring the case within the jurisdiction of the court, if the only dispute was as to an interest in the surface location; and, if by reason of the allegations of the bill concerning the value of the ore in the mine the fact that the dispute related only to the surface location was overlooked, it was the duty of the court to dismiss the bill for want of jurisdiction when that fact was discovered. Section 5, Act March 3, 1875 (18 Stat. 470).

The case was heard and determined in the circuit court, not upon any question of the sufficiency of the pleadings, but upon the merits of the whole case, the decree of the court reciting that the court had found that the allegations of the bill had not been sustained by the evidence. Upon appeal this court also determined the controversy upon the merits of the whole case, and found that the evidence did sustain the allegations of the bill as to the one-eighth interest claimed by the complainant, and directed the court below to proceed and grant that relief which the complainant was entitled to have according to right and justice and the laws of the United States.

Section 4538 of the Revised Statutes of Idaho provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." Under this statute the circuit court had jurisdiction upon the pleadings to determine the entire controversy between the parties respecting the Skookum mine and the ores therein contained. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733. It was the duty of the defendants to interpose all the defenses they had to the action, and, having failed to do so, the defendant the Empire State-Idaho Mining & Developing Company is debarred from interposing a defense which they had at that time by a new action. *Burton v. Huma* (C. C.) 37 Fed. 738. In *Dowell v. Applegate*, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, the rule in such a case is stated to be: "A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to any ground which might have been presented."

Testimony on behalf of the defendants is referred to as tending to show that the apex of the vein containing the ore in the Skookum mine was outside the surface location of that claim, and it is contended that, because counsel for the complainant objected to this testimony as irrelevant and immaterial, he must be deemed as having

objected because that issue was not involved in the case. No such inference can be drawn from the proceedings. It was not claimed that this testimony tended to show that the apex of the vein was outside the Skookum claim and in some other claim owned by the defendants, and unless that was the purpose of the testimony, and it tended to establish that fact, it was clearly irrelevant and immaterial. The defendants were required to prove whatever adverse title they had, and, unless the testimony tended to establish such a title, it was subject to complainant's objection. The testimony is, however, in the record, and it is not claimed now that, as it appears in the record, it tends in any way to establish such a defense. Moreover, no ruling of the court below excluding such testimony was brought here on the appeal, and if any inference is to be drawn from this feature of the proceedings it is that the defendants did not consider the question as to the apex of the Skookum vein as being an issue in the case.

We are of the opinion that the petitioner is entitled to have the mandate of this court in Hanley against Sweeny et al. enforced, but, in view of the statement of the respondent that he will proceed to enforce it upon being advised as to the views of this court upon the questions that have been discussed in this opinion, we will withhold the writ of mandamus until the further order of the court.

PACIFIC STEAM WHALING CO. v. GRISMORE et al.

(Circuit Court of Appeals, Ninth Circuit. June 2, 1902.)

No. 758.

1. CARRIERS—STEAMSHIP—OVERCROWDING PASSENGERS.

A steamship is liable in damages to passengers who, although they were sold second-class tickets, were given only the accommodations of steerage passengers, and who suffered great discomfort from lack of proper food and water and from being overcrowded in unclean and badly ventilated quarters. While the obtaining of an inspector's certificate permitting the vessel to take more passengers than she actually carried may relieve her from prosecution for the statutory penalty for carrying an excessive number, it does not relieve her from liability to passengers for a violation of her implied agreement to furnish them with reasonable accommodations.

2. ADMIRALTY PRACTICE—TAKING TESTIMONY ON APPEAL.

The parties to a suit in admiralty should make reasonable effort to obtain all testimony material to the issues in the trial court, and the practice of taking further testimony after an adverse decision, to be used in the appellate court, is one not to be encouraged.

3. CARRIERS—STEAMSHIP—DELAY IN LANDING PASSENGERS' EFFECTS.

Libelants contracted for the carriage of themselves and their baggage and effects by a steamship from San Francisco to Nome in the spring of 1900. There was no landing place at Nome, and all landing had to be done by means of lighters. The tickets provided that the voyage should end at the place of anchorage, and that the landing was no part of the contract. After they were put on shore libelants were compelled to wait in some cases 10 days, and until the ship had been to other ports and returned, before receiving their baggage, effects, and freight, by reason of which they suffered exposure, expense, and loss on account of the delay, which was due, to some extent at least, to the fact that the ship was unnecessarily overloaded. Held, that the stipulation in the

contracts did not exonerate the ship from liability in damages under the circumstances shown, even if enforceable within reasonable limits, owing to the condition of the port and the prevailing custom.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

For opinion below, see 110 Fed. 221.

Gorham & Gorham and Gorham, Brown & Gorham, for appellant.
P. P. Carroll and John E. Carroll, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. In the court below three separate libels and one intervening libel were filed against the steamship Valencia to recover damages alleged to have been suffered by various libelants (11 in number) by reason of an alleged breach of contract for the transportation of themselves and their personal effects on the Valencia from the port of San Francisco to the port of Nome, Alaska, during the season of 1900. The causes were, after the trial, consolidated. The Valencia, according to the certificate of inspection made by the proper officers at San Francisco, Cal., had 37 state rooms and 128 berths, and was allowed to carry 503 passengers, viz.: "128 first-cabin, ——— second-cabin, and 375 deck or steerage passengers." A further certificate was obtained from the inspectors to the effect that the Valencia had provided accommodations for, and was authorized to carry, 99 second-cabin passengers. This, as will appear from the testimony hereinafter referred to, was an inadvertent error, and was intended for "99 second-class passengers." On her voyage from San Francisco the local inspectors at Seattle increased the limit of passengers which the Valencia was entitled to carry to 615. The evidence shows that each of the libelants who purchased "second-class" tickets in San Francisco paid therefor the sum of \$75, and from representations made to them understood that they were to have second-class accommodations on board the steamship; but as a matter of fact they were treated as steerage passengers and received no other accommodations. The number of passengers at San Francisco was 475, and this number was increased by 15 from Seattle. The tickets purchased by the libelants had printed thereon, among other things:

"Ship's voyage and all responsibility under this contract end on arrival at usual place of anchorage. Landing is no part of this contract. This company will, where it may find it practicable, assist in landing without charge to passengers, but such act on its part shall not be deemed to be done under this contract, and in no case shall its liability for damage, injury, or loss of whatsoever nature exceed the value of the conveyance used in landing."

The damages sought to be recovered by the libelants herein are for failure on the part of the steamship company, and of its master, officers, and crew, to furnish second-class quarters (steerage being furnished instead); failure to furnish food equal to that furnished first-class passengers; failure to furnish proper and adequate accommodations, sufficient wholesome and properly cooked food and pure water; and the detention of libelants' effects on board for 10 days

or thereabouts after the arrival of the vessel at Nome. The damages resulting therefrom are alleged to be for the suffering in health and mind, mental pain and worry, sickness and distress, loss of personal effects, and incapacity and deprivation of earning a livelihood, etc. The court below was of opinion that, while the various libelants exaggerated their grievances in many respects, the evidence in the case was indisputable that the passengers did suffer great discomfort for want of proper food, and that they were so crowded in their quarters, in which they had to sleep and where their meals were served, as to constitute a violation of the implied agreement of the carrier to provide reasonable accommodations for the number of passengers engaged to be carried, "and to not subject the passengers to such treatment as all men must condemn as inhuman." The court also found that there was considerable delay in landing the baggage and effects of the passengers at Nome, and rendered a decree in favor of certain libelants aggregating about \$2,700.

The case seems to have been fairly tried and to have received the careful attention of the presiding judge. A review of the evidence upon which the decree was based would serve no useful purpose. The testimony was not taken in the presence of the judge below, and for that reason we have examined it closely, and are of opinion that the district court arrived at the correct conclusion in regard thereto. Much of the evidence is of a sickening, disgusting, and unpleasant nature. After the decree was rendered the appellant obtained an order from this court permitting the taking of additional testimony,—a practice which, by the way, is becoming entirely too common. Parties should endeavor to procure all the testimony material to the issues presented by the pleadings in the first instance. The practice of bolstering up a lost cause by additional testimony ought not to be encouraged. But in this case the additional testimony has no special bearing upon the discomfort of the passengers on the voyage, but was offered to explain certain points discussed by the court as to the overcrowding of the ship, and, as appellant claims, to show that the permit of the United States inspectors of steam vessels, of date May 21, 1900, to carry an increased number of passengers on the steamship beyond the number allowed by the certificate of inspection then in force, was not requested or granted after the capacity of the steamship under her certificate of inspection had been oversold, but, on the contrary, it was before the capacity of the steamship had been reached by the sale of tickets, and before it was at all certain that the vessel's capacity would all be taken; that the permit issued for 99 additional second-cabin passengers was intended for 99 second-class passengers, and the use of the word "cabin" in lieu of "class" in the permit, indorsed on the certificate of inspection, was an inadvertent error in the office of the United States inspectors of marine vessels at San Francisco, where it was issued. This character of testimony might have some tendency to relieve the steamship company from censure or criticism to which it might otherwise be subject, and might be deemed sufficient to relieve the company against any prosecution for the statutory penalty for carrying an excessive number of passengers, but it does not relieve it from

liability to the passengers if any damage to them was occasioned thereby. It is claimed that the conditions prevailing at Nome in 1900 were not such as to render void, as against public policy, a contract for transportation providing for delivery at anchorage and providing that landing was no part of the contract. Ordinarily, parties are bound by the strict letter of their contract. The general rule is that delivery of goods belonging to passengers must be in accordance with the customs and usage of delivery, and, if so made, the carrier will be discharged from responsibility. *Constable v. Steamship Co.*, 154 U. S. 51, 63, 14 Sup. Ct. 1062, 38 L. Ed. 903. But this general rule and the reasons upon which it is founded do not reach the conditions existing in the present case. The testimony fails to convince us that the baggage, freight, and personal effects of the libelants were delivered "as soon after the arrival as the conditions of the weather and sea in the open roadstead at Nome would permit," as claimed by the appellant. The steamship arrived at Nome on the night of June 17th, and the master testified that the passengers "were all ashore within 48 hours." His version of the delay in the landing of the baggage and freight appears from the following questions and answers:

"Q. Mr. Birt, one of the libelants, and Mr. White, an intervening libelant, complain that freight upon which he had paid fifty-two dollars charges, I think, goods and merchandise, were not delivered to him until ten days after the seventeenth day of June, and until the ship had arrived at Nome and departed and gone to Golofnin Bay and York Bay and come back to Nome. A. That may possibly be. Q. Can you explain it? A. It was put on the beach, and he did not come after it. The freight was landed on the beach within seven days. I sailed from there on the twenty-fourth, with everything out. Q. Did you have occasion to land any Seattle or San Francisco shipments at Nome upon your return to Nome from Golofnin Bay or York? A. Yes, sir. Q. Why were not they landed on the first arrival? A. Because we could not get the lighters to take it. In the meantime we ran to Golofnin Bay. We could not get any lighters, we understood, for thirty-six hours, and we ran to Golofnin Bay, and were gone twenty-four hours, and came back and got one lighter, and they said they could not get us another for thirty-six or forty-eight hours, and in the meantime we went down to Cape York and landed the rest of the freight, and was back there in twenty-eight hours."

The testimony of the libelants shows that they were put to the expense and inconvenience of purchasing food and securing sleeping apartments in tents while waiting for the delivery of their own tents, provisions, machinery, tools, etc., and were also deprived of the opportunity of laboring or working ashore. The testimony in its entirety supports the views entertained by the lower court, that the libelants were subjected to unreasonable delay, privations, and losses that would not have occurred if the ship had not been "unnecessarily overloaded." The absence of lighters and the state of the weather were not the only causes of discomfort and delay. The trial court was called upon to deal with an exceptional case, arising at a time of great anxiety and excitement as well on the part of the passengers as on the part of the steamship company. Time and opportunity were important and valuable; neither could well brook delay. The task imposed upon the trial court of measuring the duty of the re-

spective parties so as to be fair to all, in order to meet the ends of justice, was to some extent difficult. Under all the circumstances of this case, we are of the opinion that the carrier is not relieved from liability for the freight and baggage by reason of the language in the contracts that the landing should not be deemed a part of the voyage. The custom and usage of landing passengers on a bleak shore without the delivery of their baggage and effects until after the ship goes to other places to deliver other freight, and remains away for a week or more, if such custom existed, is one that should be more honored in the breach than the observance, and ought not to be sanctioned or encouraged by the courts. The law, as well as humanity, demands that reasonable efforts should be made by the carrier to protect the rights of passengers in this respect. In *Post v. Koch* (D. C.) 30 Fed. 208, *Benedict, J.*, said, "Landing is part of the contract with a passenger." The privilege of contracting for a limitation of liability is allowable only within such limits as are just and reasonable and consistent with the sound policy of the law. *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 324, 21 L. Ed. 297. See, also, *The President* (D. C.) 92 Fed. 673, 675. There is no division of the damages allowed to the several libelants, and nothing in the record to show what proportion thereof was allowed for the delay in landing or loss of freight as distinguished from the discomforts of the passengers during the voyage. The allowance was for a lump sum to each libelant. The court explains the allowance as follows:

"The several sums awarded being, in my opinion, reasonable compensation for personal discomfort, extra expenses, losses of baggage and freight, and consequential losses on account of delay in delivering their baggage and freight; and in fixing the amount of damages I have made due allowance for exaggerations in evidence, for contributory negligence on the part of the libelants, and for unnecessary expense to the claimant in defending the ship, on account of claims for excessive damages."

The record does not, in our opinion, disclose any error which would justify this court in setting aside the decree. The decree of the district court is affirmed, with costs.

CHICAGO HOUSE WRECKING CO. v. BIRNEY.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1902.)

No. 1,649.

1. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—QUESTION OF FACT AS TO POWERS OF SUPERINTENDENT.

• Defendant, a wrecking company incorporated in Illinois, was engaged in tearing down the buildings used during the exposition at Omaha. There was evidence tending to show that one B., during several months while the work was in progress, performed the actual duty of superintendence,—hiring and discharging men, and directing the foremen of the several gangs as to their work,—although the treasurer of the company remained in Omaha during most of the time, and had full power to represent the company in all matters. Plaintiff, who was a workman employed by defendant in the work, was injured through obeying a negligent order given by B. Defendant introduced evidence that B. had

no independent power of superintendence, but was only an intermediary through whom its treasurer, who was superintending the work, communicated his orders, and executed his powers, and occupied the same position toward the company and its employes as other foremen. *Held*, that the question whether B. was in fact vested with and exercised the powers of a general superintendent over the work was one for the jury.

2. SAME—VICE PRINCIPAL—HEAD OF DEPARTMENT.

A wrecking company which had purchased all the buildings used for an exposition which covered many acres of ground, and was engaged in tearing the same down, and selling the materials, placed a general superintendent, who was a skilled engineer, in charge of the work of tearing down the buildings, in which a force of from 150 to 300 men were engaged for six months. The superintendent hired and discharged men, and was constantly on the ground, personally directing the foremen of the different gangs and the general course of the work. The selling of the materials was in charge of different men. *Held*, that the tearing down of the buildings was a separate department of the company's business, and that the superintendent in his relation to the men employed in such work was not a fellow servant, but a vice principal, for whose action in giving a negligent order to a workman, in relation to his work, which resulted in the latter's injury, the company was liable.

3. SAME—DAMAGES FOR PERMANENT INJURY—INSTRUCTION.

A court in charging the jury as to the damages recoverable, in an action for a personal injury which the evidence tended to show was permanent in character, instructed that it would not be proper to multiply the amount of plaintiff's annual earnings by his expectancy of life, and reach a result in that way, but that it was the province of the jury "to ascertain by the exercise of a sound judgment what would be the present cash value of his earnings, considering his expectancy of life." Further on, the court stated: "Sometimes it has been said that it is such a sum which, if put at interest, would earn annually the amount of money which the testimony may show he might earn, * * * or did earn; but this is not conclusive upon the jury; it all finally comes back to your sound judgment and discretion, * * * to fix the amount in your sound discretion, governed by the rules which I have stated." *Held*, that such charge, considered as a whole, was not erroneous as imposing upon the jury an incorrect measure of damages.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Nebraska.

W. D. McHugh and Isaac R. Andrews (J. M. Woolworth, on the brief), for plaintiff in error.

Charles J. Greene (Ralph W. Breckenridge, Howard H. Baldrige, and Richard S. Norval, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action for personal injuries which Otto C. Birney, the plaintiff below and the defendant in error here, sustained while he was in the service of the Chicago House Wrecking Company, the plaintiff in error, and was assisting in the tearing down and removal of the large exposition buildings at Omaha, Neb. The negligence complained of was an order given by W. G. Bennett, a person in the service of the Chicago House Wrecking Company (hereafter termed the "Wrecking Company"), which order exposed the plaintiff to great peril, and in the execution of which

he was injured in a manner and to an extent that has probably disabled him for life from pursuing his ordinary avocation. It is conceded that the order given by Bennett was, under the circumstances, a negligent order, or, if this concession is not made in terms, it is at least admitted that there was evidence which warranted the jury in finding that it was negligent, and in finding that the plaintiff was in no wise at fault for obeying it, or in the manner of executing it. As the case hinges entirely on the questions whether Bennett was one of those persons for whose action in giving the order the wrecking company was responsible, or whether there was evidence from which a jury could properly find that he occupied a relation to the company which renders it responsible for the order, it is unnecessary to state the circumstances under which the injuries were received with much detail. It will suffice to say generally that the evidence shows substantially the following facts: That on the day of the accident a portion of the liberal arts building was being demolished; that the plaintiff had been at work in that building for about half an hour, in tearing up the floor of an upper gallery, when he was commanded by Bennett to go to a certain upright post on the outside of the building, and tie a rope thereto, to enable other persons, who were on the outside, to pull the upright down; that a crossbeam or girder rested in a notch or shoulder of this upright, which was liable to become detached, and to fall by any swaying of that part of the building; that, to reach the place where the rope was to be tied to the upright, the plaintiff was compelled to walk across flooring joists from which the floor had been removed, and, while doing so, to look downward, and be very careful of his footing; that he was unaware that the crossbeam over his head was liable to slip and fall, which fact was known, or ought to have been known, to Bennett; and that, while he was tying the rope, the crossbeam fell because of the swaying of the building, upon which men were pulling from the outside with ropes, and, as it fell, struck the plaintiff, and precipitated him to the ground, a distance of 20 feet or more, which fall produced concussion of the brain, and partially paralyzed the plaintiff, and rendered him wholly unconscious for something over a week, until a surgical operation was performed.

The facts which are pertinent to a decision of the questions above stated are as follows: The plaintiff introduced testimony showing that the wrecking company was an Illinois corporation having its chief office in Chicago, and that it was engaged, on a large scale, in the business of wrecking buildings in various parts of the country, and marketing the materials. The corporation was composed principally, if not entirely, of two brothers by the name of Harris, one of whom, Frank Harris, was termed its treasurer, and had full authority to represent the corporation, and exercise its corporate powers, with reference to the enterprise in which it was engaged, at the time of the accident, in the city of Omaha. He made the contract with the exposition company for the purchase of its buildings, and took possession of them immediately after the exposition closed. The buildings thus bought covered a large tract of land more than 100 acres in extent; some, if not all, of them being very large structures.

The work of dismantling them occupied six months, during which period from 150 to 300 men were employed by the wrecking company. The men so employed worked in gangs numbering from 12 to 20 men each, and each gang had its separate foreman or boss. While the work of tearing down the buildings was under way, the grounds were frequented by many buyers, who went in and out of the buildings, selecting such lumber as they desired, and by wagons and cars. Many persons were also on the ground who were engaged in loading materials upon such vehicles. The work of demolishing such large structures, under the conditions last named, was dangerous, and of a character which required careful supervision by some one to prevent accidents. W. G. Bennett was an experienced bridge builder who had been in the wrecking company's service about eight years at the time of the accident, and had worked for it in various places. He was brought from Chicago to Omaha by the wrecking company to oversee and supervise the work of taking down and removing the exposition buildings. In that capacity he went from place to place on the grounds, in a buggy or on horse back, and exercised control over all the 15 or 20 foremen who were in the company's service, who were working in all parts of the ground. He hired and discharged men as they were needed; directed them where and how to work; and exercised such general control over the grounds, and all of the work that was being done therein, save the sale of old material,—which labor was in charge of another person, by the name of Newman,—that he was regarded by the foremen and the laborers as the superintendent of the work of demolition, and his orders were respected accordingly. When Harris, the treasurer, was absent from Omaha, as he was for some days at a time during the progress of the work, the work did not stop, but proceeded, apparently, under the sole direction of Bennett, precisely as when Harris was in Omaha. Harris does not appear to have given orders and directions to the foremen and men who were actually engaged in demolishing the buildings, except on a few occasions.

The theory of the defendant company was, and it introduced considerable testimony in support of that theory, that Harris was its general superintendent; that Bennett exercised no independent functions as superintendent of the wrecking department; that he was merely the mouthpiece of Harris; that he reported to Harris daily, and received orders with respect to the number of men to be employed, the wages to be paid, the buildings to be wrecked, and the method of doing the work; and that he was in fact only an intermediary, through whom Harris, as superintendent, gave orders to his subordinates.

The power which Bennett actually wielded, for several months before the accident occurred, is certainly some evidence that he had been vested, by the corporation, with the power of superintendence which he visibly exercised. If he was allowed, for a considerable length of time, to exercise an authority which warranted the belief, on the part of those who worked under him, that he was the general superintendent of the work of demolition, as seems to have been the case, and if they were induced by that belief to respect his orders ac-

cordingly, the trial court was not required to accept, as conclusive, the statement of the defendant's witnesses to the effect that he was merely an intermediary through whom Harris, the real superintendent, communicated his orders, and that he occupied the same relation to the wrecking company and to the plaintiff as the other foremen. It was the province of the jury to say, in the light of all the evidence, whether Bennett was or was not the general superintendent of the work of demolition, and whether, in that respect, he exercised independent functions for and in behalf of the corporation. The position which he occupied cannot be said to have been made so entirely certain and clear, by the evidence, as to leave no reasonable ground for doubt or controversy. The trial court directed the jury to determine if "the * * * wrecking company had intrusted Bennett with the immediate supervision and control of the wrecking or tearing down of all the buildings owned by the defendant," and if "Bennett was in fact a general superintendent" of that work. We are of the opinion that there was no error in this direction, and that the testimony, considered as a whole, was of such a nature as entitled the jury to determine that issue.

In the same instruction to which reference was last made, the trial court further charged the jury that if they found that Bennett was the superintendent of the work of demolishing the buildings, and had been intrusted by the wrecking company with the immediate supervision of that work, then he was a vice principal, and his negligence was the negligence of the wrecking company. The verdict shows beyond peradventure that the jury did find that he occupied the position of superintendent of the work of tearing down the buildings, and that he had been intrusted with that duty, so that the further question to be determined is whether one who acts as general superintendent for a corporation in the execution of a work of such a character, and of such dimensions, as that heretofore described, occupies such a position as will render the corporation liable for a negligent order of the superintendent, in consequence of which another of its employes is injured.

It is conceded on all sides that a master may be liable to one of his servants for an injury sustained in consequence of the negligence of another person in his employ, on the ground that the latter person was a vice principal, although his negligent act was not done in the discharge of one of the personal duties of the master. Thus, in the celebrated case of *Railroad v. Baugh*, 149 U. S. 368, 383, 13 Sup. Ct. 914, 37 L. Ed. 772, it was conceded that where the business of the master is large and diversified, and has been separated into departments, the head of one of such departments, if he exercises full control over it, is the personal representative of the master, for whose negligent acts the master may be held liable. The same concession was made in other cases subsequently decided by that court, and in several cases that have since been decided by this court, in which we have endeavored to apply the doctrine of the *Baugh Case*. *Railroad Co. v. Hambly*, 154 U. S. 349, 359, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railroad Co. v. Keegan*, 160 U. S. 259, 264, 16 Sup. Ct. 269, 40 L. Ed. 418; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct.

843, 40 L. Ed. 994; *Coal Co. v. Johnson*, 6 C. C. A. 148, 56 Fed. 810; *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525; *Balch v. Haas*, 20 C. C. A. 151, 156, 73 Fed. 974. It has always been found to be difficult, if not impossible, to describe a department in language which will fit all cases, and furnish a sure test by which to determine, in every instance, if the person in charge of what is claimed to be a department is so in fact, and for that reason is a vice principal, or is merely a fellow servant. Much depends, of course, upon the magnitude and character of the work that is done in that subdivision of the business which one has been appointed to superintend, and upon the further question whether the work is of such a nature as requires intelligent and careful supervision on the part of the master. It is noteworthy that in the *Baugh Case* the supreme court did not, in terms, overrule its prior decision in *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787 (although it has since done so), in so far as the latter case held that the conductor of a railway passenger train, who commands all of its movements, directs when it shall start, at what stations it shall stop, and who has the general management of it, and control over the persons employed thereon, is a vice principal of the company, for whose negligent acts it is responsible. In the *Keegan Case*, 160 U. S. 259, 264, 16 Sup. Ct. 269, 40 L. Ed. 418, the remark made concerning the doctrine of departmental control was, in substance, that while that court recognized that the head of a department might, in a proper case, be regarded as a vice principal, yet that this must not be understood to mean "that each separate piece of work was a separate department." In the *Peterson Case*, *supra*, it was held that the foreman of an extra gang of laborers, consisting of 13 persons, who were engaged in putting in ties, although he had power to hire and discharge men belonging to the extra gang, was not a vice principal. Following these decisions, we held in *Coal Co. v. Johnson*, *supra*, that a foreman in a coal mine, who had control of only 10 or 12 men, with power to direct their work, and was himself under the immediate orders of the pit boss and superintendent of the mine, was not a vice principal; and in *City of Minneapolis v. Lundin*, *supra*, that a foreman of a gang of men engaged in sewer building, who had been appointed by a superintendent of sewer construction, who was himself an appointee of the city engineer, upon whom was devolved, by the city charter, the general superintendence of all public works, was not a vice principal of the city; and in *Balch v. Haas*, *supra*, that a foreman of a gang of men engaged in street construction, when there were two gangs working under different foremen, neither of whom had control over the other was not a vice principal of the contractor by whom, and in pursuance of whose directions, the work of construction was being done, although the particular foreman did have power to hire and discharge men.

Cases supporting the view that under the facts of this case *Bennett* should be regarded as a vice principal might very likely be cited from some of the state courts, particularly decisions coming from those states which have been more liberal and less guarded than the federal courts in applying the doctrine of departmental control; but

a reference to such adjudications would be superfluous, since, as a rule, the cases referred to are not in harmony with the federal adjudications by which this court is bound. We are of opinion that, without departing from what was actually decided in either of the foregoing cases, the defendant company may be held responsible for the order negligently given by Bennett, and that it ought to be held liable on the ground that he was its personal representative as respects that branch of the enterprise which he had been appointed to superintend. The work undertaken by the defendant company was of such proportions that it had been subdivided into at least two departments, namely, into the sales department and the wrecking department, of which latter department Bennett was the head or superintendent, as the jury have found on sufficient evidence. The work which he supervised not only gave him authority and control over many men, including 15 or 20 foremen of gangs, but it was work which required careful supervision by a person who was skilled in the construction and dismantling of large structures, in order that it might be done with ordinary safety. It was clearly the duty of the wrecking company to appoint some one to exercise immediate and constant supervision over the work in hand, and over the unusually large number of men who were employed on the job; and this fact renders it extremely probable that, because of his skill and experience, Bennett had been selected for that purpose, and given control of the work, and that he was not merely an intermediary through whom Harris communicated his orders. We can hardly believe that the corporation would have been willing to allow a work of this magnitude and character to proceed from day to day without having a competent man like Bennett constantly on the ground, armed with authority to give such orders as he deemed necessary, and to meet every emergency as it arose, without consulting any superior. It must be borne in mind that the task undertaken was not like an ordinary business, which ran on well-established lines, and could be controlled by a foreman acting in pursuance of general instructions. It consisted in tearing down rather than building up, and owing to the size of the buildings, and the nature of the work, the laborers so engaged were liable, at any time, to be confronted with unexpected conditions which called for instant and decisive action by one who was well qualified to command. We conclude, therefore, that the person appointed to discharge such responsible duties should be regarded, not merely as a fellow servant, but as a vice principal, and that his employer ought to be held responsible for his negligent acts.

It is furthermore noteworthy that in the present instance the plaintiff was not injured by the negligent act of Bennett after he had descended to the plane of an ordinary laborer, and while he was assisting the plaintiff in doing the ordinary work of a laborer. He was injured in consequence of a negligent order given by Bennett, in the giving of which Bennett was obviously exercising the functions of the master. In the *Baugh Case*, 149 U. S. 368, 389, 13 Sup. Ct. 914, 37 L. Ed. 772, special attention was directed to the fact that in that case "the injury [complained of] was not in consequence of the fireman's obeying any orders of his superior officer," or, as the court fur-

ther say, "it did not result from the mere matter of control," but was due to the engineer's fault in running his engine. In view of this utterance, it might be inferred that, if the injury had been sustained in that case, as it was in this case, in consequence of the exercise of the power of control, the result might have been different. But, be this as it may, for reasons heretofore indicated we think that no error was committed by the learned trial judge in charging the jury that Bennett was a vice principal if he had been appointed to supervise the tearing down of all of the buildings, and was the superintendent of that work.

It is suggested in the brief of counsel for the defendant company, but the point is not argued at length, that the trial court erred in refusing an instruction which presented for the consideration of the jury the defendant's theory of Bennett's relation to that company. We find, however, that this theory was fairly presented to the jury for its consideration by the instructions which were given by the trial court. In one of these instructions the jury were advised, in substance, that if they believed from the evidence that Harris was in charge of the defendant's business at Omaha, in taking down the buildings, and planned the work of taking them down, and directed the methods to be pursued in that behalf, and that Bennett was subject to the orders of Harris in that respect, then Bennett was not a vice principal, even though the jury believed that he visited the various foremen, and gave them directions with respect to the work. This instruction was fully as favorable as the one which was asked by counsel for the defendant company with relation to the same subject-matter; and the refusal of the instruction which was asked cannot be regarded as a material error. The question as to whether Bennett was charged, by the defendant company, with the duty of supervising the dismantling of the buildings, and acted as superintendent of that work, or whether that duty was performed by Harris, seems to have been fairly submitted to the jury for its determination, with sufficient directions from the court concerning that subject.

The only other point which is pressed in argument is that the lower court misdirected the jury with respect to the measure of damages. The jury were instructed on this head, in substance, that, while the Carlisle mortality tables had been introduced in evidence to determine the probable duration of the plaintiff's life, yet that they were not binding upon the jury, but were introduced in evidence merely as an aid to the determination of its probable duration. The jury were then directed, if they found that the plaintiff was permanently injured, to ascertain what effect, if any, such permanent injuries would have upon the plaintiff's powers to earn a livelihood; taking into consideration his ability to perform labor before he was hurt, and his previous earning capacity. The jury were also instructed that it would not be proper to multiply the amount of his annual earnings by his expectancy of life, and reach a result in that way, and that it was the province of the jury to ascertain, by the exercise of a sound judgment, what would be the present cash value of his earnings, considering his expectancy of life, whatever they might believe the probable duration of his life to be. The court then observed (and it is this

passage which is chiefly criticised): "Sometimes it has been said that it is such a sum which, if put at interest, would earn annually the amount of money which the testimony may show he might earn, * * * or did earn;" but, said the court, "this is not conclusive upon the jury; it all finally comes back to your sound judgment and discretion, so far as the loss of time is concerned, to fix the amount, in your sound discretion, governed by the rules which I have stated." The point of the objection seems to be that this instruction advised the jury that the proper method of computing the damages would be to multiply the loss of earnings each year by the plaintiff's expectancy, according to the Carlisle tables, and that this was an erroneous method of calculation. We do not so understand the instruction, nor do we think that it is fairly susceptible of such an interpretation. The jury were plainly told that the Carlisle tables were not binding upon them,—further, that although it had some times been said that the amount of damage was a sum which, if put at interest, would earn annually what he might have realized if unhurt, yet that this was not conclusive, and that after all the jury must exercise their sound judgment and discretion in determining the extent of his loss. Viewing the instruction as a whole, and bearing in mind that the subject to which it relates is one concerning which no very precise directions can be given, we are not able to say that it was materially erroneous. Besides, as the trial court, which had the power to set aside the verdict if the damages were excessive, did not see fit to do so, we infer that it did not regard the verdict which was rendered by the jury as excessive in view of the character of the plaintiff's injuries.

We do not find, in the proceedings below, any error which, in our opinion, will warrant a reversal of the judgment, and it is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). The jury were instructed by the court below to ascertain by the exercise of their judgment what the present cash value of the plaintiff's earnings during his expectancy of life would be to him, and to allow this amount as one element of his damages. The only guide which the court gave them to direct their judgment in finding this amount was contained in these words:

"Sometimes it has been said that it is such a sum which, if put at interest, would earn annually the amount of money which the testimony may show he might earn annually,—the amount of money which the testimony may show he might earn or did earn; but this is not conclusive upon the jury; it all finally comes back to your sound judgment and discretion, so far as the loss of time is concerned, to fix the amount in your sound discretion, governed by the rules which I have stated."

Now the court had stated only one rule for ascertaining the damages for loss of earnings, and that was to allow such an amount as would produce annual interest equal to the amount which the plaintiff would have annually earned. If he would have earned \$420 per annum, and the rate of interest was 6 per cent. per annum, they were to allow him \$7,000, because \$7,000 at 6 per cent. annual interest would produce \$420 per annum. If his expectancy of life was 40

years, he would, under this rule, receive \$420 per annum interest, and at the end of 40 years, when he died, he would have the entire principal, \$7,000, remaining. In other words, he would have at his death just \$7,000 more than he would have had if he had not been injured, and if he had constantly earned his wages, because the annual interest he would have received would equal his earnings, and the \$7,000 would remain unimpaired at his death. No discussion or argument can more clearly demonstrate the error of this instruction than its statement, and this simple illustration of it.

It is said, however, that the court also told the jury that this rule was not conclusive, and that the jury might, so far as the loss of time was concerned, fix the amount of compensation for it in their sound discretion, governed by the rules which the court had given. But this statement was as vicious as the other. The court had given but one rule, and that rule was conclusive. It was conclusively wrong, and the charge of the court that it was not conclusive,—that the jury might follow it or not as they chose,—was as grievous an error as it would have been to have told them that they must follow it; because the verdict is general, and it is impossible to tell whether the jury applied or disregarded the vicious rule which the court submitted to them. There is every probability that they followed it, for the testimony shows that the earnings of the plaintiff never exceeded \$420 per annum, and yet the jury rendered a verdict for \$9,500. However this may be, the charge was erroneous, and the presumption is that error produces prejudice. This record does not show that the erroneous instruction did not guide the jury in their deliberations, and control the amount of their verdict, and such an error is always fatal unless it appears so clear as to be beyond doubt that it did not prejudice, and could not have prejudiced, the complaining party. *Railroad Co. v. Holloway* (C. C. A.) 114 Fed. 458; *Association v. Shryock*, 20 C. C. A. 3, 11, 73 Fed. 774, 781; *Railroad Co. v. McClurg*, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Smith v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Moores v. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; *Railroad v. O'Brien*, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299; *Mexia v. Oliver*, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Peck v. Heurick*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302. On account of this error in the instructions of the court, the judgment below should, in my opinion, be reversed, and a new trial should be ordered.

I am also of the opinion that there was no substantial evidence in the record that W. G. Bennett was the vice principal of the Chicago House Wrecking Company. The evidence seems to me to show without dispute that he was a mere foreman, acting all the time pursuant to the direction of Harris in his work of directing the various gangs of men, and their foremen in the discharge of their duties. It would, however, serve no useful purpose to review the voluminous evidence directed to this question, since the erroneous ruling of the court, to which reference has been directed, leads to the same result.

**ÆTNA LIFE INS. CO. v. BOARD OF COM'RS OF HAMILTON
COUNTY, KAN.**

(Circuit Court of Appeals, Eighth Circuit. August 4, 1902.)

No. 1,854.

1. RES JUDICATA—WHERE PARTIES, DEFENSES, AND ISSUES ARE SAME, CAUSES DIFFERENT, AND FINDING GENERAL.

A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second action between the same parties upon different causes of action in which the same defenses are interposed and the same issues are presented that were made in the earlier action, unless he makes it appear by pleading or proof that some new and determining issue or matter is involved in the second, action that was not, or may not have been, litigated or decided in the first.

2. SAME—IMMATERIAL WHICH OF SEVERAL DEFENSES WAS SUSTAINED IN FIRST ACTION WHERE NO NEW DETERMINING MATTER IS PRESENTED IN SECOND.

Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, matter, or right is involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without re-litigating at least one defense and issue determined in the former action, and overruling the decision upon it there rendered.

3. SAME—WHERE MATERIAL ISSUE IN SECOND ACTION MAY NOT HAVE BEEN LITIGATED OR DECIDED IN FIRST, IT IS NOT RES ADJUDICATA.

Where the record is such that there is or may be a material issue or matter that may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel, unless by pleading or proof the party asserting it establishes the fact that the issue, right, or matter in question was actually and necessarily litigated and determined in the former action.

4. SAME—JUDGMENT ON DIFFERENT CAUSE OF ACTION.

When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters, which might have been, but were not, litigated or decided.

5. SAME—JUDGMENT ON SAME CAUSE OF ACTION.

When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former action is conclusive in the latter as to every question which was or might have been presented and determined in the former.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

On July 20, 1897, the Ætina Life Insurance Company, a corporation, brought this action upon coupons, some of which were cut from 20 bonds dated May 7, 1877, and others from 40 bonds dated May 16, 1883. The plaintiff alleged in its petition that these bonds and coupons had been issued by the defendant, the board of county commissioners of the county of Hamilton, state of Kansas; that the plaintiff had purchased them for value, before maturity; that the coupons in suit were overdue; that demand of payment had been made, and that they had not been paid. The answer of the de-

¶ 5. See Judgment, vol. 30, Cent. Dig. § 1241.

fendant consisted of a denial that the bonds and coupons were ever issued by it; a denial that the plaintiff ever bought them; an assertion that these bonds and coupons were executed and issued by parties who were not officers of the county of Hamilton, and who had no authority to issue them on its behalf; that the county never received any consideration therefor; and that the plaintiff was estopped from maintaining this action, because in a prior suit between the same parties upon other coupons cut from the same bonds the same defenses had been interposed and the same issues had been presented which were interposed and presented in this case, and those defenses and issues had been tried, and a judgment had been rendered therein for the defendant, and had been subsequently affirmed by this court. *Ætna Life Ins. Co. v. Hamilton Co.*, 25 C. C. A. 94, 79 Fed. 575. To this answer the plaintiff replied that it was true that in an action between these parties on other coupons cut from the same bonds from which those involved in this action were taken the same defenses were interposed and the same issues were made which were interposed and made in this suit; that evidence was introduced in support of all the allegations of the petition; that a trial was had; that the court found for the defendant, and rendered a judgment in its favor, which was affirmed in this court. But it denied that all the issues and defenses in the former action were litigated and determined, and alleged that the court made no specific finding of facts, but that the judgment in favor of the defendant was rendered upon a general finding in its favor; so that it is impossible to determine which of the various defenses pleaded by the county in that action were sustained. The reply also contains an allegation that the county clerk of Hamilton county made a written certificate to the effect that the actual indebtedness of the county, including that evidenced by the bonds in question, did not exceed \$80,000; that he did this for the purpose of persuading the plaintiff to buy the bonds; that the plaintiff was thereby induced to purchase them; and that these facts estop the county from denying their validity. In this state of the case the court below granted a motion for judgment on the pleadings in favor of the defendant upon the ground that the right of the insurance company to recover upon the bonds or the coupons was rendered *res adjudicata* by the former judgment to the effect that they were void. The writ of error challenges this decision.

Frank P. Lindsay, Oliver J. Bailey, and James H. Sedgwick, for plaintiff in error.

C. N. Sterry and George Getty, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defenses interposed and the issues raised in this case are identical with those presented in the former action, in which judgment was rendered for the defendant upon coupons cut from the same bonds as were those in this suit. The only new allegation in this action is that the plaintiff was induced to buy the bonds and coupons by the certificate of the county clerk that the indebtedness of the county, including that evidenced by the bonds in question, did not exceed \$80,000; and this averment is immaterial, because the county clerk had no statutory or other authority to make such a certificate for the county. *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 282, 30 C. C. A. 38, 48, 49 L. R. A. 534. The fact that the issues of demand and refusal of payment in the two actions differ because they must have been made at different times, since the coupons in this action were not due until after the former action was commenced, is

of no consequence, because a demand and refusal were not essential to the maintenance of either action, and the legal presumption is that the former judgment was based on a sufficient defense, and not upon an immaterial issue. *Speer v. Board*, 88 Fed. 749, 753, 754, 32 C. C. A. 101, 105; *Hughes Co. v. Livingston*, 43 C. C. A. 541, 556, 104 Fed. 306, 321. The only real question in the case, therefore, is this: Is a former judgment upon a general finding in favor of the defendant which does not disclose which one of several defenses was sustained, an estoppel of the plaintiff therein from maintaining a second action upon different causes of action against the same defendant in which the same defenses are interposed and the same issues are presented that were made in the earlier action? Counsel for the plaintiff argue with great force and persuasiveness that this question must be answered in the negative. They plant themselves upon the declaration of the supreme court in *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214, that "it is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." They cite in support of their contention *Cromwell v. Sac. Co.*, 94 U. S. 351, 24 L. Ed. 195; *Board v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270; *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Railway Co. v. Leathe*, 84 Fed. 103, 28 C. C. A. 279; and *Bank v. Williams (Wash.)* 63 Pac. 511,—and they insist that, because the general finding and judgment in the first action do not indicate which one of the several defenses pleaded in both actions was litigated, nor upon which one the judgment was based, that judgment cannot constitute an estoppel upon any one of these defenses or issues, and that every defense there presented may be again litigated in this action, unless the defendant proves by extrinsic evidence which one or more of them were actually litigated and determined in the former suit. The propositions that there is nothing in the record in the former action nor in the pleadings in this action that discloses which one of the several defenses interposed in both actions was sustained in the earlier one, and that, if it is essential to the estoppel in this case to determine this fact, this judgment cannot stand, must be conceded. But how is the determination of the question whether one or another of these defenses was sustained in the earlier action essential to the establishment of the estoppel? The pleadings upon which this judg-

ment stands show that the same issues are made and that the same defenses are interposed here that were made and interposed in the former action. The judgment in the earlier action is conclusive evidence that at least one of these defenses was sustained, and that at least one of these issues was determined in favor of the defendant. By that judgment the plaintiff is estopped from again litigating that defense or that issue, and an estoppel from litigating one of many defenses or issues that are equally fatal to his case would seem to be as conclusive and as fatal as an estoppel from litigating them all. The quotation from *Russell v. Place*, and the general declarations of the courts in the other cases cited, must be read in the light of the facts then under consideration by those courts. In that class of cases in which the second action presents a material issue or matter which may not have been raised, litigated, and decided in the former action it is undoubtedly essential to the estoppel to show what issue was litigated and decided and what question was determined in the earlier case, in order to determine whether or not the issue there determined embraced the matter in litigation in the second action. But where, as in the case at bar, the pleadings conclusively show that all the defenses made and all the issues joined are identical in the two actions, it is difficult to perceive how it can make any difference to which one of the defenses or issues the estoppel applies, because the mere fact that it does apply to one defense and to one issue is as fatal to the maintenance of the second action as it would be if it applied to all. When the opinions which have been cited by counsel for the plaintiff are carefully read, analyzed, and considered, they will not be found to be inconsistent with this distinction. The decisions which they cite all fall within the first class of cases to which we have adverted and fail to rule the question which is presented in the case in hand.

In *Russell v. Place*, 94 U. S. 606, 609, 24 L. Ed. 214, the question was whether a judgment at law against a defendant for damages for the infringement of a patent which contained two claims estopped the defendant in a subsequent suit against it for an injunction against the infringement from litigating the issues of the novelty, the prior public use, and the infringement of the invention, which had been pleaded in the action at law. The court answered this question in the negative, because there were two claims to the patent, one of which might be valid and the other void, and the judgment at law did not disclose whether it rested on a finding that both or only one of the claims was infringed, and, if but one, it did not show which one. In other words, the judgment in the action at law might have been founded upon the determination of an issue which would not have entitled the complainant to an injunction restraining the defendant from the use of both of the inventions described in the two claims of the patent.

In *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550, the action was brought upon a contract to pay three-fourths of the fuel saved by the use of Sickles' cut-off on a steamboat for a certain length of time. The plaintiff, for the purpose of estopping the defendant from questioning the validity of this contract, offered in evidence the record of a former judgment in an action of like character for the fuel saved during an earlier term, together with the testimony of witnesses that the con-

tract involved in the earlier action was the same as that upon which the second action was founded. The supreme court decided that in this state of the case it was competent for the defendant to introduce the testimony of witnesses to prove that the contract involved in the former action was in writing, while that in question in the latter suit was a parol agreement, and therefore void under the statute of frauds. In other words, the defendant was permitted to show that the former judgment was not an estoppel, because it had a new defense in the second action, which was not pleaded, tried, or ruled upon in the former case.

In *Cromwell v. Sac Co.*, 94 U. S. 351, 359, 24 L. Ed. 195, the findings in the former action upon which the judgment for the defendant was based disclosed the fact that the bonds and the coupons that had been cut from them upon which the action was based were fraudulently issued, and they contained no finding that the holder of the bonds paid value for them. The supreme court held that a judgment upon this finding did not estop the holder of the bonds from maintaining a second action on other coupons taken from bonds of the same issue upon proof that he had purchased and paid value for them in good faith in reliance upon the recitals which they contained, before their maturity. In other words, it held that the earlier judgment did not estop the plaintiff from maintaining a second action upon different causes of action, and upon a state of facts which presented an issue of law and of fact that was not raised or litigated in the earlier suit. To the same effect is the decision in *Board v. Sutliff*, 97 Fed. 270, 274, 38 C. C. A. 167, 171.

In *Nesbit v. Independent Dist.*, 144 U. S. 610, 619, 12 Sup. Ct. 746, 36 L. Ed. 562, the converse of this proposition is maintained. It is there held that the litigation and defeat, in a prior action upon coupons by a purchaser for value without notice, of the defense that the debt of the district exceeded its constitutional limit when the bonds were issued did not estop the district in a subsequent action upon the bonds themselves from maintaining the defense that the debt was in excess of the constitutional limit against the same plaintiff who was there proved to have received notice of this fact before he bought the bonds.

The case of *Railway Co. v. Leathe*, 84 Fed. 103, 105, 28 C. C. A. 279-281, holds only that, where one of several defenses to a prior suit was that the defendant had assumed and was liable for the debts of a railroad company, and that suit was dismissed, the judgment of dismissal did not estop the defendant from litigating the question of his liability in a subsequent action against him, for the reason that the record of the former suit did not show that all the defenses there pleaded were sustained, and hence did not establish the fact that the court had decided that the defendant had assumed and had become liable for the debt of the railroad company.

In *Bank v. Williams* (Wash.) 63 Pac. 511, the holder of bonds filed a petition for a mandate to compel the county commissioners of Pacific county and the school district to levy a tax to pay the interest upon the bonds of the district. The school district answered (1) that its debt was in excess of its constitutional limit when the bonds were

issued; (2) that the bonds were fraudulently issued; (3) that since the issue of the bonds a large portion of the district had been cut off and made a part of other districts; and (4) that the moneys then in the hands of the county treasurer were not applicable to the payment of the interest on the bonds. The petitioner demurred to this answer. The court overruled the demurrer, and dismissed the petition. Afterwards the plaintiff brought an action against the same defendants upon the coupons cut from these bonds, and the defendants answered that the plaintiff was estopped from maintaining the second action by the record and judgment in the first. To this the plaintiff replied that the judgment in the former action was rendered on the sole ground that none of the moneys then in the hands of the county treasurer were applicable to the payment of the bonds, and that no other defense or issue was decided or determined in that case. He established the truth of the averments of this reply by parol testimony. The court held that in this state of facts the former judgment did not estop the plaintiff from litigating the three defenses which were not tried or determined in the earlier action, and sustained the judgment below for the plaintiff.

This brief analysis of the controlling facts of the cases upon which the plaintiff places its chief reliance discloses the fact that in every one of them the record was such that the former judgment either was or might have been rendered without a litigation and decision of the crucial and determinative issue presented in the second action. In every case cited the second action presented some controlling issue, which either was not or might not have been litigated and decided in the former suit. It is not so in the case in hand. This case is presented upon the petition, answer, and reply. There is no averment or statement in any of these pleadings that any issue or defense, any right, question, matter, or fact, that is or can be determinative of this action, was not raised, presented, litigated, and decided in the former suit. On the other hand, these pleadings admit that the same issues have been raised, that the same defenses have been interposed in both actions, that in the former action evidence was introduced in support of all the allegations of the petition, that the earlier action was duly tried, and that a judgment was rendered for defendant upon due consideration. It is true that the defendant interposed several defenses to that action, and that it is impossible to determine from the pleadings which one was sustained. Nor is that fact material. One of the defenses which the county has presented in both of the actions was necessarily sustained in the earlier suit, and all the bonds from which the coupons in both actions were taken and the coupons themselves were held to be void in view of that defense. The doctrine of *res adjudicata* is that the same parties are conclusively estopped from again litigating any issue, question, right, or matter which they have once lawfully raised and litigated, and which the court has once decided. This second action upon coupons cut from the same bonds as those involved in the first action cannot be sustained without a second litigation and an overruling of the very defense which the court sustained in the former action. Concede that all the other issues and defenses may be tried and decided in this suit without again litigating any issue presented before, yet there remains that one defense which was sustained

in the former action which was fatal to the plaintiff's case then, and which is fatal to it now, unless the plaintiff can again in this action raise the issue which that defense presents, and can here obtain a decision and judgment upon it which shall be the converse of those which were rendered in the former action. This it may not do. The very purpose of the establishment and maintenance of civil courts is to finally determine controversies between the parties who present them. If the decisions of these courts upon questions lawfully submitted to and tried by them were not conclusive, if the courts left the questions which they decided open to repeated litigation and decision, their usefulness would immediately cease, and litigants would no longer invoke their aid to protect their rights or redress their wrongs. It is essential to the peace and repose—nay, it is essential to the very existence—of civilized society that the decisions and judgments of the courts invoked for the protection of the rights of person and of property should be final and conclusive between the parties and their privies upon every question of fact and of law which they properly put in issue and the courts actually try and decide. The maintenance and application of this salutary principle have evoked these established rules for the administration of estoppel by judgment:

Where the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.

When the second suit is upon a different cause of action, but between the same parties, as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been, but were not, litigated or decided. *Linton v. Insurance Co.*, 104 Fed. 584, 587, 44 C. C. A. 54, 57; *Commissioners v. Platt*, 79 Fed. 567, 571, 25 C. C. A. 87, 91, 49 U. S. App. 216, 223; *Board v. Sutliff*, 38 C. C. A. 167, 171, 97 Fed. 270, 274; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690, 5 C. C. A. 249.

Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action. *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214.

A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second suit against the same defendant upon different causes of action in which the same defenses are interposed and the same issues are presented that were made in the earlier action, unless the party denying the estoppel makes it appear by pleading or proof that some

new and material issue, question, or matter is involved in the second action, which was not or may not have been litigated or decided in the first action. *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 236, 8 Sup. Ct. 495, 31 L. Ed. 411; *Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 46 C. C. A. 639, 644, 107 Fed. 781, 786, 787.

Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, question, or matter is or may be involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without relitigating at least one defense and issue determined in the former action, and overruling the decision upon that defense which was there rendered.

The pleadings in this case leave no avenue of escape from the conclusion that at least one of the defenses pleaded in this action was actually and necessarily litigated and sustained in the former action between these parties, wherein there was a judgment for the defendant. That defense proved fatal to the validity of the bonds and coupons in that earlier action. In the absence of pleading or proof that this action presents some determining issue which might not have been litigated and decided in the former action, the defense which was there sustained is as conclusively established in this action by the judgment in that action, and is as fatal here as it was in the earlier suit.

The judgment below must be affirmed, and it is so ordered.

LILIENTHAL et al. v. McCORMICK et al.

McCORMICK et al. v. LILIENTHAL et al.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1902.)

No. 688.

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—HOW DETERMINED.

In a suit to enforce a lien claimed to have been given by a contract, to secure advances made thereunder, and also damages for its breach, the aggregate amount of such advances and damages claimed in good faith constitutes the amount in controversy for the purpose of the jurisdiction of a federal court, and it is immaterial to such question that the contract as construed by the court gave a lien only for the advances, which were less than the jurisdictional amount.

2. SAME—DIVERSITY OF CITIZENSHIP—PARTIES TO CROSS BILLS.

Where a federal court obtains jurisdiction in a suit to enforce a lien on property, by reason of the diversity of citizenship between the complainants and defendants, such jurisdiction extends to the determination of the rights of defendants or interveners, who also assert liens on the same property, by cross bills against other of the defendants, which give them the right to contest complainants' claim, although there is no di-

¶ 1. Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

¶ 2. Supplementary and ancillary proceedings and relief in federal courts, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 195.

versity of citizenship between the parties to such cross bills, and notwithstanding the fact that the cross bills make it necessary to bring in new parties.

3. TENDER—SUFFICIENCY—EVIDENCE TO SUPPORT.

To support a plea of tender, it must be clearly shown that the tender was fairly made, that it was absolute and unconditional, and that it covered the full amount then due.

4. APPEAL—REVIEW—FINDINGS OF FACT.

Findings of fact made on conflicting evidence will not be disturbed on appeal unless it clearly appears that they are opposed to the weight of the evidence, or some obvious error or mistake is clearly shown.

5. CHATTEL MORTGAGE—CONSTRUCTION OF CONTRACT—CLAIMS SECURED.

A contract for the sale of hops to be thereafter raised provided that the purchaser should advance a part of the price when the time for picking the crop arrived, and that, in case the hops should not be delivered in accordance with the contract, such advances should be repaid on demand, with interest. It further provided that it should stand as a chattel mortgage on the entire crop of the sellers, "to secure the payment of said sums advanced, and interest, and the performance of all the provisions hereof"; and that, in case the hops should be sold thereunder, the purchaser should retain, from the proceeds, "said sums and interest and all costs," and account to the sellers for the remainder. *Held*, that such provisions could not be construed as giving the purchaser a lien for damages recoverable for the sellers' breach of the contract.

6. EQUITY JURISDICTION—LEGAL DEMAND—RIGHT TO JURY TRIAL.

A cause of action for damages for breach of a contract cannot be tried, in a suit in equity in a federal court to foreclose the contract, as a chattel mortgage securing advances made thereunder; the claim for damages being separable from that for a lien, and a legal demand upon which defendants were entitled to a jury trial unless they waived the right.

7. ATTORNEYS' FEES—ENFORCEMENT OF STIPULATION IN CONTRACT—DISCRETION OF COURT.

Where a chattel mortgage provided for attorneys' fees in case of foreclosure, but before the commencement of a suit to foreclose the same defendants offered, and subsequently paid into court, a sum nearly equal to the amount recovered, and the subsequent litigation was principally with respect to a further claim of the mortgagee as to which he was unsuccessful, the court properly refused to allow the complainants attorneys' fees.

Appeals from the Circuit Court of the United States for the District of Oregon.

For opinion below, see 86 Fed. 100.

The controversy between the parties in this case depends upon the construction to be given to the terms of the following agreement:

"Articles of agreement made this 12th day of September, one thousand eight hundred and ninety-six, between Chas. McCormick, Wong Him, Jim Lip, and Ah Tong, all of Woodburn, county of Marion, state of Oregon, parties of the first part, and Lillienthal Brothers, of the city, county, and state of New York, parties of the second part.

"The parties of the first part have bargained and sold, and by these presents do grant, sell, and convey, unto the said parties of the second part, thirty [30,000] thousand pounds [net weight] of their crop of hops, the growth of the year 1897, grown on the ranch of Chas. McCormick in Marion county, state of Oregon, of which farm 70 acres are set out in hops, and are now being by them cultivated, and which are to be harvested during the year one thousand eight hundred and ninety-seven, to have and to hold the same unto said Lillienthal Brothers, their executors, administrators, or assigns, forever. The said parties of the first part hereby agree to complete the cultivation of the said hop crop, and to harvest, cure, and bale the same in good, first-class, and workmanlike manner, and immediately thereafter, and

not later than Nov. 10th, 1897, to deliver the 30,000 pounds of the same in bales of about one hundred and eighty-five pounds each, in new 24-oz. bale cloth (seven pounds tare per bale to be allowed), at railroad whse. at Woodburn. Said hops, when delivered, are to be not the product of a first year's planting, and not affected by spraying or mold, and are to be of choice quality, and in sound condition, good color, fully matured, cleanly picked, free from vermin damage, properly dried and cured, and in good merchantable order and condition, and shall be delivered in lots of not less than — lot to the said parties of the second part, their agents, executors, administrators, or assigns; and the said parties of the first part further agree that this contract has preference, both as to quality and quantity, over all other contracts made as to said growth of hops, by said parties of the first part, with any other purchaser; and it is understood and agreed that said parties of the second part, or their agent, may, at any time after the execution of this agreement, have full and free access to and upon said described premises. That said parties of the first part further agree, at least ten days before baling said hops, that they will notify said parties of the second part, or their agents, in writing, of the time at which they will be in readiness to deliver said hops; which said notice shall be personally served upon said parties of the second part or their agent. It is further agreed that when said hops are delivered they may be inspected by the parties of the second part, or by an agent selected by said parties of the second part at the time of the delivery of any lot thereof, or at any time thereafter, within ten days after delivery of the entire quantity hereby bargained and sold shall have been completed, and should said hops, or any part thereof, not be delivered in the condition herein agreed upon according to the judgment of said parties of the second part, or their said agent, the said parties of the first part shall, upon demand, repay to said parties of the second part such sums of money as they may have advanced on the said crop, with interest at the rate of ten per cent. per annum from the date when advanced, and this instrument shall be a chattel mortgage on the entire crop of hops raised on the above-described land to secure the payment of said sums advanced and interest, and the performance of all the provisions hereof; and, if not paid upon demand, the said parties of the second part may forthwith, and without further notice, take possession of said hops, and sell the same, with or without notice to the parties of the first part, upon ten days' advertisement as herein provided, and out of the proceeds retain said sums and interest and all costs, including attorneys' fees, rendering the surplus, if any, to the parties of the first part. Such advertisement shall be by posting a notice describing the property to be sold, stating the time and place of sale, the amount to be made at such sale, and that the sale is made under the provisions of this agreement, and shall be posted in three public places, in the county where the sale is to take place, for ten days immediately preceding the date of sale.

"And, in consideration of the foregoing, said parties of the second part do hereby agree to pay, to said parties of the first part, the sum of seven cents per pound for each pound of hops delivered and accepted on the conditions stipulated for; that is to say, one dollar paid upon the signing of these presents, the receipt whereof by said parties of the first part is hereby acknowledged; three and one-half cents per pound for each pound of hops hereby bargained to be paid at the time of picking said hops, upon ten days' notice from said parties of the first part; and the balance, if any there may then be due, after delivery of the entire amount bargained and sold to, and acceptance by, said parties of the second part, at the time and place and in the condition as hereinbefore provided. It is further agreed that all advances made as hereinbefore provided shall bear interest at the rate of ten per cent. per annum up to the time of acceptance of all of said hops by said parties of the second part, and that the parties of the second part, through their agents, shall have the right to determine at picking time, when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition; and, if such agents of the parties of the second part shall determine that the growing crop is not in such condition, then said parties of the second part shall be released from any obligations to furnish picking money as called for in this contract. The

party of the first part shall not be liable [except to repay advances] for any shortage on delivery due to causes beyond his control. It is further agreed that the said parties of the second part may, at their option, keep the said hops insured against all risks by fire, for their full value,—that is to say, for an amount not less than the value herein agreed to be paid therefor,—at the expense of the said party of the first part; such insurance to operate from the time said hops are picked, and to be in the name and for the benefit of said parties of the second part; and, in case of loss of said hops by fire before delivery and acceptance, the party of the first part shall immediately repay, to said parties of the second part, all the moneys heretofore advanced under this contract, with interest at the rate of ten per cent. per annum.

"In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"Charles McCormick.

"Ah [Chinese signature] Tong.

"Wong Him.

"Jim [Chinese signature] Lip.

"Lillenthal Bros.

"H. J. Ottenheimer."

The court, after disposing of certain exceptions to the answer of defendants, and of divers demurrers and pleas of the respective parties herein, upon the final hearing found and decreed, among other things:

"That the complainant Albert Lillenthal is a citizen of the state of New York, and a resident and inhabitant of the said state, and the complainant Philip N. Lillenthal is a citizen of the state of California, and a resident and inhabitant of said state, and the said Albert Lillenthal and the said Philip N. Lillenthal, at the times mentioned in this bill of complaint, have been partners in business under the firm name of Lillenthal Brothers. That the defendant Charles McCormick is a citizen of the state of Oregon, and a resident and inhabitant of said state; that the defendant Wong Him is a citizen of the empire of China, and a resident and inhabitant at this time of the state of Oregon; that the defendant Jim Lip is a citizen of the empire of China, and at this time a resident and inhabitant of the state of Oregon; that the defendant Ah Tong is a citizen of the empire of China, and at this time a resident and inhabitant of the state of Oregon; and the Bank of Woodburn is a corporation organized under the laws of the state of Oregon, and doing business in the said state, having its principal place of business at the town of Woodburn in the said state of Oregon, and for the purposes of the jurisdiction of this court is a citizen and inhabitant of the said state of Oregon. That the amount involved in this controversy, exclusive of interest and costs, is in excess of two thousand dollars." That, under the provisions of the contract, "complainants advanced and paid to the defendants Charles McCormick, Wong Him, Jim Lip, and Ah Tong, pursuant to the terms of the contract above mentioned, on the 12th day of September, 1896, the sum of one dollar, and on the 30th day of August, 1897, the sum of one thousand and fifty (\$1,050.00) dollars, and have been ready and willing to accept and receive all the property set forth and described in the said contract, of the kind and character therein specified, and at the time and place therein mentioned for the delivery of the same, and to pay therefor the purchase price of the same in pursuance of the said contract. That the defendants Charles McCormick, Ah Tong, Wong Him, and Jim Lip have failed and refused to deliver unto the complainants Lillenthal Brothers the property which by the contract they agreed to deliver, and have given notice to the said complainants that they have abrogated and annulled the said contract in writing, and would refuse to comply with the conditions thereof, and have refused and continued to refuse to tender or to deliver to the complainants the hops mentioned and described in the said contract; that the thirty thousand (30,000) pounds of hops of the kind and quality mentioned and specified in the said contract were reasonably worth, at the place and time therein appointed for the delivery of the same, the sum of four thousand five hundred (\$4,500) dollars. That in the year 1897 there

was raised upon the premises described in the said agreement more than eighty thousand (80,000) pounds of hops. That the contract above mentioned constitutes a mortgage upon all the hops raised upon the said premises, but only as security for the repayment of the sums of money advanced by the said complainants upon the said hop crop, with interest at the rate of ten per cent. per annum from the date of such advances, and cannot be enforced as a lien to secure damages for the nonfulfillment of the contract. That at the time of filing their answer in this cause, to wit, on the 11th day of December, 1897, the defendants Charles McCormick, Wong Him, Jim Lip, and Ah Tong brought into court, and offered and tendered to the complainants Lillienthal Brothers, and deposited with the clerk of this court, the sum of one thousand and sixty-three (\$1,063.00) dollars for the benefit of the complainants; that, at the time such tender was made, there was due to the complainants from the said defendants the sum of one thousand and eighty-one dollars, and the complainants Lillienthal Brothers had also expended in the costs and disbursements of this suit the sum of ——— dollars; that said tender, so made by the said defendants to the said complainants, is not a full and sufficient defense to the matters set forth in the bill of complaint."

On February 23, 1900, the defendants other than the Bank of Woodburn moved the court to dismiss the bill of complaint and certain cross bills "upon the ground that it appears from the nature of the cause as stated in the bill of complaint of said complainants, and in the pleadings, that said court could not legally give, make, or render a decree herein for an amount necessary to confer jurisdiction upon this court to entertain the said suit, and that the amount really in dispute between the parties is not sufficient to confer jurisdiction upon this court, * * * and because the Bank of Woodburn, cross-complainant therein, and Chas. McCormick, one of the defendants therein, are citizens of and residents and inhabitants in the state of Oregon; and upon the further ground that the defendant Wong Gee, named in the above-entitled cause by way of cross bill, was not a defendant in or a party to the suit commenced by the bill of complaint filed by the defendants Lillienthal Bros. against Chas. McCormick, Wong Him, Jim Lip, and Ah Tong, and the cross-complainant Bank of Woodburn."

On October 12, 1897, the defendants, other than the Bank of Woodburn, served on complainants an offer in writing as follows:

"Woodburn, Oregon, October 12, 1897. To Lillienthal Brothers, and to H. J. Ottenheimer, your agent: You will each of you please take notice that the hops under our contract with you bearing date September 13, 1896, to wit, thirty thousand pounds, the growth of the year 1897, was delivered at the railroad warehouse at Woodburn, Oregon, according to contract, and which said hops, * * * were inspected and accepted by you, and which said hops you on October 10, 1897, and on October 11, 1897, each day refused, and ever since have refused and neglected, to take or pay for, or comply with your said contract; and, you having failed and refused to comply with your said contract, we therefore elect to consider said contract to be abrogated and annulled, and of no force or effect, and we do hereby tender you the sum of \$1,063.00 as the money advanced and paid by you under said contract, including interest thereon."

The record shows that this letter was sent from Gervais, Ore., by registered mail, and addressed to H. J. Ottenheimer at Salem, Ore.; that it was mailed about 4 o'clock in the afternoon of the day it bears date, and was received by Mr. Ottenheimer four or five days afterwards.

Cox, Cotton, Teal & Minor, for appellants Lillienthal Bros.

John H. Woodward, for appellees McCormick and others.

Fenton, Bronaugh & Muir, for appellee Bank of Woodburn.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

1. This suit was brought by Lilienthal Bros., against McCormick et al., upon the contract set out in the foregoing statement, to enjoin them from removing the hops grown upon the premises of McCormick during the year 1897, and from selling or disposing of said hops; for the appointment of a receiver to take possession of and store and take care of the same; that the contract between the parties be declared a lien upon the hops in favor of complainants to the extent of the money advanced by them to defendants, with interest, and for all damages sustained by reason of the failure of the defendants to carry out and perform their contract; and that said sums be made a specific charge upon the property, and upon the proceeds of the sale of the hops, and for all costs and disbursements, etc. The Bank of Woodburn is made a party defendant in the suit under an allegation that it claims some interest in the hops by virtue of certain contracts with the different defendants, McCormick et al., which were executed and delivered to secure the payment of several different sums of money. The Bank of Woodburn filed several cross bills setting up its claims in the premises. In addition to the findings set forth in the statement of facts, the court found divers findings as to the amounts loaned and advanced to the different defendants by the Bank of Woodburn, and the different mortgages given to the bank to secure the payment of these loans, and the amount still due, and

—"That the said sums are secured by the several mortgages given and executed to secure the respective notes as hereinbefore alleged, and constitute liens upon the property described in the several mortgages as set forth in the several cross bills of complaint filed by the cross-complainant, the Bank of Woodburn, against the several defendants as hereinbefore set forth, and should be paid out of the property mortgaged or the proceeds of the same; that the mortgage in favor of the complainants * * * Lilienthal Brothers is a first lien upon all of the property described in the bill of complaint, and in the several cross bills of complaint, and particularly described as all hops grown in the year 1897, and harvested from the farm of Charles McCormick in Marion county, Oregon, the same being about eighty thousand (80,000) pounds of hops. That the said complainants are entitled to a decree foreclosing the lien of their mortgage upon the said property, and to recover the sum of one thousand and eighty-one dollars, with interest from the 11th day of December, 1897, at the rate of ten per cent. per annum, and their costs and disbursements taxed at one hundred and fifty-five and eighty-one-hundredths dollars, less the sum of one thousand and sixty-three dollars, with interest on the same from the 11th day of December, 1897, at the rate of ten per cent. per annum; which sum was paid into this court on the last-mentioned date, to be applied upon the indebtedness due from the defendants to the complainants; but are not entitled to recover any sum as attorneys' fees in this cause; and that the lien of the complainants upon the property aforesaid is superior to the lien or liens of the cross-complainant the Bank of Woodburn upon said property, or any thereof;"

—that, subject to the lien of complainants, the Bank of Woodburn is entitled to a judgment to certain named sums, and foreclosure of its mortgage, and entered its decree accordingly. From the decree, the complainants take an appeal, and in support thereof contend that the circuit court erred in its construction of the agreement of September 12, 1896, in this: that, while it construed the agreement to be a

mortgage upon the entire hop crop, it limited the lien thereof to the amount advanced by complainants, with interest, and refused to allow complainants any sum as attorneys' fees. The defendants, other than the Bank of Woodburn, appeal from the decree, and make 11 specific assignments of error, which may be generalized as follows: That the court had no jurisdiction of the subject-matter of the controversy, either in amount claimed or as to the citizenship of the parties; and, further, because it appears that the complainants in the cross bills and one of the defendants are citizens and residents of the same state, and that the property upon which the original complainants claimed a lien was never in the custody of the court; that the tender made by defendants to complainants was valid; that no default was made by the defendants in any of the terms of the contract of September 12, 1896; that the Bank of Woodburn had a complete remedy in the state court; that neither the complainants nor the Bank of Woodburn are entitled to any relief whatever. The various objections to the jurisdiction of the court are not, in our opinion, well taken.

2. The suit was brought upon the agreement set forth in the statement of facts, and the complaint shows such a diversity of citizenship between the parties to the agreement or contract as entitled the complainants to bring the suit in the circuit court of the United States. The court obtained jurisdiction of the original suit by virtue of the diversity of the citizenship of the parties. The amount in controversy exceeded \$2,000, exclusive of interest and costs, and this amount was sufficient to give the court jurisdiction of the cause. The suit was brought, not only to recover the amount of money advanced by complainants, viz., \$1,051, but also for damages in the sum of \$2,400, making a total of \$3,451. It makes no difference, in so far as the question of jurisdiction is concerned, that the court in its decree held that the contract only afforded a security for the amount advanced, and could not be construed as giving a lien for the damages. It is the amount claimed in the bill of complaint, and not the amount recovered, that furnishes the test of jurisdiction. As was said by the court in *Peeler v. Lathrop*, 1 C. C. A. 93, 99, 48 Fed. 780, 786: "The amount in dispute, or matter in controversy, which determines the jurisdiction of the circuit courts in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith." *Gordon v. Longest*, 16 Pet. 97, 104, 10 L. Ed. 900. 4 *Rose's Notes on U. S. Rep.* 147, and authorities there cited; *Lee v. Watson*, 1 Wall. 337, 339, 17 L. Ed. 557; *Hilton v. Dickinson*, 108 U. S. 165, 174, 2 Sup. Ct. 424, 27 L. Ed. 688; *Barry v. Edmunds*, 116 U. S. 550, 561, 6 Sup. Ct. 501, 29 L. Ed. 729. The record shows that the amount sued for was claimed by complainants in good faith. The court having jurisdiction of the case, it became its duty to construe the contract, and determine therefrom whether the complainants in such foreclosure suit were entitled to recover any damages which, under the terms of the contract, could be enforced as a mortgage lien upon the property. It is true that, if no suit had been brought by the complainants, the Bank of Woodburn could have brought suit in the state court to enforce its liens, and obtain full relief. But it was properly made a defendant by complainants, and, having been brought into the suit in the United

States court, it had the right to assert its claims, and seek affirmative relief by filing a cross bill for the foreclosure of its liens; and it had the right, in such suit, to litigate the question whether the complainants had any lien against the property for damages. It was the proper court to deal with the subject-matter of the litigation. It had jurisdiction to determine the controversy between complainants and the Bank of Woodburn as to the priority of their respective liens upon the property. In this case, the Bank of Woodburn was made a party defendant in order that its rights might be heard and determined. If it had not been made a party, it would have had the right to intervene. The citizenship of the Bank of Woodburn, and of Wong Gee, who was not a party to the original bill, did not deprive the court of its jurisdiction. In *Osborne & Co. v. Barge* (C. C.) 30 Fed. 805, 806, the court said:

"The jurisdiction of the cause of action presented by the original bill, and of the parties thereto, cannot be and is not questioned. Having acquired full and complete jurisdiction of the original cause, and the parties thereto, the court cannot be deprived thereof because another party obtains leave to intervene for the assertion of a right to the property which is the subject of the proceeding. If it be necessary for the protection of the rights of a third party that he be heard in the cause pending, he may be permitted to intervene even though the court would not have, by reason of his being a citizen of the same state with complainant, jurisdiction over an original proceeding between the same parties. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888."

See, also, the opinion of Mr. Justice Harlan in *Jesup v. Railroad Co.* (C. C.) 43 Fed. 483, 495, 496, and authorities there cited. First Nat. Bank v. Salem Capital Flour Mills Co. (C. C.) 31 Fed. 580, 583; *Compton v. Jesup*, 15 C. C. A. 397, 68 Fed. 263, 279, and authorities there cited; *Schenck v. Peay*, Fed. Cas. No. 12,450. Consolidations, cross-bills, and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought in may be. *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 23, 82 Fed. 124, 128, and authorities there cited; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 11 Sup. Ct. 61, 34 L. Ed. 625; *Park v. Railroad Co.* (C. C.) 70 Fed. 641, and authorities there cited.

3. The written offer to pay complainants the sum of \$1,063, evidently made in an effort to save further costs and interest, was insufficient as a legal tender. There was no actual tender of any money. It is true that the statute of Oregon provides that an offer to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money; but the supreme court of that state have declared that this statute does not dispense with readiness and ability on the part of the person making the offer to pay the money at the time the offer is made. *Ladd v. Mason*, 10 Or. 308, 314. The evidence does not affirmatively show that the offer made covered the full amount then due. The law is well settled that there can be no valid tender of part of an entire debt. The mistake in the sum offered, if any, must be regarded as the mistake and misfortune of the defendants. *Brandt v. Railroad Co.*, 26 Iowa, 114, 116; *Patnote v. Sanders*,

41 Vt. 66, 73, 98 Am. Dec. 564. The offer, as made, was conditional, based on the statement that complainants had made default in carrying out the terms of the agreement, and that the defendants had the right on their part to abrogate and annul the contract. The proofs should be clear that a tender was fairly made, and that it was absolute and unconditional. *Loring v. Cooke*, 3 Pick. 48, 50; *Moore v. Norman*, 43 Minn. 428, 434, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247; *Perkins v. Beck*, 4 Cranch, C. C. 68, Fed. Cas. No. 10,984; *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Chemical Laboratory*, 9 Metc. 42, 52; *Rand v. Harris*, 83 N. C. 486; *Noyes v. Wyckoff*, 114 N. Y. 204, 207, 21 N. E. 158. There was no legal tender in the offer contained in the letter. In 2 Greenl. Ev. § 601, the author says:

"To support the issue of a tender of money, it is necessary for the defendant to show that the precise sum, or more, was actually produced in current money, such as is made a legal tender by statute, and actually offered to the plaintiff."

See, also, *Peugh v. Davis*, 113 U. S. 542, 544, 5 Sup. Ct. 622, 28 L. Ed. 1127; *Harvester Co. v. Hamilton*, 80 Minn. 162, 83 N. W. 44; 21 Enc. Pl. & Prac. 558. The decree of the court upon this point, as to the insufficiency of the tender or payment of money into court, is clearly correct.

4. The several findings of fact contained in the decree—especially the finding that the defendants, McCormick et al., have failed and refused to deliver, "unto the complainants," the property which by the contract they agreed to deliver—will be accepted by this court as correct without any particular discussion or review of the evidence. The evidence is in many respects conflicting upon several points, and in such cases the general rule of law upon this subject is well settled that the findings of the court below upon facts will not be disturbed unless the appellate court can clearly see that it is opposed to the weight of the evidence, or unless some obvious error or mistake is clearly shown. *Railroad Co. v. Ristine*, 23 C. C. A. 13, 77 Fed. 58; *Trust Co. v. McClure*, 24 C. C. A. 64, 78 Fed. 209; *Lansing v. Stanisics*, 36 C. C. A. 306, 94 Fed. 380; *Harding v. Hart* (C. C. A.) 113 Fed. 304, 306; *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552, and authorities there cited; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Keep*, 155 U. S. 265, 267, 15 Sup. Ct. 83, 39 L. Ed. 144. It is proper, however, to state in this connection that we have carefully examined the evidence upon which there is any conflict, and are of the opinion that the facts found by the court are supported by the evidence.

5. We are of opinion that the court did not err in holding that the contract could not "be enforced as a lien to secure damages for the nonfulfillment of the contract." The complainants admit that the ordinary remedy to recover damages for the breach of a contract would be an action for damages, but they contend that the words, "and the performance of all the provisions hereof," as used in the contract, necessarily imply that they were to have a lien, not only for the advances they made, but also for the damages which they sustained by reason of the failure of defendants to perform all the covenants of the contract on their part to be performed. The general rule is that, in order

to constitute a mortgage, there must be a debt, and that ordinarily a mortgage is not given to secure the performance of a contract other than a contract to pay money. We do not understand complainants to deny this general proposition, but they claim that this definition is too narrow to be applied to the terms of the contract under consideration. In other words, they claim that this case is taken out of the general rule by virtue of the clause above referred to. This contention cannot, in our opinion, be sustained. The language above quoted is vague, indefinite, ambiguous, and uncertain; it must be considered in the light of the entire agreement, and, when so considered, it is not fairly susceptible of any such construction. It certainly does not directly give a lien upon the property for damages. It is reasonable to believe that, if the intention of the parties had been to give a lien, the parties would have named a specific sum to be paid "as fixed and liquidated damages" for nonperformance of the contract, and provided that complainants should have a lien upon the property for said sum. In no other way could the sale have been made in the manner provided for in the agreement. When the agreement specified that "out of the proceeds" Lilienthal Brothers should "retain said sums and interest and all costs," it meant the sums of money advanced, and the "interest and all costs." There was no sum mentioned for any damages that might otherwise arise. No lien could be given unless the language to that effect was clear, definite, and certain. As the instrument reads in its entirety, it does not give a lien for any damages. Every instrument, contract, conveyance, or mortgage must, of course, be construed, with reference to the provisions thereof, so as to carry out the true intent and meaning of the parties. It is true, as complainants claim, that an estate in lands may be conveyed for the special purpose of securing, by way of mortgage, the performance of some special act. Jones, *Mortg.* § 16, and authorities there cited. "But," as there said, "to define the different kinds of mortgages, and the many different rights under them, is the service attempted by a treatise on the subject." We shall not attempt to do this. In *Association v. Adams*, 109 U. S. 211, 214, 3 Sup. Ct. 161, 27 L. Ed. 910, cited by complainants, it was insisted that the bank was entitled to the proceeds of a certain sale because the agreement of the parties constituted a mortgage, etc. The court said:

"We are of the opinion that this contention is not well founded. While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act, or it cannot be construed to be a mortgage."

The action for damages for failure to perform the conditions of the contract is separable from the lien given for failure to pay the sums of money advanced by complainants. The defendants had the right to a jury trial to settle the amount of damages, in the one case, by an action at law, while the advances made, in the other case, could be foreclosed in a suit at equity. The general principles upon this subject are fully discussed in *Scott v. Neely*, 140 U. S. 106, 109, 11 Sup. Ct. 712, 35 L. Ed. 358, and authorities there cited. This right in the federal courts cannot be dispensed with except by the consent of the parties entitled to it. The language of the agreement relied upon

ought not to be so construed as to impair the rights of the respective parties in this respect. Complainants could not deprive defendants of the right to have a jury trial as to the claim for damages by blending it with a suit in equity to foreclose a lien for the advances made under the contract. The supreme court, in *Scott v. Neely*, referring to these questions, among other things said:

"All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side because, in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States. * * * The debt or obligation, to secure which it is given, is stated in the instrument itself, and the only proceeding with reference to its amount is one of calculation as to the interest thereon, or as to what remains due after credit of payments; and it is only to ascertain this that a reference is made to an accountant, usually a master in chancery, and not to try the validity of the debt or obligation secured. The equitable suit is to enforce the application of the property to the purposes intended by the contract of the parties. * * * In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon created by contract, or by some distinct legal proceeding."

6. The only remaining point necessary to be noticed relates to the disallowance of counsel fees. Under all the facts, conditions, and circumstances of this case, we are unwilling to say that the court erred in refusing to allow complainants any counsel fee.

The decree of the court is affirmed, with costs on appeal to the Bank of Woodburn, appellee; the appealing parties to pay their own costs.

ALASKA PACKERS' ASS'N v. DOMENICO et al.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1902.)

No. 789.

1. ADMIRALTY—REVIEW ON APPEAL—FINDING OF FACTS.

A finding of fact made by the court in an admiralty case upon the conflicting testimony of witnesses examined in open court will not be disturbed on appeal.

2. CONTRACT—CONSIDERATION—PERFORMANCE OF LEGAL OBLIGATION.

Libelants contracted with respondent, which owned a salmon canning plant in Alaska, to perform services as sailors in navigating a vessel from San Francisco to such plant and return, and in catching and canning salmon, while there, during the season, for which they were to receive a stipulated compensation. After reaching the plant they refused, without cause, to further perform the contract unless respondent's superintendent signed an agreement to pay additional compensation. He stated that he had no authority to do so, but being unable to procure other men, owing to the remoteness of the place and the shortness

¶ 1. See Admiralty, vol. 1, Cent. Dig. § 770.

of the season, he complied with their demand, and a second contract was signed, identical with the first except as to the compensation to be paid. *Held*, that the agreement to pay additional compensation for services which libelants were legally bound to render under the old contract was void for want of consideration, conceding the superintendent's authority to make it, there being no just ground to claim, under the circumstances shown, that respondent voluntarily waived the breach of the original contract by libelants.

Appeal from the District Court of the United States for the Northern District of California.

Chickering & Gregory, for appellant.

Marshall B. Woodworth and Edward J. Banning, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The libel in this case was based upon a contract alleged to have been entered into between the libelants and the appellant corporation on the 22d day of May, 1900, at Pyramid Harbor, Alaska, by which it is claimed the appellant promised to pay each of the libelants, among other things, the sum of \$100 for services rendered and to be rendered. In its answer the respondent denied the execution, on its part, of the contract sued upon, averred that it was without consideration, and for a third defense alleged that the work performed by the libelants for it was performed under other and different contracts than that sued on, and that, prior to the filing of the libel, each of the libelants was paid by the respondent the full amount due him thereunder, in consideration of which each of them executed a full release of all his claims and demands against the respondent.

The evidence shows without conflict that on March 26, 1900, at the city and county of San Francisco, the libelants entered into a written contract with the appellant, whereby they agreed to go from San Francisco to Pyramid Harbor, Alaska, and return, on board such vessel as might be designated by the appellant, and to work for the appellant during the fishing season of 1900, at Pyramid Harbor, as sailors and fishermen, agreeing to do "regular ship's duty, both up and down, discharging and loading; and to do any other work whatsoever when requested to do so by the captain or agent of the Alaska Packers' Association." By the terms of this agreement, the appellant was to pay each of the libelants \$50 for the season, and two cents for each red salmon in the catching of which he took part.

On the 15th day of April, 1900, 21 of the libelants signed shipping articles by which they shipped as seamen on the Two Brothers, a vessel chartered by the appellant for the voyage between San Francisco and Pyramid Harbor, and also bound themselves to perform the same work for the appellant provided for by the previous contract of March 26th; the appellant agreeing to pay them therefor the sum of \$60 for the season, and two cents each for each red salmon in the catching of which they should respectively take part. Under these contracts, the libelants sailed on board the Two Brothers for Pyramid Harbor, where the appellant had about \$150,000 invested in a salmon cannery. The libelants arrived there early in April of the year mentioned, and began

to unload the vessel and fit up the cannery. A few days thereafter, to wit, May 19th, they stopped work in a body, and demanded of the company's superintendent there in charge \$100 for services in operating the vessel to and from Pyramid Harbor, instead of the sums stipulated for in and by the contracts; stating that unless they were paid this additional wage they would stop work entirely, and return to San Francisco. The evidence showed, and the court below found, that it was impossible for the appellant to get other men to take the places of the libelants, the place being remote, the season short and just opening; so that, after endeavoring for several days without success to induce the libelants to proceed with their work in accordance with their contracts, the company's superintendent, on the 22d day of May, so far yielded to their demands as to instruct his clerk to copy the contracts executed in San Francisco, including the words "Alaska Packers' Association" at the end, substituting, for the \$50 and \$60 payments, respectively, of those contracts, the sum of \$100, which document, so prepared, was signed by the libelants before a shipping commissioner whom they had requested to be brought from Northeast Point; the superintendent, however, testifying that he at the time told the libelants that he was without authority to enter into any such contract, or to in any way alter the contracts made between them and the company in San Francisco. Upon the return of the libelants to San Francisco at the close of the fishing season, they demanded pay in accordance with the terms of the alleged contract of May 22d, when the company denied its validity, and refused to pay other than as provided for by the contracts of March 26th and April 5th, respectively. Some of the libelants, at least, consulted counsel, and, after receiving his advice, those of them who had signed the shipping articles before the shipping commissioner at San Francisco went before that officer, and received the amount due them thereunder, executing in consideration thereof a release in full, and the others being paid at the office of the company, also receipting in full for their demands.

On the trial in the court below, the libelants undertook to show that the fishing nets provided by the respondent were defective, and that it was on that account that they demanded increased wages. On that point, the evidence was substantially conflicting, and the finding of the court was against the libelants, the court saying:

"The contention of libelants that the nets provided them were rotten and unserviceable is not sustained by the evidence. The defendant's interest required that libelants should be provided with every facility necessary to their success as fishermen, for on such success depended the profits defendant would be able to realize that season from its packing plant, and the large capital invested therein. In view of this self-evident fact, it is highly improbable that the defendant gave libelants rotten and unserviceable nets with which to fish. It follows from this finding that libelants were not justified in refusing performance of their original contract." 112 Fed. 554.

The evidence being sharply conflicting in respect to these facts, the conclusions of the court, who heard and saw the witnesses, will not be disturbed. *The Alijandro*, 6 C. C. A. 54, 56 Fed. 621; *The Lucy*, 20 C. C. A. 660, 74 Fed. 572; *The Glendale*, 26 C. C. A. 500, 81 Fed. 633; *The Coquitlam*, 23 C. C. A. 438, 77 Fed. 744; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.*, 43 C. C. A. 511, 104 Fed. 243.

The real questions in the case as brought here are questions of law, and, in the view that we take of the case, it will be necessary to consider but one of those. Assuming that the appellant's superintendent at Pyramid Harbor was authorized to make the alleged contract of May 22d, and that he executed it on behalf of the appellant, was it supported by a sufficient consideration? From the foregoing statement of the case, it will have been seen that the libelants agreed in writing, for certain stated compensation, to render their services to the appellant in remote waters where the season for conducting fishing operations is extremely short, and in which enterprise the appellant had a large amount of money invested; and, after having entered upon the discharge of their contract, and at a time when it was impossible for the appellant to secure other men in their places, the libelants, without any valid cause, absolutely refused to continue the services they were under contract to perform unless the appellant would consent to pay them more money. Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the libelants' agreement to render the exact services, and none other, that they were already under contract to render. The case shows that they willfully and arbitrarily broke that obligation. As a matter of course, they were liable to the appellant in damages, and it is quite probable, as suggested by the court below in its opinion, that they may have been unable to respond in damages. But we are unable to agree with the conclusions there drawn, from these facts, in these words:

"Under such circumstances, it would be strange, indeed, if the law would not permit the defendant to waive the damages caused by the libelants' breach, and enter into the contract sued upon,—a contract mutually beneficial to all the parties thereto, in that it gave to the libelants reasonable compensation for their labor, and enabled the defendant to employ to advantage the large capital it had invested in its canning and fishing plant."

Certainly, it cannot be justly held, upon the record in this case, that there was any voluntary waiver on the part of the appellant of the breach of the original contract. The company itself knew nothing of such breach until the expedition returned to San Francisco, and the testimony is uncontradicted that its superintendent at Pyramid Harbor, who, it is claimed, made on its behalf the contract sued on, distinctly informed the libelants that he had no power to alter the original or to make a new contract; and it would, of course, follow that, if he had no power to change the original, he would have no authority to waive any rights thereunder. The circumstances of the present case bring it, we think, directly within the sound and just observations of the supreme court of Minnesota in the case of *King v. Railway Co.*, 61 Minn. 482, 63 N. W. 1105:

"No astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the founda-

tion of an estoppel by his own wrong, where the promise is simply a repetition of a subsisting legal promise. There can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it."

In *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S. W. 844, the court, in holding void a contract by which the owner of a building agreed to pay its architect an additional sum because of his refusal to otherwise proceed with the contract, said:

"It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise, he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new, that Jungenfeld was bound to tender under the original, contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenfeld himself put it upon the simple proposition that 'if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company,' of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong. That a promise to pay a man for doing that which he is already under contract to do is without consideration is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. [Citing a long list of authorities.] But it is 'carrying coals to Newcastle' to add authorities on a proposition so universally accepted, and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration. It is true that as eminent a jurist as Judge Cooley, in *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at \$1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it \$3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered the opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine, and is not convincing; and certainly so much of the opinion as holds that the payment, by a debtor, of a part of his debt then due, would constitute a defense to a suit for the remainder, is not the law of this state, nor, do we think, of any other where the common law prevails. * * * What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor; and although, by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong."

The case of *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, is one of the eight cases relied upon by the court below in support of its judgment in the present case, five of which are by the supreme court of Massachusetts, one by the supreme court of Vermont, and one other Michigan case,—that of *Moore v. Locomotive Works*, 14 Mich. 266. The Vermont case referred to is that of *Lawrence v. Davey*, 28 Vt. 264, which was one of the three cases cited by the court in *Moore v. Locomotive Works*, 14 Mich. 272, 273, as authority for its decision. In that case there was a contract to deliver coal at specified terms and rates. A portion of it was delivered, and plaintiff then informed the defendant that he could not deliver at those rates, and, if the latter intended to take advantage of it, he should not deliver any more; and that he should deliver no more unless the defendant would pay for the coal independent of the contract. The defendant agreed to do so, and the coal was delivered. On suit being brought for the price, the court said:

"Although the promise to waive the contract was after some portion of the coal sought to be recovered had been delivered, and so delivered that probably the plaintiff, if the defendant had insisted upon strict performance of the contract, could not have recovered anything for it, yet, nevertheless, the agreement to waive the contract, and the promise, and, above all, the delivery of coal after this agreement to waive the contract, and upon the faith of it, will be a sufficient consideration to bind the defendant to pay for the coal already received."

The doctrine of that case was impliedly overruled by the supreme court of Vermont in the subsequent case of *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370, where it was held that:

"A promise by a party to do what he is bound in law to do is not an illegal consideration, but is the same as no consideration at all, and is merely void; in other words, it is insufficient, but not illegal. Thus, if the master of a ship promise his crew an addition to their fixed wages in consideration of, and as an incitement to, their extraordinary exertions during a storm, or in any other emergency of the voyage, this promise is nudum pactum; the voluntary performance of an act which it was before legally incumbent on the party to perform being in law an insufficient consideration; and so it would be in any other case where the only consideration for the promise of one party was the promise of the other party to do, or his actual doing, something which he was previously bound in law to do. Chit. Cont. [10th Am. Ed.] 51; Smith, Cont. 87; 3 Kent, Comm. 185."

The Massachusetts cases cited by the court below in support of its judgment commence with the case of *Munroe v. Perkins*, 9 Pick. 305, 20 Am. Dec. 475, which really seems to be the foundation of all of the cases in support of that view. In that case, the plaintiff had agreed in writing to erect a building for the defendants. Finding his contract a losing one, he had concluded to abandon it, and resumed work on the oral contract of the defendants that, if he would do so, they would pay him what the work was worth without regard to the terms of the original contract. The court said that whether the oral contract was without consideration

—“Depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on, upon the faith of the new promise, and finished the work. This was a sufficient consideration. If *Payne* and

Perkins were willing to accept his relinquishment of the old contract, and proceed on a new agreement, the law, we think, would not prevent it."

The case of *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, presented some unusual and extraordinary circumstances. But, taking it as establishing the precise rule adopted in the Massachusetts cases, we think it not only contrary to the weight of authority, but wrong on principle.

In addition to the Minnesota and Missouri cases above cited, the following are some of the numerous authorities holding the contrary doctrine: *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Ayres v. Railroad Co.*, 52 Iowa, 478, 3 N. W. 522; *Harris v. Carter*, 3 Ellis & B. 559; *Frazer v. Hatton*, 2 C. B. (N. S.) 512; *Conover v. Stillwell*, 34 N. J. Law, 54; *Reynolds v. Nugent*, 25 Ind. 328; *Spencer v. McLean* (Ind. App.) 50 N. E. 769, 67 Am. St. Rep. 271; *Harris v. Harris* (Colo. App.) 47 Pac. 841; *Moran v. Peace*, 72 Ill. App. 139; *Carpenter v. Taylor* (N. Y.) 58 N. E. 53; *Westcott v. Mitchell* (Me.) 50 Atl. 21; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Sullivan v. Sullivan*, 99 Cal. 187, 33 Pac. 862; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904; *Skinner v. Mining Co.* (C. C.) 96 Fed. 735; 1 Beach, Cont. § 166; Langd. Cont. § 54; 1 Pars. Cont. (5th Ed.) 457; *Ferguson v. Harris* (S. C.) 17 S. E. 782, 39 Am. St. Rep. 745.

It results from the views above expressed that the judgment must be reversed, and the cause remanded, with directions to the court below to enter judgment for the respondent, with costs. It is so ordered.

BEEZLEY v. PHILLIPS.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,614.

1. GUARDIAN'S SALE—JURISDICTION TO ISSUE LICENSE.

A guardian's sale of real estate is void in a case in which the court which issued the license to the guardian to sell the property had no jurisdiction of the subject-matter.

2. SAME—PETITION FOR SALE TO PAY DEBTS INSUFFICIENT TO GIVE JURISDICTION TO SELL FOR MAINTENANCE OR INVESTMENT.

The statutes of Nebraska provide two different modes of procedure for the sale of the real estate of a ward by a guardian,—one to authorize its sale to pay debts, and the other to authorize its sale to support the ward, or to invest the proceeds in personal property. Upon a petition sufficient to warrant a guardian's sale to pay debts, a sale was made pursuant to the course of procedure prescribed for that purpose, which was conceded to be invalid because the court failed to cause the issue and service of the statutory notice of the hearing upon the petition which was requisite to give it jurisdiction. In the procedure to sell for maintenance and investment no notice to the ward was essential, and an attempt was made to sustain the guardian's sale on the ground that it was made for the maintenance of the ward and the investment of the proceeds. *Held*: (a) A petition which contains only the essential allegations to warrant a guardian's sale to pay the debts of the ward does not give the district court jurisdiction, under the statutes of Nebraska, to order a sale for the maintenance of the ward or for the investment of the proceeds of the sale. (b) The petition did not contain the requisite allegations to invoke the jurisdiction of the court to license a sale for maintenance or investment; the court did not attempt to license such a sale, did not

follow the course of procedure prescribed by the statute to authorize such a sale; and the guardian's sale in question was void, because the license to the guardian was not issued by a district court of competent jurisdiction, within the meaning of section 64, c. 23, Comp. St. Neb. 1901. (Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

C. C. Wright (John F. Stout, on the brief), for appellant.

R. A. Batty (Harry S. Dungan, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This is a bill in equity, exhibited by Paul Beezley, a complainant in possession, to quiet the title to 160 acres of land in the state of Nebraska. In the year 1888 the defendant, Ada E. Phillips, was a minor, and was the owner of this real estate. The title of the complainant is founded upon a sale made by the guardian of the defendant to George E. Gilbert on March 24, 1888, pursuant to a license issued by the district court of Franklin county in the state of Nebraska on December 16, 1887. The question at issue is whether or not that court ever acquired jurisdiction to authorize this sale. The statutes of Nebraska empowered the district court to license a guardian to sell the land of his ward for two purposes: (1) To maintain or educate the ward, or to invest the proceeds of the sale in productive stock or interest-bearing securities (Comp. St. Neb. 1901, c. 23, §§ 42, 43); and (2) to pay the debts of the ward and the charges of managing her estate (Id. c. 23, § 105). It provided two different and independent courses of proceeding for sales for these two purposes. Chapter 23, §§ 42-66, and §§ 105-122 and 67-82. Counsel for the complainant concede that, if the sale in question was for the purpose of paying the debts of the ward, the district court acquired no jurisdiction to grant the license, because the statutory notice of the hearing upon the petition was not given. But they insist that, although the petition was ample to warrant the issue of a license to pay debts, it was also sufficient to invoke the jurisdiction of the court to authorize a sale for the maintenance of the ward and the investment of the surplus proceeds, and that, if this position is well taken, the sale was valid, although no notice was given to the ward, for the reason that the proceeding by a guardian to sell the real estate of his ward for her maintenance or for investment has been held by the supreme court of Nebraska to be a proceeding by the minor herself, the validity of which she is estopped from challenging on the ground that she received no notice of it, for the reason that she instituted and promoted it herself. *Hubermann v. Evans*, 46 Neb. 784, 793, 65 N. W. 1045; *Myers v. McGavock*, 39 Neb. 843, 861, 58 N. W. 522, 42 Am. St. Rep. 627. Conceding, without deciding, that the fact that the petition for the license to sell the real estate contains sufficient allegations to warrant a sale of it to pay debts is immaterial, and that those averments are mere surplusage, provided it also duly invoked the jurisdiction of the district court, and that court exercised

its jurisdiction to authorize the sale of the land for maintenance or investment, let us consider the question whether or not the petition is sufficient to invoke the jurisdiction of the district court to authorize a sale for the support of the ward and the investment of the proceeds. The statutory requisites of a petition to sell land of a ward to pay debts are statements by the guardian of the amount of personal and real estate that has come to his hands the amount remaining undisposed of, the debts of the ward, and a description of the real estate and of the condition and value thereof. Sections 68, 69, 105, c. 23. The essentials of a petition for a sale of such real estate for the support of the ward and the investment of the proceeds are averments of facts which show that the income of the ward is insufficient to maintain her, and that it would be for her benefit that her real estate, or some part of it, should be sold, and that the proceeds thereof should be put out at interest, or invested in some productive stock. Sections 42, 43, 47. The material allegations of the petition in this case were that the ward was the owner of the 160 acres of land here in controversy, that this tract was wild and unproductive, that there was no personal property with which to pay the debts of the estate or to support the minor, that there were debts against the estate to the amount of about \$400, and that it was "necessary for the support of said minor and the payment of said debts of said estate to sell said land, and that a sale thereof and investment of the proceeds would be for the best interest of said estate." Now, if we strike out of this petition the allegations relative to the debts of the estate, it contains no averments which would invoke the action of the district court to license the sale of the land of this ward. The necessary averments to warrant such action must show that the income of the ward is insufficient to support her, or that it would be for the benefit of the ward that her real estate should be sold, and its proceeds invested. This petition contains no averment of the amount of the ward's income, or of the insufficiency of that income to maintain her; no allegation that, aside from the necessity to pay the debts, it is necessary or expedient to sell the real estate, or that it would be for the benefit of the ward that it should be sold, and its proceeds invested. The averments of the petition in that regard are all conditioned by the alleged necessity of the sale to pay the debts. The only allegations which would appeal to the court to order the sale are that the debts are \$400, and that it is necessary to sell the land, not for the maintenance of the ward but to support the minor, and pay the debts; and that, in view of these debts, a sale and the investment of the proceeds would be for the best interests of the estate. A careful consideration and analysis of this petition convinces us that it was not a petition for the sale of the real estate of this ward for her support, or for the investment of the proceeds in interest-bearing securities. It was a petition for the sale of her land to pay the debts of the estate. It did not invoke the jurisdiction of the district court for the former purpose and it clearly did so for the latter. This view of the purpose and effect of the petition is confirmed by the facts that the district court so understood it and that it never undertook to exercise its jurisdiction to license a sale for maintenance or investment, but took all its action on the theory that the petition was for a sale to pay debts.

In the proceeding to sell to pay debts the order to show cause why the license should not issue is required to be directed to all persons interested in the estate. Section 69. In the proceeding to sell for maintenance and investment the order is to be directed to the next of kin of the ward and all persons interested in the estate. Section 48. The district court directed the order in this case to all persons interested in the estate. In the proceeding to sell to pay debts the statute authorizes the court to grant the license if it is satisfied after the hearing that a sale of the real estate is necessary to pay the just debts of the ward and the expenses of managing her estate, or if such sale be assented to by all persons interested; and it permits the guardian with the approval of the judge to give a credit of not exceeding three years for three-fourths of the proceeds of the sale. Sections 79, 86, 105. In the proceeding to sell for maintenance and investment the statute authorizes the issue of the license if it appears to the court that it is necessary, or would be for the benefit of the ward, that the real estate should be sold. It requires the court to specify in the order of license whether the sale is made for the maintenance of the ward, or for her education, or in order that the proceeds may be put out at interest, or invested in productive stock; and it contains no permission to allow any credit for the payment of the purchase price. Section 53. The order of license in this case recited that it appeared to the court that the debts of the estate were \$325, that the costs and expenses of administration would be \$75, that the ward had no personal estate, that the land was unimproved and unproductive, that it was for the best interest of the estate that this real estate should be sold, and that the balance of the proceeds after the payment of the debts and expenses of administration should be invested, and that no person interested in the estate had given a bond to pay the debts and expenses. After these recitals this order licensed and empowered the guardian to sell the land here in question for a purchase price one-fourth of which should be paid in cash and the remaining three-fourths in three years, with interest at 7 per cent. There was no recital in the order that it appeared to the court that it was necessary, or that it would be for the benefit of the ward, that the land should be sold. Nor did this order specify that the sale was made for the maintenance of the ward, or for her education, or in order that the proceeds might be put out at interest, or invested in productive stock. This brief comparison of the proceedings in the district court with the methods of procedure prescribed by the statutes for guardians' sales to pay debts and to support wards and invest proceeds proves conclusively that in this case the district court never exercised, nor undertook to exercise, its jurisdiction to license the sale of this land for maintenance or investment. The only proceeding that the petition warranted the commencement of, and the only proceeding that was instituted by it, was the statutory proceeding to sell the land to pay the debts of the ward and the expenses of managing her estate. And, as counsel for the complainant admit that the district court never acquired any jurisdiction of that proceeding, the conclusion is irresistible that that court was without jurisdiction to license the sale for any purpose, and the guardian's deed of the

property, upon which the title of the complainant is founded, was unauthorized and is void.

Other objections to the title of the complainant have been presented and argued, but that which has already been considered is fatal to his title, and is decisive of this case. No good purpose would be served by the prolongation of this opinion to consider and discuss other questions.

The decree below must be affirmed, and it is so ordered.

CITIZENS' SAVINGS & LOAN ASS'N et al. v. BELLEVILLE & S. I. R. CO.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 842.

1. CORPORATION—EQUITABLE RIGHT TO STOCK.

A railroad company issued and delivered to a county a certificate for a certain number of shares of its authorized capital stock, in payment for which it received bonds of the county, which it transferred to a contractor, who constructed its road in part payment therefor. The contractor was entitled under his contract to all sums received by the company for stock sold, and to all stock remaining unsold at the time the road was completed. The bonds were payable to bearer, and were transferred for value by the contractor to complainants, or to others through whom complainants acquired them. The bonds were adjudged void, and in a subsequent suit by a stockholder of the company against the county the certificate of stock issued in exchange therefor was also declared void and canceled. *Held*, that the bonds, being void when delivered by the company to the contractor in lieu of the stock for which they had been exchanged, carried with them the right to such stock, which passed by their transfer to subsequent holders, and that complainants were entitled in equity to a decree requiring the company to issue the stock to them.

2. SAME.

The fact that complainants were chargeable with notice, either constructive or actual, of the facts which rendered the bonds void, would not affect their right to relief against the railroad company; no question of bad faith being involved.

3. SAME—SUIT TO COMPEL ISSUANCE—PARTIES.

In a suit against the railroad company to compel the issuance of the stock to complainants, as bona fide holders of the bonds, neither the county, the original holder, nor any stockholder of the company was a necessary party.

4. SAME—CONDITIONS PRECEDENT—DOING EQUITY.

The railroad company was not entitled in such suit to demand that complainants should be required, before being entitled to equitable relief, to bring into court, for its use, interest payments made by the county on the void bonds; having parted with nothing which gave it any equitable right to such payments.

5. DISMISSAL AS AGAINST INTERVENING DEFENDANT—EFFECT AS TO OTHER DEFENDANTS.

The dismissal of a bill by the court as to a defendant who has been improvidently granted leave to come in as a defendant on his own motion, but who is not a necessary or proper party, does not affect the right of complainant to proceed against the original defendant.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

In 1857 the Belleville & Southern Illinois Railroad Company was chartered by the legislature of Illinois. It had an authorized capital stock of

\$2,000,000, the issuance of which was under the control of the directors. The charter authorized the company to receive stock subscriptions from counties, which should be binding on the counties if made conformably to the railroad aid act of 1849. This act permitted a county to subscribe for not more than \$100,000 of the capital stock of any railroad company, if the proposition (to which the county might affix conditions) should receive at an election the support of a majority of the legal voters of the county, and to issue its bonds in payment of its stock subscription. In 1869 the majority of the legal voters of Perry county carried a proposal that the county should subscribe for \$150,000 of the capital stock of the Belleville & Southern Illinois Railroad Company, to be paid with county bonds, on condition that the company should locate its machine shops at Du Quoin. On July 2, 1870, a constitutional amendment came into force, which provided: "No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or lend its credit in aid of such corporation: provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." Const. 1870, Amend. 14. In September, 1870, the directors of the Belleville & Southern Illinois Railroad Company passed a resolution requiring the president and chief engineer to locate the machine shops at Du Quoin. In December, 1870, the county court delivered to the railroad company 100 bonds of Perry county, for \$1,000 each, payable to bearer, due in 20 years; and the railroad company delivered to Perry county its certificate that the county was the owner of 1,000 shares, of \$100 each, in the capital stock of the company. The railroad company did not build its machine shops at Du Quoin, but at East St. Louis. For 17 years Perry county paid the interest on the bonds. In 1888 the county defaulted, and in a suit brought by the Citizens' Savings & Loan Association, one of the appellants here, it was finally decided that the bonds were void. *Citizens' Savings & Loan Ass'n v. Perry Co.* (March 4, 1895) 156 U. S. 692, 15 Sup. Ct. 547, 39 L. Ed. 585. In a suit by a stockholder against the railroad company and Perry county, the state court determined that the certificate of stock held by the county was void, and ordered its cancellation and return to the railroad company. *Stebbins v. Perry Co.* (Oct. 12, 1897) 167 Ill. 567, 47 N. E. 1048. In obedience to this decree the certificate was canceled and surrendered. None of the holders of the void bonds was a party to that suit, but some of them knew that such litigation was in progress. The railroad company in 1869 contracted with one Selah Chamberlain to build its road. The contract provided that Chamberlain should receive as pay, among other things, the following: "All moneys which have been or shall be paid on account of subscriptions to the capital stock of said railroad company; the balance of such capital stock which shall remain unsubscribed for at the time of completion of said railroad; all moneys, lands, and other property which have been or shall be prior to the completion of said railroad granted or donated by any county, town, corporation, or individual to aid in the construction of said railroad, or any portion thereof, except such lands as shall be occupied by said railroad, or be necessary for use in the actual operation of the same." The Perry county bonds were turned over by the railroad company to Chamberlain in part payment for the construction of the road. In August, 1871, the Citizens' Savings & Loan Association purchased from a firm of New York brokers 40 of these bonds, of which it remains the holder. The other appellants hold 39 of the bonds, purchased at various dates between August, 1871, and 1882. Appellants paid for the bonds prices ranging from 82 to 104 cents on the dollar. This suit was begun in April, 1898, by the Citizens' Savings & Loan Association against the Belleville & Southern Illinois Railroad Company to obtain a decree requiring the defendant to issue to complainant a certificate for 400 shares of its capital stock. The other appellants were admitted as parties complainant. The facts hereinbefore narrated were counted upon and proven, and this appeal presents the question whether appellants were entitled to relief. Appellee has interposed a motion to dismiss the appeal,

based upon these facts: Stebbins, a stockholder in the railroad company, filed a petition to be let in as a party defendant on the ground that he had a substantial interest as stockholder in defeating the issuance of stock to complainants. The court granted him leave to plead, answer, or demur to the bill "in all respects as though he had been made a defendant." He demurred, assigning various reasons, one of which was that there was no equity in the bill. Complainants confessed Stebbins' demurrer, and the court thereupon dismissed the bill as to Stebbins. The railroad company then moved that the bill be dismissed as to it on the ground that the confession and dismissal as to one joint defendant deprived complainants of the right to proceed against the remaining joint defendant. This motion was carried to the hearing, at which the bill was dismissed generally for want of equity.

Edward Cunningham and Wm. B. Sanders, for appellants.

John G. Drennan and Charles W. Thomas, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bonds were void. The stock subscription was void. The stock certificate was void. But the stock was not void. The 1,000 shares with respect to which the void subscription was made and the void certificate issued were a part of the authorized capital stock, were as existent and valid as any other of the shares, and were fully within the directors' power to dispose of for value to any one who had capacity to contract. Under the construction contract, Chamberlain was entitled to the proceeds of the sale of these shares, if sold, or the shares themselves, if unsold. In payment for labor and materials that went into the road the company delivered to Chamberlain the void bonds it took from Perry county on the void sale of these shares. Perry county lacked authority to subscribe for the shares and to issue the bonds as it did. The county and the railroad company, in exchanging the bonds and the stock certificate, were in *pari delicto*. But the railroad company and Chamberlain had capacity to make the construction contract. In executing this contract the railroad company took void bonds it had received from Perry county, and turned them over to Chamberlain in payment of a valid debt, and in this the railroad company and Chamberlain were not in equal fault. Chamberlain, like any other purchaser, was chargeable with notice of the condition precedent in the proposition adopted by the voters; but he did not participate in the proceedings underlying the bond issue, and it was not his, but the railroad company's, duty to perform the condition precedent. The railroad company received the bonds as blank pieces of paper; but, in passing them to Chamberlain as good payment of its debt to him, it must be held to have represented that the condition precedent had been performed or would be performed, and that, on its failure to perform, it would deliver to him the shares in lieu of which the bonds were paid to him. The issuance of bonds and the subscription for shares by the county being nullities, the first that anything of substance appeared in the transaction was when the railroad company paid for labor and materials with the void bonds, and the first that the labor and materials were paid for in money was when Chamberlain sold the bonds to appellants or their predecessors in interest. So the outcome

was that appellants' money paid appellee's debt, for which appellee was bound by its contract to deliver, not void bonds, but the very shares in question, which have lain unsold and unsubscribed for, except as they were sold to and subscribed for by Chamberlain in his contract.

The case of *Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, relied on by appellee, is not found to be controlling. The present is not a case of subrogation, as that doctrine is defined in the books. Nor is the case of *Railroad Co. v. Wade*, 140 U. S. 65, 11 Sup. Ct. 709, 35 L. Ed. 342, cited by appellants, a direct precedent. But the principle, variously stated, is fundamental in equity that no one should be permitted to retain a specific, identified thing which, *ex æquo et bono*, he should surrender to another. The limits of the application of this principle cannot and should not be attempted to be stated with precision and finality, but, as Mr. Justice Miller suggested with respect to what constitutes due process of law, should be left to the long processes of judicial inclusion and exclusion. The root of the matter is, however, that courts of equity were called into being to enforce, and should continue to apply and extend the application of, those standards of common honesty and natural justice which appeal to the conscience of right-thinking men. In this case, appellee has received full consideration for the shares of stock in question. The consideration cannot be returned, but the stock can be surrendered. Appellee should not be permitted to hold the shares by reason of the fact that it turned over void bonds when it should have delivered these identical shares.

It remains to determine whether other considerations prevent the granting of appropriate relief.

It is said that one of the appellants should be defeated because he had actual notice of facts which should have led him to full knowledge of the illegality of the bond issue. The bonds were signed by the officers of Perry county and delivered to the railroad company after the constitutional amendment of 1870 went into effect. As the bonds contained no recitals, every person was bound, at his peril, to find out whether they came within the exception to the constitutional inhibition. Actual notice, no question of bad faith being involved, should not be visited with more serious consequences than constructive notice.

Perry county was not a necessary party. The bonds and the stock subscription having been adjudged void, the county has no possible interest in this controversy.

The stockholders of appellee were not necessary parties. This case does not involve an overissue of stock. These shares are part of the authorized capital. The directors had authority to contract for their disposal for value. Chamberlain, under the facts of the case, subscribed and paid for them. The stockholders are no more concerned than in any case in which a subscriber for shares asks a specific performance of his contract. And this also disposes of the motion to dismiss the appeal. No cause of action was stated against Stebbins or any other stockholder. As the order admitting him to defend was improvidently granted, it is immaterial how he was let out.

Chamberlain was not a necessary party. The void bonds were payable to bearer. He took them for value. He transferred them for value. He did not transfer any right on the bonds against Perry county, for there was none. If there had been, that right would have been in the bearer. The void bonds, when put in circulation by the railroad company, represented the right to these shares of stock. If the railroad company had given to Chamberlain its direct written obligation to issue to bearer a certain number of shares, Chamberlain could have transferred his right without indorsement. The right that arose in Chamberlain on the delivery of the void bonds to him (namely, to demand the stock) passed by his delivery of the bonds to the bearer. As no one can assert the right except the bearer, it is not necessary to appellee's protection that former holders should be made parties to this suit.

Appellee insists that appellants are not entitled to ask equity without doing equity, by bringing into court for appellee's use the interest paid by Perry county. The county received nothing, was obligated to pay nothing, and parted with nothing except voluntary gifts. If the county had paid moneys to appellants or prior holders on some other claim, or without claim, appellee would have as much right to demand those sums. The void bonds came into the hands of appellee as blank paper. Appellee, under the facts of the case, issued them as evidences of the right to shares of stock, and they can now serve no purpose but to identify the persons entitled to the shares.

Appellants are not chargeable with laches. The bonds were not finally declared void until 1895. The litigation concerning the validity of the stock subscription ended in 1897. Within a few months this suit was commenced. Appellee was not the owner of these shares, but held them as trustee, and no limitation upon the right of action would begin until appellee denied the trust.

The decree is reversed and the cause remanded, with instructions to enter a decree requiring appellee to issue certificates of stock as prayed for.

KING v. CITY OF SUPERIOR.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 854.

1. MUNICIPAL BONDS—ESTOPPEL BY RECITALS.

There is no distinction to be made as to the conclusiveness of a recital in a municipal bond, whether it is of a fact required by constitutional law or by statute law.

2. SAME.

A general recital in bonds issued by a city that "all acts, conditions, and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law," estops the city, as against a bona fide holder of such bonds for value, to deny that before or at the time of issuing the bonds it provided for the collection of a tax sufficient to pay the interest and principal thereof as required by the constitution of the state; such act being one to be done by the city, and which it had power to certify that it had done.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The plaintiff in error brought suit against the city of Superior upon two of its bonds, of \$1,000 each, numbered 10 and 11, respectively, of installment E, and two coupons for interest thereon; the bonds being of like tenor and effect, and of the form following:

"Number ———.	"United States of America.	\$1,000. ⁰⁰ / ₁₀₀ .
	"Installment E.	
	"State of Wisconsin.	
	"City of Superior.	
	"Street Improvement Bond.	
	"County of Douglas.	

"Know all men by these presents that the city of Superior, in the county of Douglas and state of Wisconsin, for value received, hereby acknowledges itself indebted to and promises to pay the bearer hereof the sum of one thousand dollars, lawful money of the United States of America, to be paid on the first day of September, A. D. 1896, with interest thereon at the rate of six per centum per annum, payable semiannually on the first days of March and September in each year, as evidenced by the semi-annual interest coupons hereto attached, as they severally become due; both the interest and principal of this bond being payable at the National Bank of the Republic, in the city and state of New York. This bond is issued by and under authority of chapter 13 of the amended charter of said city of Superior, being chapter 124, Laws of Wisconsin for the Year 1891, approved March 31st, 1891, and of a resolution duly passed, approved, and published by the common council of said city, dated the 8 day of October, A. D. 1891. This bond is one of an issue of annual installment bonds, the aggregate amount of which is fifty-eight thousand five hundred and eighteen ²⁴/₁₀₀ dollars, of which this bond is number ——— of installment E; said issue being divided into 5 equal installments, designated installments A, B, C, D & E, respectively. Each installment consisting of 12 bonds, numbered from one to 12, inclusive. Numbers 1 to 11, inclusive, being of the denomination of one thousand dollars, and number 12 of seven hundred three ⁶⁵/₁₀₀ dollars. All bonds in installment A are payable on the first day of September, 1892, and the remaining installments, in the order in which they are above mentioned, become payable annually thereafter on the 1st day of September in each year, so that the last installment, namely, installment E, becomes due and payable on the 1st day of September, A. D. 1896. Said bonds are issued for the purpose of defraying the cost of constructing the improvement on Ritchie avenue, between the Hammond and New York avenues, and on account of such assessment made upon the property benefited by reason of such improvement as the owners have not elected to pay. The payment of the interest and principal of this bond is made chargeable upon the property benefited by said improvement, as evidenced by a statement and schedule of such special assessment, on which the bonds are issued, as recorded in the office of the city clerk of said city of Superior. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law. The faith and credit of said city of Superior is hereby irrevocably pledged for the prompt payment of this bond, both principal and interest. In testimony whereof the said city of Superior, in the county of Douglas and state of Wisconsin, has caused this bond to be signed by its mayor and city clerk, and countersigned by its comptroller, and the seal of the said city to be hereto attached, this 1st day of September, A. D. 1891."

The city answered thereto, admitting the making of the bonds and their ownership by the plaintiff in error, and interposed as a defense that the bonds are void as a general obligation of the city, because before or at the time of their issue the city did not provide for the collection of a direct

annual tax sufficient to pay the same, with interest, as they should fall due, and that their issue was therefore in violation of the constitution of the state of Wisconsin (article 11, § 3, amendment of 1874), which provides: "Any county, city, town, village, school district or other municipal corporation incurring any indebtedness as aforesaid shall before or at the time of doing so provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." At the trial the city of Superior proved that these bonds were issued to defray the cost of constructing improvements as stated in the bond, pursuant to chapter 124, Laws 1891, and that by resolution of the common council of the city on June 23, 1891, the amount of the assessment for which the bonds were issued was "levied and assessed as a special tax for the purpose of defraying the cost of said improvements upon and against each lot, piece, or parcel of real estate benefited, in the various sums set opposite each such lot, piece, or parcel of real estate in the last of the schedule attached to said final report, to wit, the column headed, 'Correct Amount Assessed.'" The court below directed a verdict in favor of the city, holding the bonds void, and a writ of error was issued to review the judgment entered upon such verdict.

Charles F. Harding, for plaintiff in error.

A. L. Sanborn, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). There might be ground for saying that the bonds in question are payable only out of the special assessments upon the property benefited by the improvement, were it not that such contention is set at rest by the decision of the supreme court of Wisconsin in *Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800. That court held with respect to like bonds that the city is bound to pay in any event, and that the conclusion is inevitable that on its face the bond imports an absolute indebtedness and a general liability of the city.

The principal question urged at the bar is whether the recitals of the bond estop the city from asserting that the constitutional provision that before or at the time of incurring the indebtedness the city should provide for the collection of a direct annual tax sufficient to pay the interest of the debt as it falls due, and to pay and discharge the principal within 20 years from the time of contracting the debt, had not been complied with by the city at or before the issuing of these bonds. It is urged for the plaintiff in error that the assessment upon the property benefited is a sufficient "annual tax," within the meaning of the constitution. It is an interesting question whether the term "assessment" is synonymous with "tax," as there employed. The conclusion to which we are constrained upon another branch of the law renders unnecessary the consideration of the question. In the discussion, counsel have diligently explored the whole field of decisions with reference to recitals in bonds. The defendant in error insists that the effect of the decisions is that, if the precedent condition which has not been performed is a legislative requirement, a general recital that all conditions precedent have been complied with will estop the municipality, but if the condition is required by the constitution the recital must be specific. It is insisted for the plaintiff in error that where an act is required to be done by a municipality, either by the constitution or by the statute, or

by both, antecedently to or coincidently with the contracting of the indebtedness, and the municipality had the power to do it, a general recital that it has performed all the acts required by law precedent to and in contracting the indebtedness will estop it from subsequently denying the fact, and a sharp distinction is drawn between the inadequate exercise of ample power and the total absence of power. Here the act to be done, and which was imposed by the constitution as a necessary precedent to the incurring of this indebtedness, was one to be done by the city and its constituted authorities. The city has asserted that "all acts, conditions, and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law." The reason of the rule declared is that the bond goes upon the market with recitals assuring the purchaser of the facts which, if they exist, would render the bond valid, and, as the purchaser has presumably parted with his money upon the faith of the recitals, the municipality cannot be heard to say that its statements which induced the purchase of the bond are false. We fail to perceive any sufficient reason why the estoppel should not operate with respect to an act required by the constitution to be done, as well as to an act required by the statute to be done. The mischief to be prevented is the same, and there would seem to be no good reason for distinction. It might be otherwise with respect to a constitutional provision which prohibited the issuing of bonds in excess of a certain limit, and prescribed a definite rule for determining whether that limit had been exceeded. We do not deem it necessary to review the wealth of authority upon this subject, for, as we conceive, it has been determined by the ultimate tribunal. In *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040, there was a recital to the effect that the total amount of the issue did not exceed the limits prescribed by the constitution of Colorado; and it was held that the county was estopped, as against an innocent holder for value, to deny the truth of the recital. The recital was specific, it is true; but it was the recital of a fact, and not of an act to be done by the city, and the constitution had not prescribed the manner in which that fact might be determined. In *Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, the court cited approvingly the statement of the court in *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360, to the effect:

"The estoppel does not arise except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers by law as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guaranty to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts to be ascertained and determined whenever disputed, but upon the ascertain-

ment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency."

It is true that in the Rollins Case there was a specific recital that the total amount of the issue did not exceed the limit prescribed by the constitution. But the principle enunciated seems to us to be applicable here, for the condition precedent—the levy of the annual tax—was an act to be done by the city, and it had the power to certify that it had done it.

In the case of Waite v. City of Santa Cruz (decided Feb. 24, 1902) 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552, the bonds contained a recital to the effect that they were—

"Issued to refund the bonded indebtedness of the city in pursuance of and in conformity with the constitution of the state of California and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with the vote of more than two-thirds of all the qualified electors of said city of Santa Cruz voting at a special election duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found, and declared in the manner and as required by law. And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened, and performed, in legal and due form, as required by law."

It will be observed that this last recital is nearly totidem verbis with the recital in question. It was objected that by the constitution of California there was no power granted to incur indebtedness exceeding in any year the income and revenue provided for such year, unless upon a two-thirds vote of the qualified electors—

"Nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

The court, speaking by Mr. Justice Harlan, after a review of the cases, said:

"Applying to the present case the principles heretofore announced by this court, is there any escape from the conclusion that the city of Santa Cruz is estopped to dispute the truth of the recitals in the bonds in suit, which stated that they were issued in pursuance of the act of 1893, as well as in conformity with the constitution of California, authorizing it to incur indebtedness or liability with the assent of two-thirds of the qualified voters at an election held for that purpose, and that all acts, conditions, and things required by law to be done precedent to issuing the bonds had been properly done and performed in due and lawful form as required by law? We think not."

The precise question here involved was before the circuit court of appeals for the Eighth circuit in the case of National Life Ins. Co. v. Board of Education of City of Huron, 10 C. C. A. 637, 62 Fed. 778. It was there resolved that there was no distinction to be made as to the conclusiveness of a recital, whether it was of a fact required by constitutional law or by statute law. In this opinion we concur.

We perceive no reason why in the one case, more than in the other, a recital should be less effective with respect to a condition precedent to be performed by the municipality. Assuming, as we do, that the constitution required that the city should levy an annual tax at or before the time of issuing the bond, as distinguished from the assessment made, that duty was cast upon the authorities of the city; and, when it has certified that "all acts required to be done precedent to and in the issuing of the bond have been duly performed in regular and due form as required by law," we perceive no need for a more specific recital. We are of opinion that, as against a bona fide holder before maturity and for value, the bond in question must be held to be a valid legal liability of the municipality. We are gratified that no inequitable result can flow from this holding. These bonds were required to be, and presumably were, sold at par, and the city received the full face value of them, and presumably expended the amount received in the improvement contemplated. That amount, in large measure, at least, has been returned to it by the assessment upon the property benefited. It would be unjust that the city should be improved at the expense of strangers who have advanced their money upon the faith of declarations by the city authorized by law. We are not greatly grieved that our duty constrains us to require of the defendant in error that it comply with the dictates of common honesty.

The judgment is reversed, and the cause is remanded, with direction to the court below to grant a new trial.

CUDAHY PACKING CO. v. ANTHERS.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,693.

1. MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE—INSTRUCTION.

In action by a servant for injuries owing to the parting of a rope by which an elevator was raised and lowered, the court charged, in substance, that it was defendant's duty to provide a reasonably safe rope, and that if defendant violated such duty plaintiff could recover. Defendant contended that the instruction was erroneous, and that it did not require the jury to find whether such negligence was the proximate cause of the injury. *Held*, that the contention was of no merit, since, if the rope was not safe, defendant's negligence was unquestionably the proximate cause of plaintiff's injury.

2. SAME—FELLOW SERVANT—CONCURRING NEGLIGENCE.

Where a servant is injured owing to the negligence of the master in furnishing proper appliances for an elevator, the negligence of a fellow servant in the operation of the elevator does not relieve the master from liability.

3. SAME—NEGLIGENCE OF FELLOW SERVANT.

In action for injuries sustained by a servant owing to the parting of the rope by which the elevator was raised and lowered, when it was suddenly stopped by a fellow servant, there was nothing in the evidence

¶ 2. Concurrent negligence of master and fellow servant, see notes to *Maupin v. Railway Co.*, 40 C. C. A. 236.

See *Master and Servant*, vol. 34, Cent. Dig. §§ 515, 518, 526, 527.

to indicate that it was regarded by any one as hazardous to stop the elevator suddenly, or anything tending to show that the operator generally stopped it more slowly than on the occasion of the accident, nor that he knew of any weakness in the rope, or ground for apprehending danger. *Held*, that no negligence on the part of the operator was shown.

4. SAME—ELEVATOR INSPECTOR.

One inspecting an elevator is not a fellow servant of one whose duties require him to ride on the elevator.

In Error to the Circuit Court of the United States for the District of Nebraska.

The plaintiff in error (defendant below) is a corporation engaged in slaughtering cattle, sheep, and swine, and in curing, packing, and selling the products. The defendant in error (plaintiff below) was one of its employes, and on November 8, 1900, was engaged in removing hams from the fourth story to the pickling department in the third story of a packing house of defendant in Omaha. He loaded the hams on a truck in the fourth story, which he wheeled to an elevator, in which he, with his loaded truck, was lowered to the third story, where the hams were moved on the truck to the place where they were to be left. On one of these trips on that day the elevator was lowered faster than usual, and stopped more suddenly than usual when it reached the floor of the third story, when from the jar or jerk of the stop the rope which sustained the elevator cage, and by which it was raised and lowered, parted, and the cage with the plaintiff and the loaded truck fell to the bottom of the elevator shaft, and the plaintiff sustained severe injuries. A new manila rope, 2 inches in diameter and 240 feet long, had been put on this elevator July 1, 1900. About 112 feet of this rope was exposed to the weather, and this part, which also went around the drum, became worn and weakened, so that about the middle of September, 1900, it was cut off, and the part running to the elevator spliced to new rope, extending to the drum. This rope, although inspected nearly every day, and deemed by the inspector sufficient up to the time of the accident, had become weakened and somewhat worn and frayed, and it parted at the time of the accident by the pulling apart of the said splice. The petition alleged negligence of the defendant in failing to provide a safe rope and safe appliances for the security of said elevator. These allegations were in the amended answer met by a general denial, and allegations that plaintiff's injuries were caused by his own contributory negligence and the negligence of a fellow servant. Upon the trial the jury rendered their verdict in favor of the plaintiff for the sum of \$6,500, and on the same day, May 29, 1901, judgment was entered in favor of the plaintiff and against the defendant for \$6,500 and costs.

Edson Rich and Charles E. Clapp, for plaintiff in error.

H. C. Brome (D. L. Johnson and A. H. Burnett, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The assignments of error are directed to the parts of the instructions to the jury which were excepted to. The first assignment challenges this portion of the charge:

"The law imposed the duty upon the defendant, Cudahy Packing Company, to use ordinary care to provide a reasonably safe rope with which to

¶4. Who are fellow servants, see notes to *Railroad Co. v. Smith*, 8 C. C. A. 668; *Railway Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286.

operate this elevator, and it devolved upon the defendant to use ordinary care to provide the plaintiff with a reasonably safe appliance with which he could perform his work, and also a reasonably safe place for him to perform his services. That was the duty of the defendant, and if you are satisfied by a preponderance of the evidence in this case that the defendant violated its duty towards the plaintiff in the particulars mentioned, then the plaintiff would be entitled to recover whatever damages naturally and legitimately followed from the injuries which resulted from such negligence."

This portion of the charge is criticised, because it did not, in case the jury should find that the defendant was negligent, upon the evidence, and the law so clearly stated, require the jury to find further whether or not such negligence of the defendant was the proximate cause of the injury sustained by plaintiff.

It is improper to confuse a jury by submitting to them, as a matter which they are to pass upon and determine, an issue which, though made by the pleadings, has been entirely eliminated from the case by the whole evidence when the case goes to the jury. It was clear and unquestioned at the close of the testimony that at the time of the accident the rope furnished by defendant to operate its elevator parted, causing the fall of the elevator cage and the injury to plaintiff. If that rope was then not a reasonably safe rope for the use it was put to, and was continued there through the failure of the defendant to use ordinary care to provide a reasonably safe rope for the operation of that elevator, such negligence of defendant was, unquestionably, a proximate cause of the injury to plaintiff.

The question as to defendant's alleged negligence was fairly submitted to the jury, and formed the only material issue for the jury to pass upon, in view of all the evidence at the close of the trial. There was then no claim, nor any evidence on which to base any color of claim, that there was any contributory negligence on the part of the plaintiff. James Tuets, who operated the elevator, was the fellow servant of the plaintiff, and had he been guilty of negligence which alone caused the injury to plaintiff, the defendant would not be responsible. But if Tuets had been negligent in the management of the elevator, and the defendant had also been negligent, and kept an insufficient and unsafe rope on the elevator, from failure to use ordinary care in respect to the rope, and the negligence of the defendant and that of the fellow servant concurred in causing the injury, the defendant would still be liable. It is no defense that another participated in the wrong. "It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow servant, the master has been held to be liable. *Clark v. Soule*, 137 Mass. 380; *Cowan v. Railway Co.*, 80 Wis. 284, 50 N. W. 180; *Sherman v. Lumber Co.*, 72 Wis. 122, 39 N. W. 365, 1 L. R. A. 173; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Railroad Co. v. Reesman*, 9 C. C. A. 20, 60 Fed. 370, 19 U. S. App. 596; *Sommer v. Coal Co.*, 32 C. C. A. 156, 89 Fed. 54, 59 U. S. App. 519; *Flike v. Railroad Co.*, 53 N. Y. 550, 13 Am. Rep. 545; *Booth v. Railroad Co.*, 73 N. Y. 38, 29 Am. Rep. 97; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266." *Deserant v.*

Railroad Co., 178 U. S. 409, 420, 20 Sup. Ct. 967, 44 L. Ed. 1127. It was needless, therefore, to incumber the deliberations of the jury with any question as to whether Tuets was careful or negligent, as the solution of that question would not aid in the determination of the liability of the defendant, who, if guilty of negligence in respect to the rope which broke, was equally responsible to the plaintiff whether Tuets was careful or not. But the court was right in holding that there was no evidence of such unusual management by Tuets as to warrant submitting to the jury any question as to his negligence. The elevator was provided by defendant for moving its meat products between the different floors of its building. Its speed, and the appliances for controlling its movements, were provided for in the plan of its construction. It was made to move rapidly to speed the work, and to be stopped suddenly, or move gradually, as convenience might suggest. The only security for the cage with its load was the strength of the rope by which it was suspended and moved in the shaft. There is nothing in the evidence to indicate that it was regarded by anybody as hazardous to move it as rapidly or to stop it as suddenly as its construction permitted, nor anything tending to show that the operator generally stopped it more gradually than in this instance from any apprehension of danger, or for other purpose than to enable him to stop with more exactness at the proper place. At this time he had, perhaps inadvertently, allowed it to pass rapidly nearly to the third floor before checking its speed, and then stopped it suddenly. But this sudden stoppage was intentional, and not the result of accident or carelessness. He had full control of the levers, and purposely made the stop. He had run that elevator more than two years. There is no evidence that he had any knowledge or suspicion of any weakness of the rope, or ground for apprehending danger in so stopping, instead of allowing the cage to pass a trifle below the floor, incurring the slight delay of bringing it back. It was not a case when an unusually heavy load, more than the elevator was constructed to move with safety as its ordinary load, was placed upon it. Tuets, in the absence of notice to the contrary, had, so far as the evidence shows, the right to assume that the rope provided and in use was strong enough to sustain such ordinary load, when the elevator was run and stopped as rapidly as its construction allowed of. The inspector of the rope, while performing that duty, was not the fellow servant of the plaintiff, but was engaged in the performance of a duty of the master.

The foregoing covers all the assignments of error, and the judgment is affirmed.

DAVIS v. TRADE DOLLAR CONSOL. MIN. CO.
(Circuit Court of Appeals, Ninth Circuit. May 5, 1902.)

No. 763.

1. MASTER AND SERVANT—INJURY OF SERVANT—FELLOW SERVANTS.

The foreman of one shift of men alternating with others in working in a mine is a fellow servant with the members of the other shifts, and the master is not liable for an injury to one of the men caused by the negligence of the foreman of the preceding shift.

2. SAME—NEGLIGENCE OF FELLOW SERVANT.

Three shifts of men were engaged in driving a tunnel in a mine, working alternately. One shift would drill a number of holes in the face of the tunnel, charge them with blasting powder, and explode them, and then retire, to be succeeded by another shift. It was the custom for the outgoing shift to note the number of explosions, and inform the succeeding shift how many, if any, of the blasts remained unexploded. The foreman of one retiring shift stated to the incoming shift that two blasts had not been heard to explode,—one at the top, and the other at the bottom, of the tunnel. Their location, however, could not be certainly known without an examination, and this was made by plaintiff, who was one of the second shift. He located one at the top, and supposed the other to be at the bottom, where it was covered by the fallen rock. It was in fact in the breast of the tunnel, and on further drilling it was exploded, and plaintiff was injured. *Held*, that the injury was not chargeable to the negligence of the foreman of the outgoing shift in failing to correctly locate the unexploded blasts, which plaintiff, as an experienced miner, must have known could not be done with certainty merely from the sound of the explosions.

3. SAME—UNSAFE PLACE TO WORK—ASSUMED RISKS.

A master is not required to furnish the servant with a safe place to work as against a danger which is temporary, and arises from the hazard and the progress of the work itself, and is known to the servant, who in such case assumes the risk therefrom.

In Error to the Circuit Court of the United States for the District of Idaho.

The plaintiff in error was an experienced miner, engaged in the work of driving a tunnel in the mine of the defendant in error. The work was being continuously conducted by three shifts of men, working eight hours each. In each shift there were seven men, one of whom was the foreman or shift boss. Each shift operated two Burleigh drills, and bored from nine to seventeen holes in the face of the tunnel, which were charged with blasting powder and exploded, after which the shift retired to give place to the succeeding shift. At times some of the blasts failed to explode. It was the custom of the men of the retiring shift to note the number of explosions, and inform the incoming shift how many, if any, of the blasts remained unexploded. On May 26, 1900, at 7 o'clock in the morning, the plaintiff in error, with his shift, went into the tunnel to work. The foreman of the shift that had just gone off informed the incoming shift that there were two shots the reports of which had not been heard,—a back hole and a lifter. A back hole is a hole in the top of the tunnel, going in straight, and a lifter is one that goes in down on the ground at the bottom of the tunnel. After so being informed,

¶1. Who are fellow servants, see notes to *Railroad Co. v. Smith*, 8 C. C. A. 668; *Railway Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286.

¶3. Assumption of risks incident to employment, see note to *Railroad Co. v. Hennessey*, 38 C. C. A. 314.

See *Master and Servant*, vol. 34, Cent. Dig. §§ 583, 584.

the plaintiff in error went into the tunnel, and examined the face of it, and found one unexploded back hole on the left-hand side of the tunnel, and on the right-hand side, at the bottom of the tunnel, he saw a pile of muck or debris, behind which he supposed was the unexploded hole in the bottom. The fact was that the second unexploded hole was in the breast of the tunnel. The fact that it was unexploded was not discernible upon a casual examination, for the reason that the other blasts had broken off a portion of the rock into which it was sunk. This happened occasionally, and that it might occur at any discharge of the blasts was a contingency to be reckoned with. The shift to which the plaintiff belonged began working with their two drills. While they were so working, one of the drills bored into or near the unexploded blast, and caused it to explode, killing two of the men outright, and very seriously wounding the plaintiff in error. For the injuries so sustained the plaintiff in error brought this action against the defendant in error, alleging in his complaint, in substance, that it was the duty of the defendant in error to keep the plaintiff in error informed as to whether all the holes drilled and loaded by the previous shift had been exploded; that, by the exercise of ordinary care and prudence, it might have known that some of the holes fired by the preceding shift had failed to explode; that the plaintiff in error was injured by reason of the negligence of the defendant in error in failing so to inform him. Upon the trial of the case, after the plaintiff in error had rested his case, the court instructed the jury to return a verdict for the defendant in error, on the ground that, if the plaintiff in error was injured by the negligence of the foreman of the preceding shift, it was the negligence of a fellow servant. This ruling of the court the plaintiff in error makes the subject of his principal assignment of error.

James H. Hawley and Wm. H. Puckett, for plaintiff in error.

Richard Z. Johnson, Richard H. Johnson, and John F. Nugent, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We think the ruling of the trial court was clearly correct. Not only was the foreman of the shift of men who retired from the tunnel just before the shift to which the plaintiff in error belonged went in to work a fellow servant with all the members of that shift, within the doctrine of *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, and *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, but we think the evidence upon which the plaintiff in error rested his case falls short of showing that the foreman of the preceding shift was negligent. The complaint does not charge that the plaintiff in error was misinformed as to the location of the unexploded shots, but that he was not informed as to the number thereof. He did not allege, nor did he offer to prove, that there were more than two blasts remaining unexploded when he went in to work upon the tunnel. In fact it was conceded that there were but two. The mistake which the foreman of the retiring shift made was in supposing that the second of the unexploded blasts was at the bottom of the tunnel, instead of at the breast thereof. It is evident from the testimony, however,—and the plaintiff in error must have so understood it,—that the foreman located the position of the unexploded blasts solely by the sound of the explosions; a method which was uncertain, as the plaintiff in error must have known. The rules of ordinary prudence required the plaintiff in error to require some

member of his shift before beginning to drill to make examination of the face of the tunnel, and discover the location of the unexploded blasts, and the evidence shows that the plaintiff in error himself made the examination. The foreman of the retiring shift did not pretend to say that he had made such examination. He stated to the incoming shift what he had heard, not what he had seen. It is reasonable to say that the information he imparted was for the purpose of directing the attention of the incoming shift, first, to the number of unexploded blasts, and, second, to the places where he thought they would be found. The plaintiff in error, while making his examination, did not take the trouble to remove the débris at the bottom of the tunnel, which débris he erroneously supposed concealed an unexploded hole. If he had done so, he would have found that the hole had exploded with the others, and his attention would thereby have been sharply directed to the fact that there yet remained an unfired shot, which must be located before beginning his work.

Error is assigned to the ruling of the court in refusing to permit a witness to testify what, in his judgment as a miner, was the proper course to adopt in tunnels to protect the men at work against the danger of explosion of missed holes, and in excluding testimony as to the custom and habit in tunnels in that regard. There was no issue made in the pleadings to which the evidence so offered was pertinent. In the complaint it was sought to charge the defendant in error with liability for the injury which the plaintiff in error sustained by averring that the defendant in error could, by the exercise of ordinary care and prudence, have ascertained whether all the holes had exploded, and that it did in fact know that two of the holes had failed to explode, which fact the plaintiff in error had no means of knowing, and that the defendant in error was negligent in failing to give him information thereof. The evidence of the plaintiff in error contradicts some of these averments. It shows that the defendant in error did not know that some of the holes had not exploded, unless, indeed, such knowledge was imputable to it from the knowledge which the foreman of the preceding shift had; and, if it be assumed that his knowledge was the knowledge of the company, then it is not true that the plaintiff in error did not have all the knowledge upon the subject which the defendant in error possessed, for he was informed that two of the holes had not exploded. It is true that the law of master and servant requires that the former furnish the latter a safe place in which to work, but the master is not required to furnish the servant a safe place in which to work where the danger is temporary, and when it arises from the hazard and the progress of the work itself, and is known to the servant. The master is not required to be present at the working place at all times, in person or by a representative, to protect a laborer from the negligence of his fellow workmen or from his own negligence in the constantly changing conditions of the work. The plaintiff in error, while working in the tunnel, had full knowledge of the danger from unexploded blasts, and of all the means which were being employed to protect him therefrom. He assumed the risk of any defect, if defect there were, in the means used to detect the danger. The danger from a missed blast

was a danger incident to the work. *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525, 19 U. S. App. 245; *Brown v. King*, 40 C. C. A. 545, 100 Fed. 561; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Bunt v. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. 464, 34 L. Ed. 1031.

We find no error in the rulings of the circuit court. The judgment is affirmed.

BLAYLOCK v. INCORPORATED TOWN OF MUSKOGEE.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,685.

1. MUNICIPAL CORPORATIONS—EXTENT OF POWER AND LIABILITIES QUESTION OF LOCAL LAW.

The extent of the powers and liabilities of municipal corporations under the statutes of a state is generally a question of local law, upon which the decisions of the courts of the state are authoritative in the national courts.

2. STATUTE—ADOPTION—PRIOR CONSTRUCTION.

The enactment or adoption of a statute, which has been elsewhere in force, is presumed to be the adoption of the construction which had been previously given to that statute by the judicial tribunals whose duty it was to interpret it.

3. MUNICIPALITIES IN INDIAN TERRITORY—DEFECTS IN STREETS OR SIDEWALKS—LIABILITY.

On May 2, 1890, congress made chapter 29 of Mansfield's Digest of the Laws of Arkansas, which governs municipal corporations, a part of the laws of the Indian Territory (chapter 15, Ind. T. Ann. St. 1899). Prior to that time the supreme court of Arkansas had twice held that municipalities subject to that chapter were exempt from liability to individuals for negligence in the construction, maintenance, or repair of their streets. *Held*, the legal presumption is that, when congress adopted the statute of Arkansas as the law of the Indian Territory, it also adopted the construction of this statute which the supreme court of that state had previously put upon it, and a municipality in the Indian Territory governed by this chapter 29 (chapter 15) is not liable to individuals for defects in its sidewalks or streets, notwithstanding the fact that the more reasonable rule, which is sustained by the greater weight of authority, is otherwise.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

Thomas H. Owen and William T. Hutchings, for plaintiff in error.
Nathan A. Gibson, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This writ of error challenges the judgment of the court of appeals of the Indian Territory affirming the judgment of the United States court in the Indian Territory for the Northern district, which sustained a demurrer to a complaint against the incorporated town of Muskogee for injuries inflicted upon the plaintiff by the negligence of the municipality in the care of its sidewalks. The

case presents but one question, and that is whether or not municipalities governed, as the defendant was, by chapter 29 of Mansfield's Digest of the Laws of Arkansas, which was made a part of the laws of the Indian Territory (chapter 15, Ind. T. Ann. St. 1899), by the act of congress of May 2, 1890 (26 Stat. 94, c. 182, § 31), are liable for injuries resulting from their negligence in the care of the sidewalks upon their streets. The more reasonable rule—the rule sustained by the supreme court and by the great weight of authority—undoubtedly is that a municipality which is invested with the power and charged with the duty to make and repair its streets and sidewalks is liable to any individual for the injury which he sustains from its negligence in the exercise of this power or in the discharge of this duty. 2 Dill. Mun. Corp. (3d Ed.) §§ 1017, 1018; *Barnes v. District of Columbia*, 91 U. S. 540, 550, 551, 23 L. Ed. 440; *City of Detroit v. Osborne*, 135 U. S. 492, 496, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Madden v. Lancaster Co.*, 65 Fed. 188, 191, 192, 12 C. C. A. 566, 569. But the supreme court of the state of Arkansas had adopted and affirmed the converse of this rule prior to the enactment in the Indian Territory of chapter 29 of Mansfield's Digest of the Laws of Arkansas (chapter 15, Ind. T. Ann. St. 1899). *Arkadelphia v. Windham*, 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32; *City of Ft. Smith v. York*, 52 Ark. 84, 12 S. W. 157. When this chapter was made a part of the laws of the Indian Territory by the act of congress of May 2, 1890, it was, therefore, the established rule in the state of Arkansas, settled by the uniform decisions of its highest judicial tribunal, that corporations empowered to make and maintain streets and sidewalks under this statute were not liable to individuals for injuries caused by defects in them, or by the negligence of the corporation in the exercise of this power. The decisions of the supreme court of Arkansas, which established this rule, were not determinations of questions of general or commercial law, but they were the interpretation of the local law,—of the local statutes of the state of Arkansas,—which measured the powers and liabilities of municipalities in that state. The federal courts uniformly follow the construction of the constitution and statutes of a state announced by its highest judicial tribunal in all cases that involve no question of general or commercial law, and no question of right under the national constitution and the acts of congress. The character and limits of the powers and liabilities of the political or municipal corporations of a state are questions of local law, upon which the decisions of the supreme court of the state are authoritative in the national courts, because these questions are determinable by a construction of the constitution and statutes of the states under which the municipalities are organized. *Madden v. Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570; *Claiborne Co. v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; *City of Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260. The result is that prior to May 2, 1890, chapter 29 of Mansfield's Digest of the Laws of Arkansas (chapter 15, Ind. T. Ann. St. 1899) had been so authoritatively construed by the highest judicial tribunal of the state from which it was taken that municipal corporations governed by it were not liable, either in the state or in the federal courts, for in-

juries to individuals produced by the negligence of the corporations in the construction, maintenance, or repair of their streets and sidewalks. Thereupon congress made this chapter a part of the laws of the Indian Territory. The adoption of a statute or a law previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it. *Sanger v. Flow*, 48 Fed. 152, 154, 1 C. C. A. 56, 58; *Black*, *Interp. Laws*, p. 159, § 70. Hence the legal presumption is that the powers and liabilities of municipalities in the Indian Territory under chapter 29 of Mansfield's Digest (chapter 15, Ind. T. Ann. St. 1899) are the same that the powers and liabilities of such corporations in the state of Arkansas were at the time congress made that chapter the law of the territory. Inasmuch as such corporations were not liable to individuals for the injuries which they sustained from the negligence of the municipalities of Arkansas in the care of their streets and sidewalks under this chapter, the defendant, whose powers and liabilities are measured by the same statute, and by the construction of it which had been adopted before it became the law of the Indian Territory, is not subject to any such liability, and the judgment below must be affirmed.

ST. LOUIS, I. M. & S. RY. CO. V. LEFTWICH.

(Circuit Court of Appeals, Eighth Circuit. August 11, 1902.)

No. 1,716.

1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY—INSTANCE.

The question whether or not a passenger who had just boarded the smoking car, and was passing through that car, over the platform, to the next coach in the rear, where he intended to ride, was guilty of contributory negligence because he turned aside, grasped the railings on both sides of the steps of the platform of the car, and stepped down upon the upper step for the purpose of expectorating and throwing the contents of his mouth clear of the train, was a question for the jury, and not for the court.

2. SAME—JURY.

It is only when all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts which condition the issue of negligence or contributory negligence, that it is the duty of the court to withdraw that question from the jury; and it is not clear that all reasonable men would agree that there was any lack of ordinary care in the act of the plaintiff in this case.

3. SAME—RIDING IN PLACE NOT DESIGNED FOR PASSENGERS.

A passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car, or on an engine, or on a hand car, or on a freight or baggage car, or in any other place not designed for the carriage of passengers, is guilty of negligence which may bar his recovery of damages resulting from the concurring negligence of the railway company.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

George E. Dodge and B. S. Johnson, for plaintiff in error.

William G. Whipple and Durand Whipple, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This is an action for damages for a personal injury, and it resulted in a judgment for the plaintiff.

The chief, if not the only, reason why this judgment is assailed by counsel for the railway company, is that, in their opinion, the court below should have instructed the jury as a matter of law that the plaintiff, Leftwich, was guilty of contributory negligence which barred his right to a recovery of the damages he claimed. At the time the injury was inflicted, Leftwich was a young man about 29 years of age. He had served as a switchman and as a brakeman. On the occasion of his injury, he was a passenger on the train of the railway company, which contained two passenger coaches. The forward coach was a combination car divided by a partition into a forward and a rear compartment. The forward compartment was set apart for colored passengers, and the rear compartment was a smoking room. The next coach was a ladies' car. The plaintiff was a white man, and he had the right to ride in the smoking car or in the ladies' car as he chose. The train stopped but one or two minutes at the station where he boarded it, so that it was necessary for him to take it at once when it arrived. It was more convenient for him to ascend the steps at the front end of the smoking car when the train arrived at the station. He did so, and then passed back through this car, and out upon the platform between the two passenger coaches, on his way to the rear coach, where he intended to ride. When he was near the partition in the combination car, the train started. On his way back he coughed up some phlegm, and as he arrived upon the platform of the rear car he turned aside, grasped the railings on each side of the steps, and stepped down upon the upper step for the purpose of so expectorating that he might throw the phlegm clear of the train. As he stepped down upon this step, his foot fell upon a mass of woolen rags or waste saturated with oil, used to pack the boxes and oil the bearings of the wheels of railway cars, and commonly called "dope." As his foot struck this dope, he slipped, fell to the ground, and was injured. There was a spittoon in the coach in which he might have deposited the contents of his mouth. The facts which have been recited are undisputed, and they are all the facts material to the questions presented in this case.

The platforms and steps of railway cars propelled by steam are dangerous places for passengers to ride. They are not provided for that purpose, and passenger coaches generally carry on their doors, or in other conspicuous places, notices that the rules of railway companies forbid the passengers to occupy these places for the purpose of riding upon the trains. Moreover, it is a general rule of law that a passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car, or on an engine, or on a hand car, or on a freight or baggage car, or in any other place not

designed for the carriage of passengers, is guilty of negligence which, if it contributes to an injury that he sustains, will bar his recovery of damages therefor on account of the concurring negligence of the railway company. *Purple v. Railroad Co.* (C. C. A.) 114 Fed. 123, 129; *Railway Co. v. Salinger*, 46 Ark. 528, 536; *Hickey v. Railroad Co.*, 14 Allen, 429; *Quinn v. Railroad Co.*, 51 Ill. 495; *Paterson v. Railroad Co.*, 85 Ga. 653, 657, 11 S. E. 872; *Bon v. Assurance Co.*, 56 Iowa, 664, 667, 668, 10 N. W. 225, 41 Am. Rep. 127; *Railway Co. v. Roach* (Va.) 5 S. E. 175; *Robertson v. Railroad Co.*, 22 Barb. 91; *Eaton v. Railroad Co.*, 57 N. Y. 382, 384, 15 Am. Rep. 513; *Railroad Co. v. Langdon*, 1 Am. & Eng. R. Cas. 87; *Powers v. Railroad Co.*, 153 Mass. 188, 191, 192, 26 N. E. 446; *Flower v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Ecliff v. Railway Co.*, 64 Mich. 196, 31 N. W. 180. But the platforms and steps of passenger coaches are provided for the entrance and exit of passengers, and to enable them to pass from that part of the train on which they enter to the coach where they desire and are entitled to ride. The plaintiff rightfully entered upon this train, and immediately passed back across the platform between the cars on his way to the coach where he intended, and had the right, to ride to his destination. In all this there was no misuse of train or platform, no want of ordinary and reasonable care. But, as he passed across the platform of the last car he grasped the rails on both sides of the steps, and stepped down one step, in order to free his mouth of its troublesome burden, and to throw it clear of the train. Was this an act of which a man of ordinary prudence, in the exercise of reasonable care, would not have been guilty? Was it an act of negligence? The court below submitted this issue to the jury, and the question which that ruling presents to this court is, would all reasonable men, in the exercise of a fair and impartial judgment, draw the conclusion that, under all the circumstances of this particular case, the plaintiff failed to exercise the care which a man of ordinary prudence would have exercised when he turned aside from the door of his car, and stepped down one step, to relieve his mouth and send its contents away from the train? *Railroad Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65; *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746; *Railroad Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213. This question must be answered in the negative. The situation, circumstances, and surroundings of the actor always condition the answer to the question whether or not he has exercised ordinary care. It would undoubtedly have been negligence for one without necessity or reason to have placed himself upon one of the steps of this car while the train was in motion. On the other hand, if the train had started just after one had boarded a lower step of the platform it would not have been negligence for him to have placed his feet upon the higher steps to climb upon the platform and enter the car. The case in hand is on the debatable ground between the two cases supposed, and it is by no means clear that all reasonable men would agree that plaintiff's act evidenced any want of ordinary care under the peculiar circumstances of his case. Indeed, it is by no means certain that there are not some reasonably prudent and careful men who would have

been guilty of the same act under the same circumstances. The question which has been considered is the only one argued by counsel for the plaintiff in error, but at the close of their brief they state that, if it was not the duty of the court below to instruct the jury that the plaintiff was guilty of contributory negligence, still that court was in error because it failed to give to the jury separate instructions which they requested it to submit. These requests have been carefully read, considered, and compared with the charge of the court. So far as the rules of law which they contain were sound, pertinent, and material to the issues presented, they were fairly given in the general charge, so that there was no error in the refusal to give them in the words of the counsel for the plaintiff. Moreover, they present no question of law which is not involved in, and decided by, the conclusion that the question of contributory negligence in this case was for the jury, and not for the court.

There was no error in the trial of the case, and the judgment below is affirmed.

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In re CARLEY.

PATTEN v. CARLEY.

(Circuit Court of Appeals, Third Circuit. June 30, 1902.)

No. 21.

1. BANKRUPTCY—SPECIFICATIONS IN OPPOSITION TO DISCHARGE—RIGHT OF AMENDMENT.

A single amendment to the specifications filed in opposition to the discharge of a bankrupt, necessary to authorize the examination of the bankrupt on a matter pertinent to the question of discharge, should be allowed as a matter of course under the liberal rule as to amendments prevailing in all proceedings, where no laches or unfairness on the part of the creditor appears, and no injustice to the bankrupt or unreasonable delay in the case will be worked thereby.

2. SAME—REVISION IN MATTER OF LAW—MATTERS REVIEWABLE.

The right of a creditor to amend his specifications in opposition to a bankrupt's discharge is a valuable legal right, and the question whether a district court abused its discretion in denying such right is one of law, upon which the circuit court of appeals may exercise the power of revision conferred by Bankr. Act 1898, § 24b.

Petition to Review an Order of the District Court of the United States for the District of New Jersey.

In Bankruptcy. On petition for review.

John G. Johnson, for appellant.

Brief submitted, for appellee.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. The pertinent facts shown by the record before us in the matter of this petition, are as follows:

On November 17, 1900, Francis D. Carley was adjudicated a bankrupt, on his own petition, in the district court of the United States for the district of New Jersey; the petition and schedules showing an unsecured indebtedness of \$1,023,953.63. An order of reference was

made to Frederick W. Leonard, Esq. December 13th, the petitioner's proof of claim was filed. After an examination by his creditors, the said referee, on April 30, 1901, reported that the bankrupt was entitled to be discharged. On May 11th, specifications in opposition to his discharge were duly filed by the petitioner and by the Kentucky National Bank, and on May 15th, an order of reference, in the matter of both specifications, to Frederick W. Leonard was made. On June 11th, the first hearing on the specifications of the petitioner was had. Only one question was asked the bankrupt, which was not answered on an objection raised by his counsel. The referee sustained the objection on the ground that the specifications did not cover the matter inquired about. The reference was adjourned upon an agreement that amended specifications by petitioner should be submitted to counsel for the bankrupt, and if satisfactory, accepted, and that thereupon the examination should be resumed. This agreement failing to be carried out, on July 2d, a notice of motion to amend specifications was served on the counsel for the bankrupt, returnable July 8th. The hearing on this motion was adjourned by stipulation at bankrupt's request, to a day in the week beginning July 8th, to be thereafter agreed upon. The argument was further adjourned by stipulation to a day to be fixed by counsel, on account of the illness of the district judge. This agreement was afterwards, and on the same day, rescinded by counsel for the bankrupt, in a letter which stated that the motion to amend would be brought on Monday, July 15th. This correspondence has all been made part of the record and brought before us.

On July 15th, an affidavit was filed in behalf of counsel for the creditor, asking for an adjournment of the argument. In the petition to this court, it is stated under oath, that upon this application to the district court for an adjournment, it was ruled that argument of the motion might be made at the next session of the court, as argument at that time was impracticable; the court being about to adjourn for the summer vacation. It would also seem that the court, in relation to this affidavit of the creditor, stated that if the applicant renewed his motion on September 9th, he would not be considered to have been guilty of any further laches than existed on July 15th. On August 15th, a hearing before the referee was called. The creditor, the petitioner here, asked an adjournment until September, pending the argument of the motion to amend, filing an affidavit as to the facts upon which the adjournment was asked. The adjournment was subsequently, August 24th, denied by referee, who declared that the petitioner's proof and case were closed, and recommended the bankrupt's discharge. On September 9th, the first meeting of the court since July 15th, the motion to amend was argued and submitted, and on November 11th, the court denied the motion and sustained the referee, in recommending a discharge and declaring the testimony closed. The facts above recited sufficiently appear from the record sent up, to justify this court in exercising its authority under section 24b of the bankrupt act of 1898. That section is as follows:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the

proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The right of a creditor to oppose the discharge of his bankrupt debtor, is substantial and important, and the requirement of specifications filed within a time prescribed, is part of the orderly procedure necessary to a judicial determination of the propriety of the bankrupt's discharge. But the liberal right of amendment accorded in all proceedings, whether in equity or at law, is as important to the parties interested in a case such as this, as in those specially covered by statute and rule of court. These specifications are in the nature of a declaration, and when filed, an issue is presented between the creditor and the bankrupt. A single amendment to these specifications, necessary as the ground of inquiry and pertinent to the question of discharge, would, as a matter of course, be allowed, where no laches or unfairness on the part of the creditor appeared, and where no injustice to the bankrupt or unreasonable delay in the case would be worked by the granting thereof. It is true that the granting or not granting of the application to file an amendment to the pleadings of a case in equity or at law, rests largely within the judicial discretion of the court, and the exercise of that discretion will not be interfered with by a reviewing court, unless it appear to have been practically abused. Where facts are such, as to make it apparent to the revising court that the right to amend could not have been denied by the court below, except upon such a mistaken view of the facts disclosed by the record, as would amount to an abuse of the discretion exercised by the court, the action of the court in that regard should be reversed, and the amendment allowed.

The revision asked for in this case relates to a matter of law within the meaning of the section of the statute referred to. The right to amend, as above defined, is a valuable legal right, and the question, whether the discretion of the court below, in denying the right, has been abused, or not, is a legal question. In determining it, we do not assume to pass upon any matter of fact affecting the question of the discharge of the bankrupt, but only upon the legal right, as we understand it, of the petitioner to amend his specifications on the peculiar facts disclosed in the record.

The order of the court below is therefore reversed, and the petitioner is allowed, within such reasonable time as the court may prescribe, to file his amended specifications of opposition to the discharge of the bankrupt, and to proceed to an examination thereunder.

SAUNTRY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1902.)

No. 1,709.

1. EVIDENCE—PRESUMPTION—UNCERTAINTY CAUSED BY WRONGFUL ACT OF PARTY.

In an action by the United States to recover the value of timber alleged to have been unlawfully cut and removed from public lands by defendants, where the only evidence as to the quantity of timber taken

was the testimony of scalers, who made their estimates from measurements of stumps and tops remaining upon the land several years after the trespass was committed, an instruction that if the jury found that the timber was taken by defendants, but were in doubt as to the quantity so taken, they might indulge every fair and reasonable inference justified by the evidence in favor of the United States and against defendants, was proper and applicable to the case, although there was substantially no conflict in the estimates of the witnesses, since there was an inherent element of uncertainty in such estimates, caused by the wrongful acts of defendants, and for the further reason that defendants could presumably have produced better evidence, but did not.

2. WITNESS—IMPROPER CROSS-EXAMINATION.

Where a witness introduced by defendant was examined only as to the quantity of timber taken from certain described lands, which constituted a part of the subject-matter of the suit, it was error to permit plaintiff to cross-examine as to the quantity taken from other tracts also involved, but as to which he was not examined in chief.

3. APPEAL—IMPROPER CROSS-EXAMINATION—HARMLESS ERROR.

An error in permitting the cross-examination of a witness as to matters not covered by his direct examination was without prejudice where his testimony agreed substantially with that of the only other witness on the subject, the correctness of which was undisputed.

In Error to the Circuit Court of the United States for the District of Minnesota.

Newell H. Clapp, for plaintiffs in error.

Milton D. Purdy, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This action was brought by the United States against the plaintiffs in error to recover damages for cutting and taking away from lands of the United States timber standing and growing thereon. At the trial of the case in the court below there were two contested questions of fact: (1) Did the plaintiffs in error cut any timber from the lands described in the complaint? (2) If so, how much timber was cut by them? It appeared from the evidence that the timber was cut from the lands in question between October 1, 1887, and May 1, 1891. The United States discovered the trespass in 1895, and Special Agent Johnson went upon the lands in question for the purpose of making a scale of the timber which had been cut. Richard H. Peck, George W. Harmon, and William Mack assisted in this work. Two witnesses—Peck, called by the United States, and Harmon, by plaintiffs in error—testified as to the amount of timber cut. Their estimates substantially agreed. These two witnesses, from the very nature of the case, could only estimate the amount of timber cut by measurement of the stumps and tops of trees found years after the trespass had been committed. The trial below took place in July, 1901, and resulted in a verdict for the United States. The learned trial judge, in his charge to the jury, used the following language:

"Now, that is a difficult question to prove. These transactions date far back in time, and that would make it difficult to prove if there were no other difficulties in the case; but if you are satisfied that the defendants cut and removed the timber from these lands, then you will see that the

very act makes it very difficult, if not impossible, to prove the extent of the wrong which they did, and that the wrongful act enhances the difficulty of the proof. But there is a rule of law which will aid you in passing upon that feature of the case. If you are satisfied from the evidence that the defendants cut and removed the timber from these lands, then in ascertaining the quantity of the timber so cut and removed you may take into consideration the fact that the wrong of the defendants makes the determination of the quantity of such timber difficult. The law will not allow a wrongdoer to profit in any way by his own wrongful act. I will explain that matter to you somewhat more fully in the latter part of my charge. But for the present now I say the law will not allow a defendant to profit by reason of the fact that he has made the establishment of the exact quantity of timber difficult. In this connection you must bear in mind that I am assuming all the time that you will find the defendants were the parties who cut and removed the timber from these lands. If you do not find that to be the fact, then this portion of the charge has no relevancy whatever to the case. It is all based upon the assumption that you find that they were the parties who cut and removed the timber; then if, upon a fair and full consideration of all the evidence in the case, you are still in doubt as to the quantity of timber which they cut and removed, you may indulge every fair and reasonable inference justified by the evidence in favor of the plaintiff and against the defendants. The rule has been very well stated in the following language: 'When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him and in favor of the person whom he has injured.'

To the giving of this charge the plaintiffs in error excepted, and it is assigned as error here. Counsel for plaintiffs in error does not deny the correctness of the rule of law stated by the trial court, but denies that the case on trial was one in which the rule could have any application, for the reason that there was no conflict in the testimony as to the amount of timber cut. It is true that the witnesses substantially agreed as to the amount of timber cut, but the way the witnesses arrived at their estimates, which was by measuring stumps and tops of trees years after the cutting, demonstrates that there was an inherent element of uncertainty in their calculations. If the defendants cut the timber, it is fair to presume that they had in their possession, or under their control, very much better evidence than was in the possession of the United States; so that whether we view the case as one where the evidence of the extent of the injury inflicted was destroyed by the trespass, or as a case where the exact amount of the timber cut was known to defendants, but which evidence they failed to produce, we think the charge of the court complained of was applicable to the case on trial. The trial court repeatedly and guardedly instructed the jury that only in case the jury found that the plaintiffs in error cut the timber could they apply the rule stated in the foregoing charge. After all, what did the court state to the jury? As a result of the rule of law announced, the court said to the jury that, if they should find that the plaintiffs in error cut the timber, then if, after a fair and full consideration of all the evidence in the case, they were still in doubt as to the quantity of timber cut and removed, they might indulge in every fair and reasonable inference justified by the evidence in favor of the United States and against the plaintiffs in error. The jury had the right, without being told, to indulge in any fair and

reasonable inference in favor of the United States, which was justified by the evidence. "All evidence," said Lord Mansfield in *Blatch v. Archer* (Cowp. 63-65), "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It is said by Mr. Starkie in his work on Evidence (volume I, p. 54):

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

We think that the case now under consideration afforded a proper occasion to invoke this principle in the law of evidence.

It is also assigned as error that the court permitted counsel for the United States to cross-examine the witness Harmon as to the timber cut from section 26, and concerning which the witness was not examined in chief. While it is true that the limit to which a cross-examination of a witness shall extend is largely within the discretion of the trial court, and its decision in regard thereto will not be reviewed here except where there is an abuse of such discretion, still this court held in *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 47 C. C. A. 34, 107 Fed. 884, that an examination of a witness on cross-examination concerning matters about which he was not examined in chief was improper, and unfair to the other side. We do not think that the examination of the witness Harmon in chief would permit the counsel for plaintiff to cross-examine him in reference to section 26, but we are also of the opinion that, as the testimony elicited was the same as that of the witness Peck, called by the United States, the ruling of the court in permitting the examination of the witness Harmon in reference to section 26 was not prejudicial, especially in view of the fact that counsel for plaintiffs in error, in support of the first assignment of error, claims there was no dispute over the amount of timber cut.

Finding no error in the record, the judgment of the court below is affirmed.

PABST BREWING CO. v. GREENBERG et al.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1902.)

No 1,699.

1. TRESPASS—DAMAGES RECOVERABLE—VALUE OF PROPERTY TAKEN.

Where, in an action of trespass to recover damages for forcibly entering upon plaintiff's premises and taking therefrom certain personal property, it was shown on the trial that such property was all taken by its true owners, plaintiff cannot recover its value as an element of his damages.

In Error to the Circuit Court of the United States for the District of Minnesota.

John H. Ives, for plaintiff in error.

Moritz Heim and Stevens, O'Brien, Cole & Albrecht, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Greenberg Bros., hereafter called "plaintiffs," sued the Pabst Brewing Company, hereafter called "defendant," in the court below, in trespass, for the wrongful and forcible taking from the peaceable possession of said Greenberg Bros. of 10,000 glass bottles, the property of said plaintiffs, and of the value of at least \$500. The complaint alleged that said "Pabst Brewing Company, its agents and servants, willfully and maliciously, with strong hands and a multitude of people, forcibly entered said plaintiffs' warehouse, and took possession thereof, accompanying said conduct with insulting, abusive, and oppressive demeanor towards plaintiffs, and wrongfully and unlawfully and by threats of violence intimidated the plaintiffs, and against their will destroyed and removed from said premises all of said personal property, and converted the same to its own use, to the damage of plaintiffs in the sum of ten thousand dollars." The defendant, by its answer, admitted that about March 2, 1900, upon the invitation and consent of Greenberg Bros., it took from the possession of said Greenberg Bros. not to exceed 500 bottles, of the value of \$10, which bottles were the property of the brewing company; and denied any trespass or wrongful taking.

At the trial in the court below it appeared that on or about March 2, 1900, the representatives of several brewing companies went to plaintiffs' place of business in St. Paul, Minn., and then and there, according to defendant's evidence, each brewing company, with plaintiffs' consent, took from plaintiffs certain beer bottles which belonged respectively to each of said brewing companies. Plaintiffs introduced testimony tending to show that the bottles were taken by force. It was practically conceded at the trial that the bottles taken or destroyed were the property of the brewing companies, the only questions going to the jury being: First, the number of bottles taken or destroyed; second, whether they were taken by force, and, if by force, the amount of the damage. The learned trial court instructed the jury that, if they should find that the bottles were forcibly taken, then one item of damage would be the value of the bottles taken or destroyed. This instruction was excepted to, and is assigned as error in this court. We think that whether the defendant was liable for what its agents did in regard to its own property, or whether it was liable for the whole trespass as one of a number of joint wrongdoers, the instruction complained of was erroneous. This was an action of trespass; not replevin. Plaintiffs were not seeking to recover the possession of property of which they had been wrongfully dispossessed, but were seeking to recover the damages which naturally and legitimately resulted from the wrongful act of defendant. It is true that one who is in the actual peaceable possession of personal property may maintain trespass against any wrongdoer who forcibly injures or takes it away, including

the true owner. This is because trespass is an injury to the possession, and peaceable possession is *prima facie* evidence of title. This presumption of title, however, may be entirely overthrown. The plaintiff in trespass is generally the owner of the property, or one who has a special property therein. The only ground upon which a person merely in the peaceable possession of personal property may recover the full value thereof from the wrongdoer who takes it away is because the one who is in peaceable possession is liable over to the true owner. Hence it is that the defendant may always show, in a case of trespass, in mitigation of damages, that the property taken has been legally applied to the use of the true owner. In the case at bar, the plaintiffs being in peaceable possession of the property, it is correct to say that they could recover the full value of the property against any stranger to the title; but when it is shown by the evidence, as it was in the court below, that all the property taken had been taken by the true owner, then the plaintiffs could not be liable over to any one for the value of the property, and therefore the only reason why plaintiffs could ever recover the value thereof failed. In other words, when it appeared that the property had been taken by the true owner, then this fact mitigated the damages which plaintiffs could recover by eliminating the value of the property as an item of damage from the case. *Squire v. Hollenback*, 9 Pick. 551, 20 Am. Dec. 506; *Hanson v. Herrick*, 100 Mass. 323; *Borlander v. Gentry*, 36 Cal. 110, 95 Am. Dec. 162; 3 *Suth. Dam.* 485.

For this error in the charge of the court the judgment below must be reversed, and a new trial granted, and it is so ordered.

CITY OF DULUTH v. ABBOTT et al.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1902.)

No. 1,664.

1. DECREE—CONSTRUCTION—LIMITATION OF INJUNCTION.

A decree awarding an injunction must be construed with reference to the matters complained of in the bill, and one which enjoins a city from cutting down, injuring, or interfering with any of the poles, wires, or other parts of the plant of a telephone company is not objectionable as interfering with the exercise by the city of its police powers by cutting down poles or wires in case of fire or other public necessity, where the prayer of the bill is based entirely on allegations that the city threatens to unlawfully cut down and remove, from its streets, the poles and wires of complainant, for the purpose of obstructing it in the lawful operation of its system.

Appeal from the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 104 Fed. 833

Oscar Mitchell, for appellant.

William W. Billson (C. A. Congdon, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. The appellees filed their bill in the court below, as trustees for the mortgagee bondholders of the Duluth Telephone Company, to enjoin the threatened removal by the appellant of the poles and wires of the company from the streets of appellant. Since the hearing of the case in the court below, all of the questions involved have been passed upon by the supreme court of Minnesota in the case of *Northwestern Exch. Tel. Co. v. City of Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, and *City of Duluth v. Duluth Tel. Co.*, 87 N. W. 1127. As the questions involved are those relating to the construction of certain statutes of the state of Minnesota, it is conceded that the interpretation given to said statutes by the supreme court is controlling. This necessarily results in the affirmance of the decree appealed from. It is claimed, however, by counsel for appellant, that the decree entered herein is too broad in its terms, and we are asked to modify the same. The decree appealed from is in the following terms: "It is ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the defendant, according to the prayer of the bill." The prayer of the bill was for an injunction perpetually enjoining and restraining the said defendant, its officers and agents and employes, from cutting or taking down, injuring or interfering with, any of the poles, wires, fixtures, or any part of the plant of the said Duluth Telephone Company, or obstructing or interfering with the maintenance, operation, repair, renewals, or extension thereof. It is claimed that the injunction granted will prevent appellant from exercising its police powers; that the appellant is enjoined from cutting down poles or wires in case of fires or other public necessity. We do not think the decree subject to this criticism. The decree must be interpreted with reference to the matters complained of in the bill, which were that the appellant threatened unlawfully to cut down and remove, from the highways of said city, the telephone poles and wires of the appellees and to obstruct appellees in the lawful use and operation of their system. The threats complained of involved a destruction of the whole plant. We do not think there was any complaint against the appellant's exercising its police powers with reference to appellees' telephone system, or that the decree entered would have the effect to in any way prevent the appellant from acting within its police powers with reference to the telephone company.

The decree will be affirmed.

DULUTH FURNACE CO. v. IRON BELT MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1902.)

No. 1,738.

1. DAMAGES—BREACH OF CONTRACT FOR PURCHASE OF ORE—TIME OF BREACH.

Under a contract for the sale of 20,000 tons of iron ore, to be delivered in about equal monthly installments throughout the year, as ordered by the purchaser, but which provided that any part of such quantity not previously ordered shipped should be delivered and received by the last day of the year, where the purchaser refused to order or receive

any of the ore, the measure of the seller's damages for the breach is the difference between the contract price and the market price of the ore on the last day of the year.

In Error to the Circuit Court of the United States for the District of Minnesota.

John G. Williams, for plaintiff in error.

S. H. Holding (H. D. Goulder, Frank S. Masten, F. E. Searle, and H. R. Spencer, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. The Iron Belt Mining Company, hereafter called "plaintiff," brought this action in the court below to recover of the Duluth Furnace Company, hereafter called "defendant," damages for the breach of an oral agreement claimed to have been entered into between them on January 5, 1900. The plaintiff claimed that the contract was that it should mine for the defendant 20,000 tons of Buckeye ore, to be delivered on board cars of the Wisconsin Central Railroad at the plaintiff's mine in Wisconsin, throughout the year 1900, at the price of \$2.84 per ton of 2,240 pounds, deliveries to be made in about equal monthly installments, as defendant should give shipping orders, but deliveries or any portion thereof not called for when due to be postponed, all the ore, however, to be taken by the defendant by December 31, 1900; that for so much ore as the defendant had ordered forward in any month payment was to be made on the 25th day of the following month; and that all ore was to be paid for by the 25th of January, 1901. Defendant claimed that it never agreed absolutely to take the ore, but that the transaction had between plaintiff and defendant simply amounted to the giving by the plaintiff to the defendant of an option to purchase 20,000 tons of ore of plaintiff at \$2.84 per ton. It appeared at the trial that defendant had never taken any ore under the contract, and had uniformly refused so to do; that plaintiff had the ore in stock, and was always ready and willing to deliver the ore at any time during the year 1900. The jury found the contract to be as claimed by the plaintiff, and returned a verdict in its behalf. The court charged the jury that, if they found the contract to be as claimed by the plaintiff, then the measure of damages would be the difference between the contract price and the market value of the ore at the time of the breach of the contract, which the court held to be December 31, 1900. Counsel for defendant excepted to the rule of damages announced by the court and to the refusal of the court to charge the jury that the damages must be estimated by the difference between the contract price of the ore which was to be delivered each month and the market value of the same at the time it ought to have been delivered. Plaintiff did not claim that the contract provided that any particular amount of ore was to be taken each month. Plaintiff's claim was that it was optional with defendant as to how much ore was to be delivered each month, but that all the ore should be taken by December 31, 1900. We can see no

error in the charge of the court or in the refusal to charge. The other assignments of error are equally without merit. Therefore the judgment of the court below will be affirmed.

EXCELSIOR WOODEN PIPE CO. v. CITY OF SEATTLE.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1902.)

No. 767.

1. PATENTS—SUIT FOR INFRINGEMENT—SEVERANCE FOR PURPOSE OF APPEAL.

A licensee under a patent, having the right to join the patentee as a co-complainant in a suit for infringement with or without his consent, is entitled to prosecute an appeal from an adverse decree in such a suit, although the patentee declines to join in such appeal, by having him summoned, and his refusal entered of record.

2. EQUITY—PRAYER FOR DISCOVERY—SUFFICIENCY OF BILL.

A prayer for discovery in a bill may be disregarded where the bill propounds no interrogatories, and answer under oath is expressly waived.

3. PATENTS—LICENSEE—RIGHT TO SUE FOR INFRINGEMENT.

A grant by a patentee of the exclusive right to manufacture and sell the patented article within a specified territory is a mere license, which conveys no title to the patent within such territory, and no exclusive right of use therein which entitles the grantee to sue for infringement one who uses the article, manufactured by others outside of the territory.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Wm. F. Booth, N. A. Acker, W. W. Wilshire, and A. H. Kenaga, for appellant.

W. E. Humphrey, A. R. Titlow, and Bogle & Richardson, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was a suit in equity, from the averments of the amended bill, in which it appears that one Charles P. Allen was the inventor of a hooped pipe composed of wooden staves, the cross-joints being interlocked by concealed metallic tongues of novel construction and arrangement, the hoop of the pipe being composed of a novel strap bolt, coupling-shoe, and means for engaging them, for which invention letters patent were duly issued on the 22d day of March, 1887, granting and securing to Allen, his heirs and assigns, for the full term of 17 years from that date, the exclusive right to make, use, and vend the said invention throughout the United States and its territories; that thereafter, and prior to the commission of the acts complained of, Allen granted to the Excelsior Redwood Company, a California corporation, its successors and assigns, the exclusive right to manufacture and sell the patented article during the life of the patent within certain described territory, including the state of Washington, which right was conveyed, also prior to the commission of the acts complained of, by the Excelsior Redwood Company to the complainant the Excelsior Wooden Pipe

Company, a California corporation, which exclusive right to manufacture and sell the patented article within the state of Washington has ever since been held by it. The bill alleges, among other things, that the complainant the Excelsior Wooden Pipe Company, ever since acquiring the right mentioned, has been, and still is, engaged in the manufacture and sale of the patented pipe, and has invested large sums of money therein, and has derived large profits therefrom; that the pipe so made and sold by it has been distributed in various places throughout the territory covered by its exclusive license; that it has been put in actual use and used, and has become well known and sought and called for by intending purchasers, and that the complainant the Excelsior Wooden Pipe Company has become well known as the exclusive licensee under the patent, and that "all persons have generally acquiesced in, admitted, and recognized the validity of said letters patent, and have respected the rights of your orators therein, and refrained, in general, from infringing the same." The bill further alleges that, in compliance with section 4900 of the Revised Statutes, the complainants "have always marked and caused to be marked all of the said patented wooden pipe manufactured and sold by them with the word 'Patented,' together with the day and year the said patent was granted, to wit, March 22, 1887, thereby giving notice to the public at large that the wooden pipe was covered by the said letters patent." The bill further alleges that prior to the filing thereof, and within one year then last past, and after the acquirement by the complainant the Excelsior Wooden Pipe Company of its exclusive license, the respondent city, with full knowledge of the existence of such exclusive license, and entirely disregarding the same, and without right so to do, did, in the state of Washington, make and cause to be made a large amount of wooden pipe containing and embodying the said patented invention, and has used and continues to use the same, thereby infringing the said letters patent and the rights secured to the complainant the Excelsior Wooden Pipe Company by its exclusive license. It is further alleged in the amended bill that the defendant city is, without license or right, still making and causing to be made, and still using the said pipe so made and caused to be made, in the said state of Washington, and threatens to continue to do so, and will continue the alleged unlawful acts unless restrained by the court; that the damages thereby suffered by the complainants exceed \$50,000, but that they are unable to allege the damages with any greater certainty "without a discovery from said respondent as to the length and diameter of the said infringing wooden pipe, together with the amount of material, both wood and metal, used in its construction, and an accounting based upon said discovery"; that the respondent has realized upwards of \$50,000 by reason of the alleged infringement, "but the exact amount of which is likewise unknown to your orators, and they cannot calculate or allege the same without a discovery and accounting, as aforesaid, from said respondent." Although a discovery is prayed for, an answer under oath is expressly waived. An injunction restraining the alleged infringement is also prayed for, as well as an accounting, with a decree for such profits as the respondent may be shown to

have realized by the infringement; and such damages as the complainants may be shown to have sustained.

To the amended bill the respondent city interposed two pleas, by the first of which the city set up that on or about the 19th day of April, 1899, it entered into a written contract with the Pacific Bridge Company, a California corporation, for the construction and completion of certain additions to the then existing water system by which it supplied the inhabitants of the city with pure water, a copy of which contract was annexed to the plea, and which showed that the bridge company was an independent contractor. The plea alleged that the bridge company, as such contractor, proceeded, in accordance with the terms of the contract, to construct and complete the additions to the water system, in the course of which work it made and caused to be made and used certain wooden stave pipe for carrying the water in certain parts of the system. By its plea the city denied that it had ever at any time made any wooden pipe of the pattern described in the amended bill, or containing or embodying any of the devices or inventions covered by the patent therein alleged, or caused the same to be made, otherwise than by entering into the contract with the bridge company, and averred that, if the pipe used by the bridge company in the construction and completion of the work contracted for infringed the letters patent, such infringement, if committed at all, was committed solely by the bridge company. The plea further set up that the complainant Allen licensed the bridge company to make and use wooden pipe in the work so contracted for by it under said letters patent, and expressly consented to such manufacture and use; and that the complainant Allen, on the 16th day of March, 1901, "in consideration of payments made to said contractor, executed to this respondent a full and complete release from and waiver of any and all claims he might otherwise have against this respondent for or on account of its acceptance of said additions to its water system so constructed by said Pacific Bridge Company, and its continued use of said additions and of the pipe used by said contractor in constructing said additions to its water system." The second plea of the respondent city, in addition to the matters averred in its first plea, alleged that it had no purpose or intention to manufacture or cause to be manufactured water pipe containing or embodying the devices or inventions covered by the said letters patent, or to participate in any way in any future infringement; and denied that, unless restrained by the court, it would continue to make or cause to be made any such infringing wooden pipe. The pleas were supported by a verified answer filed by the respondent city, which, among other things, set up the same contract with the Pacific Bridge Company alleged in the two pleas, and averred that the bridge company procured from the patentee, Allen, outside of and beyond the territory covered by the license owned by the complainant the Excelsior Wooden Pipe Company, such parts of the wooden stave pipe used by it in constructing the said addition to the respondent city's water system as contained and embodied the invention covered by the said letters patent, and that, having so lawfully procured such parts so patented, the said bridge company did

use the same in the construction of the addition to the respondent city's water plant contracted for by it. The answer denied that the city had ever made any such wooden pipe as embodied any part of the said invention, or that it had ever caused any such wooden pipe to be made, but admitted that it did execute the aforesaid contract with the said bridge company, and averred that that contract did not require or obligate the bridge company to use the invention claimed by the complainants in any part of the work so contracted for and performed in and upon the respondent city's water system. By its answer the respondent city alleged that after the construction and completion of the addition contracted for by the bridge company it used the same as a part of its municipal water plant, and averred that the complainant Allen, before the work contracted for and completed by the bridge company was turned over to the city, authorized and licensed the respondent city to use the pipe embodying his invention, and released it from any claim, penalty, or damage it might otherwise have incurred for or on account of the use of the pipe in question. The answer of the city denied that it was making or causing to be made any wooden pipe embodying or containing the aforesaid invention, either in the state of Washington or elsewhere, and denied that it threatened or intended to make or cause to be made any such wooden pipe in the future, or that it has heretofore threatened or intended to make any such wooden pipe, or cause the same to be made, and denied that it had at any time threatened or intended to use any wooden pipe embodying the said invention, save and except the pipe contained in and forming a part of the aforesaid addition to its said water system constructed by the said Pacific Bridge Company, and denied that it would use any of such wooden pipe except that above mentioned unless restrained by the court.

The complainants, failing to take issue upon any matter contained in the pleas, caused the same to be set down for argument, which was had, after which the court below sustained the pleas, with leave to the complainants to take issue upon the facts set forth therein. The complainants declined to do so, and the court, holding the pleas good and sufficient as a bar to the complainants' alleged cause of action, entered judgment dismissing the bill, with costs to the respondent. Thereupon the complainant the Excelsior Wooden Pipe Company desiring to appeal from such judgment, and the complainant Allen being unwilling to do so, the former notified the latter in writing to appear at a time stated and join in the appeal, in response to which the complainant Allen appeared in the court below, and filed therein his declination; and thereupon, on the petition of the complainant the Excelsior Wooden Pipe Company, the court below allowed its appeal to this court from the judgment given below; and here a motion is made by the respondent city for the dismissal of the appeal on the ground that the appellant, the Excelsior Wooden Pipe Company, has no such title to or interest in the subject-matter of the litigation as authorizes it to prosecute an appeal in its own name.

It is true that a licensee cannot prosecute a suit in equity in his own name against a third party for an infringement, but must at least join the patentee as co-complainant, who may be so joined whether willing

or unwilling. *Birdsell v. Shaliol*, 112 U. S. 485, 487, 5 Sup. Ct. 244, 28 L. Ed. 768; *Littlefield v. Perry*, 21 Wall. 205, 223, 22 L. Ed. 577; *Paper Bag Machine Cases*, 105 U. S. 766, 776, 26 L. Ed. 959; *Brush Electric Co. v. California Electric Light Co.*, 3 C. C. A. 368, 52 Fed. 945. And as a patentee may be joined as a co-complainant against his consent originally, no good reason is perceived why he may not be so retained for the protection of the rights of his licensee, after judgment once rendered, and the cause remanded for further proceedings. The patentee may be content with a decree against him; but when his co-complainant is not, and has the right of appeal, the doctrine of summons and severance may be invoked, and upon the refusal of the patentee to join in the appeal after being duly notified to do so the appeal of his licensee may be allowed upon the entry of such refusal of record, the judgment remaining conclusive as to the party refusing. *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953; *Fost. Fed. Prac.* (3d Ed.) § 505. The motion to dismiss the appeal is denied.

Upon the merits we are of the opinion that the judgment should be affirmed. The discovery feature of the bill may be disregarded—First, because an answer under oath is expressly waived in the bill; and, secondly, because the bill propounds no interrogatories. *Huntington v. Saunders*, 120 U. S. 78, 7 Sup. Ct. 356, 30 L. Ed. 580; 6 Enc. Pl. & Prac. 732. There is no doubt that when a city infringes a right granted and secured by letters patent it is liable for the wrong. But was there any infringement in this case by the city of Seattle? In so far as the patentee is concerned, the city clearly had his consent to the use of the patented pipe. Now, what were the rights of the complainant the Excelsior Wooden Pipe Company? It never acquired the entire rights of the patentee to the invention in any territory. What it did acquire and own at the time of the commission of the acts complained of was the right to manufacture and sell the patented pipe within, among other territory, the state of Washington, and, as a necessary incident thereof, the right to use and cause to be used the pipe so manufactured and sold by it in the limited territory stipulated for. But it was not granted the right to use any of the patented pipe made by others, nor did its exclusive license to manufacture and sell the patented article within the state of Washington, with the incidental right to use and cause to be used pipe so manufactured and sold by it, preclude the use of the patented article within the state of Washington that was made by others outside of the territory. "The grant of an exclusive right," said the supreme court in *Waterman v. Mackenzie*, 138 U. S. 256, 11 Sup. Ct. 334, 34 L. Ed. 923, "under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district, to be sold outside of it. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322. So is an

instrument granting 'the sole right and privilege of manufacturing and selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. See, also, *Oliver v. Chemical Works*, 109 U. S. 75, 3 Sup. Ct. 61, 27 L. Ed. 862." The implied right to use and cause to be used articles made under the patent by the licensee in this case is limited to articles so made. It does not carry the monopoly of the entire right of user, and of the right to grant to others the right of user, which vested in the patentee under the letters patent. If so, the grant of the right to make and to sell would carry the entire monopoly, which, it is well settled, is not the case. "Every patent," said the supreme court in *Waterman v. Mackenzie*, *supra*, "issued under the laws of the United States for an invention or discovery, contains 'a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof.' Rev. St. § 4884. The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant, and convey either—First, the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, second, an undivided part or share of that exclusive right; or, third, the exclusive right under the patent within and throughout a specified part of the United States. *Id.* § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement." As the case is presented, it appears that the respondent city never made or sold any of the patented pipe, and that its acts were confined solely to the use of such of the patented article as was made or procured by the Pacific Bridge Company, and by it placed in the city's water system under a contract containing no provisions in respect to such patented article. As the Excelsior Wooden Pipe Company's license did not cover or prohibit the use of pipe so made and placed, it has no cause of complaint against the appellee.

The judgment is affirmed.

HILDRETH v. THIBODEAU.

(Circuit Court, D. Massachusetts. July 31, 1902.)

No. 1,487.

1. SPECIFIC PERFORMANCE—REQUIRING CONVEYANCE BY DEFENDANT—NECESSITY OF SHOWING TITLE.

A court cannot decree specific performance of a contract by which defendant agreed that complainant should be the owner of all inventions and improvements in a machine made by him while in complainant's employ, by requiring defendant to assign an application made by him for a patent, where complainant testifies that the invention claimed in such application is his own, and not defendant's, since in that case defendant has no title thereto, and no right to a patent which he can convey, nor has he made any invention or improvement which is covered by his contract.

2. SAME—ASSIGNMENT OF APPLICATION FOR PATENT—PENDENCY OF INTERFERENCE PROCEEDINGS.

A bill will not lie to compel specific performance of a contract by which defendant agreed that complainant should be the owner of any invention made by him, by requiring defendant to assign to complainant an application made by him for a patent, where plaintiff also has an application pending for a patent covering the same invention, and interference proceedings between them are before the patent office for adjudication.

In Equity. Suit for specific performance.

Alex P. Browne, for complainant.

William Quinby, for defendant.

COLT, Circuit Judge. This is a bill for the specific performance of the following agreement:

"Whereas, Herbert L. Hildreth, of Boston, candy manufacturer, is desirous of having perfected and manufactured a certain machine or machines for use in the manufacture of candy, and especially for sizing, shaping, cutting, wrapping, and packing; also the pulling of molasses candy; and whereas, I, Charles Thibodeau, being a skilled mechanic, and desirous of entering the employ of said Hildreth for the purpose of constructing, improving, and perfecting such machinery: Now, therefore, in consideration of such employment, and of the payment of wages to me at the rate of (\$3.25) three dollars and twenty-five cents per day, I hereby agree with said Hildreth to enter his employ, and that I will give him my best services, and also the full benefit and enjoyment of any and all inventions or improvements which I have made or may hereafter make relating to machines or devices pertaining to said Hildreth's business. I also further agree that, should said Hildreth not desire to patent any of said inventions or improvements, but to keep the same secret, I will do all in my power to assist him in this, and will not disclose any information as to the same or any of them, except at the request of the said Hildreth.

"Signed at Boston, Mass., this 29th of May, 1897.

"Charles Thibodeau."

It appears from the bill and evidence that the complainant claims title to the same invention which he asks to have assigned to him under the contract. After setting out the agreement, the bill proceeds with the following allegations:

"(9) That while the defendant was in your orator's employ he worked upon a machine owned by your orator, and designed and adapted to perform an operation known as 'pulling' the candy manufactured by your orator, upon which machine your orator applied for letters patent of the United

States under date of September 21, 1900, which application was subsequently allowed, and was about to issue, when your orator was notified for the first time by the United States patent office that another application for the same subject-matter had been filed, and that an interference between that application and your orator's application would be declared. (10) That under the statutes of the United States and the rules of the United States patent office it was not possible for your orator to learn the name of the applicant whose application for patent was deemed to interfere with your orator's until the declaration of interference, so called, was made by the patent office upon the 13th day of March, 1901, and a copy thereof received by your orator through the mails on the 14th day of March, 1901, whereby your orator learned for the first time that the defendant was the applicant for letters patent for a candy-pulling machine adjudged by the United States patent office to interfere and be identical with the machine described in your orator's application for patent. (11) That the said machine upon which said letters patent have been applied for by the defendant is a machine covered by the contract above set forth between your orator and the defendant, and that the defendant made the oath required by law in support of his application for letters patent that he was the inventor of said machine, whereas your orator became and was and is the owner of the machine so alleged to have been invented by the defendant, and entitled to the same, and to the ownership and enjoyment of any letters patent which have been or may be hereafter granted therefor."

From the allegation of the bill it appears that the candy-pulling machine invented by the complainant has been declared by the patent office to be identical with the machine described in the defendant's application for a patent, and the prayer of the bill is that the defendant be ordered "to execute a suitable assignment in writing to your orator of the said invention and the said application for letters patent." The identity of the two inventions further appears from the proceedings in the patent office. The complainant amended his original application by the insertion of claims 1 and 2 of the defendant's application, so that identically the same subject-matter is involved in the interference proceedings. In a letter addressed to the complainant, dated March 13, 1901, the patent office says:

"The subject-matter involved in the interference is: (1) In a candy-pulling machine, in combination, a series of pins or candy-pulling members, and means for moving a part of said members in intersecting paths, whereby said members automatically feed and pull the candy. (2) In a candy-pulling machine, in combination, a series of pins or pulling members, and automatically acting means for causing said members to feed the candy to each other and pull the same. The counts are claims 2 and 3 of your application, and claims 1 and 2 of the application of Chas. Thibodeau, of Somerville, Mass."

Further, the complainant, in his testimony, declares that the defendant never made any invention or improvement in candy-pulling machines, or other machines relating to the complainant's business, while in his employ, except the addition of a roll in one machine. He further declares that he made the invention which this suit seeks to compel the defendant to assign to him:

"Q. What invention did Thibodeau make while in your employ? A. None. Q. What improvements did Thibodeau make while in your employ? A. Do you mean by my orders? Q. I mean what improvements did he originate while in your employ? A. As stated yesterday, he added a roll to simply rest on top of the paper roll; that is all. Q. Please state what orders you gave to Thibodeau, as referred to in the answer to interrogatory 213. A. To build a machine as it existed when it was completed by him. Q.

What particular piece of mechanism in that machine did you direct Thibodeau to construct? A. All of it. Q. The invention in that interference was made by Thibodeau, was it not? A. I understand the machine was, but the invention was not. Q. I understand that you claim to be the inventor of the invention that you are seeking by this suit to compel Thibodeau to assign to you. Is this right? A. Our claim in the patent office shows for itself. (Question repeated.) A. I think I have told you a number of times that I claim to be the inventor."

Upon this state of proof it is manifest that the complainant claims title in himself to the invention, the conveyance of which is the purpose of this bill. A complainant cannot assert title in himself, and at the same time call upon the defendant to convey title. The complainant's evidence goes even further, for he testifies that he did not hire the defendant as an inventor, and that the defendant has made no invention or improvements (except an immaterial one) in the machines which form the subject-matter of the contract. As the invention covered by the defendant's application conferred no right upon the defendant upon the complainant's own showing, a court of equity cannot decree specific performance. A bill for specific performance will not lie for the conveyance of property in which the defendant has no title. *Kennedy v. Hazleton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; *Columbine v. Chichester*, 2 Phil. Ch. 27; *Id.*, 1 Coop. t. Cott. 295; *Ferguson v. Wilson*, 2 Ch. App. 77; *Post v. Marsh*, 16 Ch. Div. 395; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Morss v. Elmendorf*, 11 Paige, 277; *Milkman v. Ordway*, 106 Mass. 232, 256. *Kennedy v. Hazleton* was a bill for specific performance under an agreement to assign to the plaintiff any patents which the defendant might obtain for improvements in certain machines. Having invented an improvement, in order to evade the agreement, the defendant induced a third person to make application in his own name, and to take out the patent. In the opinion of the court dismissing the bill, Mr. Justice Gray said:

"A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title. A bill by vendee against vendor for specific performance, which does not show any title in the defendant, is bad on demurrer. And if it appears, by the bill or otherwise, that the want of title (even if caused by the defendant's own act, as by his conveyance to a bona fide purchaser) was known to the plaintiff at the time of beginning the suit, the bill will not be retained for assessment of damages, but must be dismissed, and the plaintiff left to his remedy at law. * * * As the patent, upon the plaintiff's own showing, conferred no title or right upon the defendant, a court of equity will not order him to assign it to the plaintiff; not only because that would be to decree a conveyance of property in which the defendant has and can confer no title, but also because its only possible value or use to the plaintiff would be to enable him to impose upon the public by asserting rights under a void patent."

Upon the complainant's case as it stands there can be no decree for specific performance under the contract, for the defendant has made no "inventions or improvements" which are covered by the contract. What this bill really seeks is to have the court declare that the defendant, under his contract, has no right to set up a claim to an invention for a candy-pulling machine which was invented by the complainant; or to have the court determine in this suit the question of priority of invention. That question is now properly before the patent office for

adjudication in the interference proceedings. If it should be determined in those proceedings that the complainant was the prior inventor of the candy-pulling machine, this bill falls, for the reason that the defendant has made no invention, and there is nothing to assign under the contract. On the other hand, if it should be determined in those proceedings that the defendant was the prior inventor, it would then be time for the complainant to bring a bill for specific performance under the contract. The present bill, to say the least, is prematurely brought, and must be dismissed.

The defendant has filed a cross-bill asking that the agreement be adjudged invalid, and that it be delivered into court and canceled. It is not contended that the agreement was obtained by fraud or misrepresentation, but it is said that it belongs to that class of unconscionable contracts which a court of equity will not enforce. I am not satisfied that the contract is absolutely void as against public policy. Whether it belongs to that class of contracts the specific performance of which a court of equity will not enforce can be determined when such an issue is presented upon a proper bill.

A decree may be entered dismissing the bill and cross-bill; neither party to recover costs.

NATIONAL PHONOGRAPH CO. v. FLETCHER.

(Circuit Court, E. D. New York. June 9, 1902.)

1. PATENTS—INFRINGEMENT—SALE OF PARTS OF COMBINATION.

One who solicits and obtains, from dealers, machines the parts of which are covered by patents, and which are not in need of repairs, for the purpose of incorporating therein certain improvements of his own, and then returning them, and in doing so reproduces elements of the combination specifically covered by a patent, infringes such patent.

2. SAME—RECONSTRUCTION OF PATENTED DEVICE FOR SALE.

A patent covering a combination of parts in a machine is infringed by one who, in concert with dealers in such machines, takes the same, and reconstructs them, substituting new parts for some of those of the patent, changing others, and using some of the old parts in new relations, and then returns the machine to the dealer to be sold as that of the patentee.

3. SAME—PHONOGRAPH REPRODUCERS.

The Edison patents, Nos. 397,280 and 430,278, relating to phonograph reproducers, *held* infringed; No. 484,584, to the same inventor, also covering specific parts of such producers, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 397,280, issued February 5, 1889, to Thomas A. Edison, for a phonograph recorder and reproducer, No. 430,278, issued June 17, 1890, to the same inventor, for a phonograph, and No. 484,584, issued October 18, 1892, to the same inventor, for a phonograph reproducer. On final hearing.

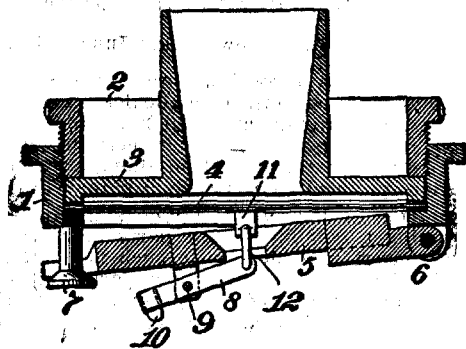
Dyer, Edmonds & Dyer, for complainant.
Seabury C. Mastick, for defendant.

THOMAS, District Judge. The complainant owns three patents covering reproducers used in the Edison phonograph. The defendant, by circulars, requested owners to send their Edison reproducers,

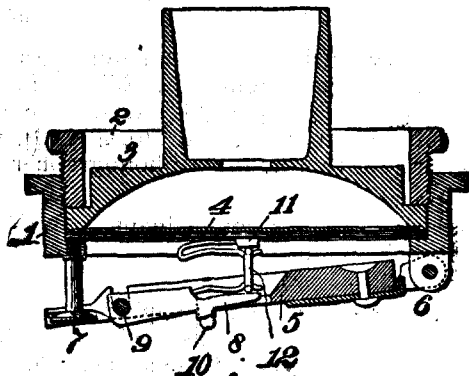
and promised to return them so improved that they would better perform their functions. The evidence does not show that the reproducers received by the defendant needed repair, although it is inferable that they had been used. Of 1,500 changed, nearly all came from one or two dealers in phonographs and parts thereof. A few were received from individual sources. Hence the defendant did not buy or sell reproducers in the usual way, but, for the purpose of their alleged nicer operation, added labor and material to those owned by others, and for this he was paid. There is no direct evidence that the reproducers refashioned by defendant thereby received increased life or strength. Every reproducer was sold primarily by the complainant; each purchaser paid the complainant a proper tribute. There is no direct evidence that the defendant's traffic has to this time diminished the complainant's sales in number or amount. What, then, did the defendant? He added his improvement wherever owners of reproducers would permit him so to do, and, save in a few instances, returned them to dealers. What did he customarily do in the way of changing the reproducer?

The complainant's and defendant's reproducers are shown in the following figures:

Edison Reproducer



Fletcher Reproducer



The parts in detail are as follows: 1, the body ring; 2, the clamping or screw ring; 3, the tube plate; 4, the diaphragm; 5, the weight; 6, the weight hinge; 7, the limiting screw; 8, the sapphire arm; 9, the arm pivot; 10, the sapphire; 11, the cross-head; 12, the link. Of these, the only parts covered by any of the combination claims are: 4, the diaphragm; 5, the weight; 6, the weight hinge; 7, the limiting screw for holding the weight in place; 8, the sapphire arm; 9, the arm pivot; 10, the sapphire; 11, the crosshead; 12, the link. The last five constitute the reproducing point, and means for connecting the same to the diaphragm, so as to permit independent and lateral movement of the reproducing point. Some of these parts are not specifically stated in the claims, but are described in the specification, or illustrated diagrammatically.

Patent No. 397,280 covers a combination of the parts above stated, but all the parts fall under the general classification of a diaphragm, a weight or retarding device, the hinge connection between the weight and the rim of the frame, a reproducing point, and means for connecting the reproducing point with the diaphragm so as to permit independent and lateral movement of the reproducing point.

Patent No. 430,278 is thus described in the letters:

"This invention relates to the recording and reproducing points of the phonograph, and has for its objects such an improvement in the form and construction of such devices, and in the manner of arranging and supporting the same, as, in the first place, to materially improve the character of the sounds produced by the instrument, so as to make them more accurately reproduce the sound vibrations communicated to the recorder than has heretofore been found possible; secondly, to make the instrument of a less delicate character, and more readily manipulated and adjusted by inexperienced persons; and, thirdly, to enable the recording point to be used for a longer period of time without having to be sharpened or reground or replaced by another."

No. 9 of these claims provides for the combination of a recording or reproducing point having a shank or extension, and a sleeve for holding the same; No. 11, for a reproducing point whose bearing surface is the surface of a portion of a sphere; No. 12, for a spherical reproducing point; No. 15, for a reproducing point pivoted so as to have a lateral movement in connection with a weight bearing thereon; No. 16, for a reproducing point having a bearing surface, which is the surface of a portion of a sphere, and pivoted so as to have a lateral movement, in combination with a weight bearing thereon; No. 17, the same as No. 16, without mention of the weight; No. 18, for a laterally rocking, spherical, reproducing point, in combination with a weight bearing thereon; No. 20, for the combination of the reproducing point, the lever carrying the same and connected with the diaphragm, the hinged plate, and the hinge connection between the said lever and said plate; No. 22, for a recording point having a cylindrical head provided with a cutting edge and a shank or extension; No. 29, for the combination of a diaphragm, a lever connected therewith, a sleeve carried by said lever, and a recording or reproducing point removably held in said sleeve.

Counsel for defendant states, after citing patent No. 430,278:

"It therefore appears that the ball-shaped or spherical reproducing point is the essential part or element of the device set forth in patent No. 430,278, the

secondary elements or parts being the means of mounting the point on the lever and the means of supporting the lever, so that it has a slight movement laterally of the record. That this conclusion is correct is readily shown by a perusal of the patent and by the statement of the inventor [page 1, line 9]: "This invention relates to the recording and reproducing points of the phonograph."

Patent No. 484,584 provides for improvement in phonograph reproducers, as follows: Claim 1. The combination, in a phonograph, with a phonograph blank of wax-like material, of a jewel reproducer. Claim 2: The combination, with a phonogram blank, of a rounded jewel reproducer. Claim 3. For a reproducer or bearing point for phonographs, consisting of a jewel not affected by chemicals, or chemical action, of the wax-like material of the phonogram blank. This patent does not seem to be infringed, as the part was in every instance supplied primarily by the complainant.

With such survey of the parts of the several patents, the defendant's changes in the same may be considered. 4, diaphragm. The diaphragm proper is retained, but its associated tube plate is changed. The Edison tube plate (not an element in the patented combination) is flat, and is close to the glass, with a large opening at the center, while Fletcher's tube is made with a space or sound chamber at the bottom of the central opening, where is placed a plate or resonator with openings at the outer edge, which improves the volume and tone of sounds, as defendant claims. Such plate is inscribed, "The Fletcher. Pat. Applied For." 5, the weight. The original plate is retained except in 25 instances, where recorders from the Edison phonograph were substituted, as shown in Fletcher's reproducer No. 1. The weight has a slot for a different kind of lever or arm for carrying the sapphire point, and also is given a larger bushing to engage the head of the limiting screw, so as to permit of greater movement, and is attached by a hinge essentially different. 6, the weight hinge, obviously, is of a different type, and has, as claimed, a better action. 7, the limiting screw is renewed, and in its bushing permits greater movement of the weight. 8, sapphire arm discarded, and another substituted. The defendant testified: "I place in this slot [in the weight] my sapphire arm, which has a double-pointed pin running through one end of it; these points are held in position by the bushings which are placed in the groove." 9, arm pivot. Edison's discarded, and another substituted. 10, the sapphire retained, and placed in the substituted sapphire arm. 11, the crosshead. Edison's discarded, and Fletcher's substituted. 12, the link. Fletcher's link substituted.

From this it appears that the only parts retained are the diaphragm, the weight, and the sapphire point; that the diaphragm is associated with a tube plate different in form; that the weight is held by a different hinge and limiting screw, and has a different bushing and slot; that the other parts of the combination are all substituted, and made from new material, and after different designs, but in every case within some of the patents. From the foregoing it is observed that there is no occasion for repairs, and hence the law relating to that subject has no specific application. The defendant receives reproducers, usually from dealers, for the purpose of return-

ing them with his improvements. Therefore, the question is whether a person may receive reproducers needing no repairs, place his improvement thereon, and return (1) with a substitution, change, or change of relation, of every part; (2) with a specifically patented part of the combination reproduced and readjusted. As to the renewal of the patented parts, there is no doubt of infringement, in view of the decisions. *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276; *Aiken v. Print Works*, 2 Cliff. 435, Fed. Cas. No. 113. In *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 433, 14 Sup. Ct. 631, 38 L. Ed. 500, it was stated with reference to the manufacture and sale of a single element of a combination, with intent that it should be united to the other elements so as to complete the combination: "Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee." This rule has been recognized even in cases where infringement has not been decreed. *Wilson v. Simpson*, 9 How. 123, 13 L. Ed. 66. This phase of the case requires no further discussion; hence, the first finding is that the defendant, by creating anew the reproducing point, and means for connecting it with the diaphragm, violates patent No. 430,278. No effort was made by the defendant to show that any particular claim alleged to be infringed was not, but the general contention was that no part of the patent was infringed. All the claims pointed out seem to be infringed, and it will be so adjudged.

The final inquiry relates to the infringement of patent No. 397,280, which covers the combination of parts. The modification, substitution, and change of relation of parts, passes the limit of allowable repairs. Reproduction, not restoration, is intended, for there is no occasion for restoration. Every vital part except the sapphire, diaphragm and weight is renewed, but the weight is the same only in its material; the sapphire is reset in an entirely new arm, whose detailed parts are unlike the original, and the diaphragm is associated with a tube plate quite dissimilar to that of Edison. If the defense were the right to repair, it could not be maintained, for no one acquainted with the appearance of the Edison reproducer could easily discover it in Fletcher's reproducer. Viewed superficially or critically, recognition is confused, if it does not absolutely fail. The reproducer is a delicate instrument adapted to the successful operation of a novel machine. The inventor has received the privilege of selling and having his machine used. The defendant's broad claim is that he may take these reproducers, with all their parts, and refashion or reassociate the parts, so that his creation and that of Edison are blended, and concert with dealers for their sale as Edison's genuine device; that is, the defendant claims the right to gather up all of the complainant's output, recast the same, subtract what he will, add his own parts, good or bad, and put afloat again as the patented product, simply because he uses some of the original parts, each in itself unchanged. If patented machines may be refashioned to suit every skilled or unskilled improver, and marketed as originals with "Fletcher's Improvement," the inventor is at the disadvantage of

having numberless coadjutors, whose association he does not invite, and whose improvement may mar the action, merit, or fame of the original device. The improver obtains the benefit of the patent without returning, it may be, equal benefit, and the inventor's goods are on the market in any and every form, good and bad. The whole suggestion seems vicious and unconscionable.

There is nothing in the law relating to repairs, as stated in *Machinery Co. v. Jackson*, 50 C. C. A. 159, 112 Fed. 146; *Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005, and kindred cases, that justifies such use of the patented article. It is true that in *Chaffee v. Belting Co.*, 22 How. 217-223, 16 L. Ed. 240, the court states that a purchaser "may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind." This decision goes no farther than this; that an individual owner may do what he will with a patented machine or article which is his property. If it be a patent medicine, he may combine it with other substance, and use it, thus improved, for his own peculiar purposes. The experiment is at his own peril. But if he advertise it for sale after such dilution, as the inventor's medicine with improvements, or turn it over to jobbers for sale, he may be destroying the merit of a patented article, and substituting something of his own compounding. What a man may do for his own use, with property made pursuant to a patent, is not what he may do for the purpose of selling as another's patented article. Hence, it is considered that the defendant's traffic involves placing Edison's reproducers on the market hampered with alleged improvements which may discredit Edison's invention, and thereby injure complainant's business, which improvements conceal or obliterate the identity of the original reproducer. In their physical being and fashioning of parts, the Edison reproducers are not "Fletcherized" reproducers, as the defendant terms them, when improved, and the complainant is entitled to a decree protecting it from a reproduction of its patented articles under the peculiar and harmful conditions stated.

A. B. DICK CO. v. POMEROY DUPLICATOR CO. et al.

(Circuit Court, D. New Jersey. March 27, 1894.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the validity of a patent has been sustained in one suit as against a plea of anticipation by a prior patent, the same issue presented by a defendant in a subsequent suit for its infringement, in the same court, will not be considered on an application for a preliminary injunction, although defendant claims to have newly discovered evidence thereon.

2. SAME—INFRINGEMENT—STENCIL SHEETS.

The Broderick patent, No. 377,706, for improvements in prepared sheets for stencils, held infringed, on a motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 377,706, issued to John Broderick February 7, 1888, for improvements in stencil sheets. On motion for preliminary injunction.

D. H. Driscoll, for complainant.

J. D. Gallagher, for defendant.

GREEN, District Judge. This matter comes before the court on a motion for a preliminary injunction. The bill of complaint alleges that the defendants are infringing letters patent No. 377,706, granted to John Broderick February 7, 1888, for improvements in prepared sheets for stencils, which letters patent had been duly assigned to the complainant, who is now the sole owner thereof. The validity of these letters patent was established in this court by a decree made the 1st day of August, 1893, in a suit in which the said A. B. Dick Company was complainant, and one William G. Fuerth was the defendant. 57 Fed. 834. In the opinion of the court in that case a stencil made by the combination of an exceedingly porous paper, having however tough fibers, such as the Japanese dental paper, or Yoshino, with a coating of wax of such consistency that its particles would readily flow or move upon each other under pressure, was novel in the art, and evidenced invention. The testimony in that case clearly established the fact that what was called a "soft wax" was first used as a coating for stencils by Broderick; that theretofore the coating commonly used had been a hard, brittle wax, which, when put under pressure, or cut or broken away in the manufacture of the stencil, broke or ruptured, or carried with it the fibers of the underlying sheet upon which it had been spread. Hence arose the difficulty of making clear and distinct certain loop letters, so called. This was entirely avoided by Broderick's use of a soft wax as a coating. And as has been said, he was the first to select, particularize, and use such a wax for such a purpose. It was further said by the court in A. B. Dick Co. v. Fuerth that the wax used by Broderick was called a "soft wax" because its particles flowed upon each other and moved readily and easily under slight pressure. The criterion of softness of wax, as distinguished from hardness of wax, is to be found in the capability of the easy displacement of its particles. If such easiness of displacement characterizes the substance, it is essentially soft. The defendants in the present case are making a stencil in all respects practically similar to the stencil protected by the Broderick patent, save that for the coating of the stencil sheet they use a wax whose fusion point is 165° F. And their insistence is that as Broderick described the wax he uses, preferably, as having a fusion point of 120° F., it follows that the wax they use is much harder, and not within the limitations of his letters patent. But the fusion point of the wax used is not the test of hardness. The true test is, will its particles move readily under slight pressure. If so, it is "soft." That the wax used by the defendants has this characteristic of softness cannot be denied. The fact that the stencil made by them is a perfect stencil proves it. And although the wax with which they coat their basic sheets may be different in composition from that used by the complainant, yet none the less is it a "soft" waxy or gummy coating, within the terms of Broderick's patent.

In the case of A. B. Dick Co. v. Fuerth, the defendant, *inter alia*, claimed that the Broderick patent was anticipated by letters patent granted to one Nickerson May 27, 1879, and numbered 215,833. This

patent was duly considered by the court, and the contention of the defendant was not sustained. The present defendants insist that they have discovered new testimony bearing upon the Nickerson patent and its practical operation, which they should be permitted to lay before the court before the pending motion is determined. An outline of the proposed testimony has been given in the affidavits submitted by the defendants. I do not think it proper to discuss here the probable or possible effect of this testimony. It must not be overlooked that the complainant's patent has once been sustained by this court when directly antagonized by the Nickerson patent. If it shall appear to be proper under any circumstances to admit such new evidence when offered, the defense raised thereby should rightly be relegated to the final hearing. A very serious question must first be settled, which concerns the right of the present defendants to interpose a defense of the character which they now seek to make. And this question arises from this state of facts: Shortly after the commencement of the suit of *Dick v. Fuerth*, the defendants organized a corporation known as the Redding Ink & Duplicator Company (he being one of the incorporators), which took over all the business of Fuerth, and continued it for some time. While that suit was pending in this court, and some time in 1891, the corporate name of this company was changed to that of Pomeroy Duplicator Company. This corporation under this new name is one of the present defendants. Of the last-mentioned company, Charles T. Pomeroy and Eltweed Pomeroy, two of the present defendants, are stockholders and directors. It is in evidence that the Pomeroy Duplicator Company, or the Messrs. Pomeroy individually, contributed to the expenses of the defense in the *Fuerth Case*. The question therefore arises, are they not all privies? And if so, are not the present defendants estopped from raising any defense save that of noninfringement? It is unnecessary to decide this now. It will more properly come before the court when the evidence proposed is actually presented.

The motion for injunction pendente lite is granted.

UNITED STATES v. KIMBALL.

UNITED STATES v. KIMBALL et al. (two cases).

(Circuit Court, S. D. New York. March 7, 1902.)

(Nos. 1-3.)

1. WITNESSES—APPEARANCE BEFORE GRAND JURY—PRIVILEGE.

Code Cr. Proc. N. Y. § 393, declaring that the defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him, applies only to "defendants," or persons against whom a charge has been brought, and is not the same as the constitutional provision declaring that no person shall be compelled to testify against himself, which provision includes, not only defendants, but all witnesses.

2. SAME—INDICTMENT—USE OF EVIDENCE.

Where an investigation before a grand jury is in progress for the purpose of ascertaining whether a crime has been committed, not based on any complaint or formal accusation, evidence given in such

investigation by persons subsequently indicted is not used elsewhere, in violation of Rev. St. U. S. § 860, declaring that any evidence voluntarily given by a witness cannot be used against him in any criminal prosecution.

3. **SAME.**

That a person subsequently indicted was subpoenaed before the grand jury and compelled to take the usual oath was not an infringement of his constitutional right not to testify against himself; he not being able to claim his constitutional privilege until he had been sworn as a witness.

4. **SAME—COMPULSION.**

Where defendants were subpoenaed to appear before a grand jury and testify in an investigation concerning matters in which they were the principal actors, and before any complaint or accusation had been brought against them, and before appearing had time to consult counsel, and on appearing stated that they were desirous of an opportunity to testify, and made no claim of their constitutional privilege to refrain from testifying, they were not "compelled" to testify, within the constitutional prohibition declaring that no person shall be compelled to testify against himself, so as to invalidate an indictment subsequently found on evidence disclosed.

5. **SAME.**

Where a witness, on appearing before a federal grand jury in response to a subpoena, stated that he had been advised not to answer any questions in regard to the subject under investigation, on the ground that his answers might tend to incriminate him, and he was thereupon fully informed that he could not be so compelled to testify, and he continued to answer questions or not, according to his free will, he could not thereafter claim, on a motion to quash an indictment against him, that his constitutional privilege was violated.

Henry L. Burnett, U. S. Atty., and Ernest E. Baldwin, Asst. U. S. Atty.

Hoadley, Lauterbach & Johnson and Edward Lauterbach, for defendant Kimball.

Underwood, Van Vorst, Rosen & Hoyt (William M. K. Olcott and Frederick B. Van Vorst, of counsel), for defendant Poor.

Lorenzo Semple, for defendant Rose.

THOMAS, District Judge. The indictment in action No. 1 charges in several counts that Kimball, while president of the Seventh National Bank in the city of New York, to evade the provisions of section 5208 of the Revised Statutes of the United States, resorted to a certain device, pursuant to which he certified and caused to be certified certain checks drawn upon the bank by the firm of Henry Marquand & Co. (consisting of Henry Marquand and the defendant Poor), at times when such company did not have on deposit with the bank an amount of money equal to the amount specified in the checks, in violation of such section, as amended by section 13, Act Cong. July 12, 1882 (1 Supp. Rev. St. p. 357). The indictment in action No. 2 charges a conspiracy between Kimball and Poor to commit an offense against the United States by a violation of such statute, in and by the certification of checks of Marquand & Co., and that pursuant to such conspiracy Poor drew checks at several times stated and Kimball certified the same. The indictment in action No. 3 charges that Kimball, while president, and Rose, while paying teller, of such bank, unlawfully certified checks of Marquand

& Co., at several times stated, in violation of such statute; the latter executing the certification under the direction of the former. The defendants moved in the first instance to inspect the minutes of the grand jury, that they might base thereon a motion to quash the indictments. The defendants brought on the second motion at the suggestion of the court, and it has been heard in connection with the first motion. The motions, at the time of submission, were based upon affidavits of the moving parties; but since the matter has been under consideration the stenographic minutes containing the examination of Rose have been added to the record by order of the court. The United States has offered no evidence beyond the affidavit of the United States attorney, stating the mere fact that 17 witnesses were subpoenaed and testified before the grand jury.

In the summer of 1901, the Seventh National Bank, theretofore doing business in the city of New York, failed, and the grand jury undertook an investigation of its previous transactions, with the obvious purpose of discovering whether its affairs had been conducted lawfully. It is inferable that this inquiry was initiated without complaint or knowledge that any given person had committed an offense that aided the failure, and the subpoenas issued to the witnesses, including the defendants, were in the form served upon Kimball. This was the usual subpoena commanding the proposed witness to appear before the grand jury, at a time and place designated, "to testify all and everything which you may know concerning the matter of the failure of the Seventh National Bank of New York City, on the part of the said United States; and this you are not to omit, under the penalty of two hundred and fifty dollars." Kimball complied with this summons, and appeared before the grand jury at the appointed time and on one or two subsequent dates.

From the affidavits of the three defendants and the United States attorney, the facts, so far as ascertainable from them, may be summarized as follows: (1) The defendants, being 3 of 17 witnesses summoned and testifying, knowing that the failure of the Seventh National Bank was under investigation, but not that indictments were contemplated against them, each gave evidence relating to checks drawn in the name of Marquand & Co., by the hand of Poor, upon the bank of which Kimball was president and Rose the paying teller. (2) Each defendant had opportunity to take legal advice,—Kimball, if not before he began his evidence, at least before he completed it upon a subsequent day or days; Poor between July 25th and 30th, and especially on the 25th day of July, when he appeared at the United States attorney's office, accompanied by his counsel, and asked for an adjournment to meet several lawyers and others respecting the affairs of Marquand & Co.; and Rose before he testified, inasmuch as he announced that he had been advised by counsel. (3) Kimball was advised by the United States attorney that he was at liberty to refuse to answer any question, and that whatever he said would not be used against him elsewhere, to which he replied that he would be glad to have the opportunity of explaining anything which occurred in relation to the matters of the bank, and thereupon gave his evidence, although he states that he believed

that a refusal to answer questions might be construed by the grand jurors as evidence that there had been wrongs committed by him, but that, having been compelled to appear, and being in the jury room, he felt constrained and compelled to answer such questions as were asked of him, and that the district attorney discussed with him, before the grand jury, his right to do certain things, some of which were made the subject of the indictments. Poor was not so advised by the United States attorney, but raised no objection to giving his evidence. Rose, upon being asked a question at some stage of the examination, objected to answering the question upon the ground that it might tend to incriminate him, but, upon being advised by the United States attorney that it was his right to refuse to answer questions that tended to incriminate him, but that the question asked did not tend to incriminate him, and that he could be compelled to answer the same, the defendant did answer it, and gave his other evidence without objection, not being able to distinguish between questions whose answers would, and those that would not, incriminate him. This evidence of Rose is modified decidedly by the minutes of his evidence hereafter discussed. (4) All the defendants state that, had they supposed or been advised that statements made by them would or could be considered against them by the grand jury, and were intended to be so used, they would have declined to submit to the examination, or at least to a part thereof. Hence it appears from such affidavits that each of the defendants,—two of them, Poor and Rose, shown to have had counsel before appearing,—knowing the occasion and nature of the inquiry and his relation to the checks, gave evidence; that Kimball was advised of his privilege by the United States attorney, and declined to avail himself of it; that Poor was not so advised by him, and that Rose was so advised, and declined to answer one question, but finally answered it, upon being told that the answer could not incriminate him and that he could be compelled to answer; and that certain of the evidence given by each witness (for the present this statement will be left applicable to Rose) was relevant and material to the subject-matter of the indictment. It will further be observed that none of the defendants states that he had not the benefit of counsel before going before the grand jury.

In the course of their argument the defendants evolved these propositions: (1) That an obeyed summons to the defendants to appear before the grand jury, and consequent evidence touching matters thereafter charged in an indictment against them, violated the constitutional provision that no person "shall be compelled in any criminal case to be a witness against himself," and that in the case of Rose the compulsion was aggravated by the insistence of the United States attorney that he should answer, after he had objected to a certain question. (2) That merely subpoenaing the defendants before the grand jury, and requesting them to testify, violated their right to choose whether they would give evidence in a proceeding wherein they were charged as defendants; that is, an indictment found by a grand jury is illegal, if the person charged in it attended pursuant to a subpoena, and gave or refused to give

evidence touching its subject-matter. (3) That under section 860 of the Revised Statutes their evidence was improperly used against them in finding the indictments.

For convenience the second and third propositions may be first considered. The competency of a defendant, in a criminal case in New York, to testify therein, is now stated in section 393 of the Code of Criminal Procedure:

"The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

The law of the state has removed the disability of a defendant in a criminal case to testify, and permits him to stand mute or to testify as he wills, and protects his choice from any suggestion of the prosecuting party, as well as unfavorable inference by the jury. No right of this nature springs from the constitution. Such a defendant could not, before the statute, be asked to take the witness stand, because, on account of his status, he could not be a witness voluntarily or compulsorily; and the disability now continues, unless of his own motion he elect to remove it. To demand or to request that he shall be sworn is an attempt to choose for him, which constrains his acceptance and coerces him to make public choice in the presence of the jury. This would be misconduct on the part of the prosecution, intended and calculated to harm the defendant, disturb his free choice, and prejudice the jury in the case of declination. This protection relates solely to a defendant. But a person cannot be regarded as a defendant, so as to render him such an incompetent witness, until some process is directed against him (*U. S. v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671; see, also, *U. S. v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134); that is, until he is selected by some judicial method as a subject of accusation. Then he is exempt from a request in the presence of the jury to give evidence in the immediate proceeding. This immunity does not flow from the constitution, but the law of the state. The constitutional provision is not directed to defendants, but is a common shield for all persons summoned as witnesses. It is for the protection of witnesses, irrespective of their relation to the proceeding. The constitution includes persons who are defendants, so far as they belong to the whole class of competent witnesses (*Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110); but at the time of the adoption of the provision the class known as "defendants" was under disability, and hence could not have been contemplated. It may not be considered that the constitution intended to protect persons having the status of defendants from giving evidence against themselves, when the law forbade them from being witnesses at all. But when the disability was removed they came within its protection, not because they were defendants, but because they might be witnesses. Moreover, when a defendant is protected by the state statute from being called, and yet offers himself as a witness in his own behalf, he cannot claim the protection of the constitution as to the charge involved, while, if he be a mere witness, and unrelated as defendant to the proceeding, he may end his evidence whenever it guiltily connects him even with the immedi-

ate offense under investigation. The present parties stood in no such relation to the proceeding, nor would they, if they had gone unsummoned before the grand jury. They could object when and where they would to incriminating evidence. But this statement of the relation of the constitutional provision to a defendant should not be misunderstood. A person charged as a defendant may be in such condition of duress that the court may infer that he was "compelled," as the word is used in the constitution, from the very fact that he is brought before the jury and thereupon gives evidence; that is, compulsion may be presumed from the circumstances, but not from his mere technical relation as defendant.

What is illustrated by the discussion to this point is: (1) That summoning a person, a defendant, before a jury, and asking him to answer, is not per se a violation of the constitution, but at most of the law of the state; (2) that, if he thereupon give evidence, his mere status as a defendant does not presume a violation of the constitution, for non constat he may give evidence in his own favor, or he may, if he wish, give evidence against himself, as in the case of an accomplice who becomes a witness for the government; (3) but compulsion in certain cases may be presumed, not from the legal status, but from the duress into which that status has brought him, as will appear later. But the present defendants had not yet become such when they gave their evidence. The proceeding of the grand jury was an investigation. This is suggested, not for the purpose of showing that it was not a criminal case within the meaning of the constitution, but (1) to aid the conclusion that the witnesses (the present defendants) were not then defendants, so as to be protected by the law of the state from being called; (2) to illustrate that they did not stand in such technical or practical relation to the procedure that summoning them and accepting their evidence could be regarded, even in the most extreme view, as compelling persons in fact, even if not technically charged, to give evidence against themselves; (3) to illustrate that section 860 of the United States Revised Statutes has not been violated.

An important national bank had failed, and the cause did not appear. No person could be brought before a magistrate, because no one was accused, and, so far as appears, no one was known or suspected, nor had it been ascertained whether the failure arose from criminal acts or the misfortunes of business. The investigation was intended to discover facts, and determine whether such facts showed that an offense had probably been committed. The proceeding was mere investigation, directed to discovery, not aimed at specific individuals. But, as the defendants show by pertinent authority, upon the evidence taken at any and all times before it, a grand jury may select probable offenders and find indictments against them. *People v. Rutherford*, 47 App. Div. 209, 62 N. Y. Supp. 224; *People v. Northey*, 77 Cal. 627, 19 Pac. 865, 20 Pac. 129. So repeated indictments may be found on the same evidence against the same persons. *State v. Clapper*, 59 Iowa, 279, 13 N. W. 294; *State v. Andrews*, 35 Or. 388, 58 Pac. 765; *Hampton v. State*, 67 Ark. 266, 54 S. W. 746; *State v. Peterson*, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; 117 F.—11

Creek v. State, 24 Ind. 151, 156. The evidence elicited on a charge against one person could be used to indict another. *State v. Beebe*, 17 Minn. 241 (Gil. 218). The evidence is not taken with such formality that, when an indictment is found, the evidence has fulfilled its entire use. After evidence has been taken in an investigation, and the jury votes upon the question whether this shows that A. has probably committed an offense, its vote is taken in the same proceeding, and the evidence taken is not used elsewhere, within section 860 of the Revised Statutes of the United States. The defendants' position that, if the present defendants were not such during the investigation, they became later specific subjects of consideration, and that the evidence taken during the general investigation could not, under section 860, be used to indict them, is untenable. They did not become defendants in the matter before the grand jury until the indictment was found, and the evidence taken prior to such indictment was at all times a part of the same proceeding. Had they been arrested upon warrant issued by a court or commissioner, they would have been defendants under that warrant, and, had they been held under any legal process, they might have been regarded as such. But that a person not even the subject of a complaint is a defendant is the merest chimera.

Returning, now, to the first general proposition, above stated, for which the defendants contend, it will be found that the defendants seek in effect to establish that under the constitutional provision no person, except upon his own request, is a competent witness before a grand jury touching matters made the subject of an indictment against him by such grand jury; that is, an indictment found by a grand jury is illegal, if the person charged in it attended before the grand jury pursuant to subpoena, and, even without objection, gave material evidence, especially if he were not warned or enabled to know that inquiry might bring him into jeopardy. The United States attorney tersely interprets the defendants' construction of the constitutional provision, as follows:

"(1) It would mean that the grand jury as an inquiring body has no right to issue its process to any person who might know or have knowledge concerning any crime to be investigated, if there should be any chance that the person so subpoenaed might in any way become criminally involved in the crime under investigation, and therefore subject to an indictment, and would entail upon that body the impossibility of ascertaining in advance whether there could be any chance of the witnesses' culpability becoming apparent. (2) It would mean that an indictment would be invalid if the person against whom it was found had been subpoenaed to appear before the grand jury, had appeared, and had been interrogated concerning the participation of any other person in the charge. (3) It would absolutely destroy the usefulness of a grand jury to inquire into crimes generally, or into violations that have been brought to their notice, other than cases that had been held for the grand jury by the respective committing magistrates. (4) It would mean that the compulsion denounced in the constitutional amendment begins the moment the process of the grand jury is actually served upon the party to whom it is directed, provided he is in any way connected with the event."

With the defendants' claims, and the government's clearly stated objections to them, in view, it will now be considered in what spirit

and manner the constitution as here involved should be construed. It is not infringement of constitutional provision to subpoena a person before a grand jury and to administer to him the usual oath. The defendants correctly state:

"It is well settled that a witness cannot claim his constitutional privilege until he is sworn. He must take the oath, so that his assertion of privilege shall be made under that sanction."

In support thereof they cite *In re Scott* (D. C.) 95 Fed. 815; *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459; *In re Rancour's Petition*, 66 N. H. 172, 20 Atl. 930; *Whitcher v. Davis* (N. H.) 46 Atl. 458; *In re Leich*, 31 Misc. Rep. 671, 65 N. Y. Supp. 3; *People v. Seaman* (Sup.) 29 N. Y. Supp. 329. See, also, *Skinner v. Steele*, 88 Hun, 307, 34 N. Y. Supp. 748. If a person cannot claim his privilege until he has been sworn, it logically follows that the constitutional provision cannot until that time be violated. It cannot be violated before it can be invoked for his protection; hence the conclusion is that compulsion, within the meaning of the constitution, does not arise from mere summoning and swearing the witness. It will not be considered whether compulsion can be predicated upon the added fact that a person gave evidence under ordinary conditions of personal freedom.

What is compulsion? Compulsion is the antithesis of willingness. The provision means that no person shall be forced to be a witness against himself against his free will. This does not mean that he may not be a witness against himself; otherwise, an accomplice could not testify. It does not mean that any person may not be called and sworn (barring persons under known legal disability). It is an exception that leaves all persons competent to be witnesses, subject to a call to testify, but enables any of such persons to exempt himself from the whole class by pleading that certain evidence which he is called upon to give will tend to show that he has committed an offense. Hence those competent and free-willed to do so may give evidence against the whole world, themselves included; but those unwilling may not be coerced, if it appear that the unwillingness arises from incriminating evidence which they are asked to give. But willingness or unwillingness is subjective, and may be known alone by act, conduct, speech, or perhaps, in extreme cases, by condition. Unless the witness exhibit his unwillingness in some manner, it cannot be presumed to exist. This is especially true, if his conduct be that of a man untrammelled, if he be free from bodily restraint or physical duress, unterrified by menace, and uninfluenced by cajolery or fraud. Presumptively the person summoned belongs to the general body of citizens, competent to testify, and so he may be considered. If he elect to be excepted from this class he must speak, or his condition or relation to the proceeding must speak for him; for exemptions are allowed only to those who ask for them. Nor is this statement the less true because, as will later appear, he should have a fair opportunity to speak. From this it follows that in a legal sense the doctrine of waiver has no application. The constitution intends that a person shall not give incriminating evidence under compulsion. Immunity from compulsion is the right reserved. This is a qualification of a general duty to testify. It implies that all

competent witnesses shall testify when duly summoned to do so, under the usual rules and limitations provided by law, but not against themselves by compulsion. The right of not being compelled, in its very nature, does not admit of waiver. Compulsion and consent—i. e., waiver—cannot coexist. Conversely, compulsion can only exist when there is something to be overcome, as, for instance, refusal, objection, or an unwillingness of which the jury is apprised. Hence that refusal, objection, or unwillingness must affirmatively appear before compulsion is possible, and it has already been shown that it cannot appear from his speaking, until the witness has been sworn.

But, to illustrate the discussion: When Mr. Poor, without a shadow of remonstrance, gave evidence, after having come to the court house in company with counsel, and after full opportunity to consult the same, what sign was there which notified the grand jury, or would have notified a judge, had one been present, that he was speaking, or was asked to speak, other than as he willed, or that he acted under legal constraint? There was nothing on which compulsion could act, nothing to initiate it, nothing to demand it. How much the more was there inferable free will and absence of constraint in Kimball's case, who expressed himself as glad of opportunity for explanation. Kimball states in his affidavit that he "felt constrained and compelled" to testify, while in effect he said before the grand jury, when his power of exemption was suggested, that he was glad to speak. He may not complain if, having assured the jury that he was glad to speak, when he was not, the jury credited, rather than suspected, his truthfulness. The courteous advice of the United States attorney he put aside, welcoming the opportunity to testify. The occasion which he then applauded as a desirable opportunity he now accuses as an oppression and violation of his rights. The fact is, as will later more fully appear, that these two witnesses knew full well their relation to the ruined bank. They undoubtedly did not act without the advice of skillful counsel. The opportunity to sway the minds of the jurymen does not appear to have been unwelcome. They failed in the desired result, and now condemn the government for summoning, swearing, and examining them, to no one of which acts they did or said aught in disapproval. Nay, more; they censure the United States attorney because he did not apprehend their ignorance, the possibility that they might be delinquent, their concealed unwillingness, their repressed timidity in asserting their privilege. In Kimball's case, what more could the attorney have done, unless he had insisted firmly that he should retire from the presence of the jury? Having been visited by Poor, in company with counsel, observing no disposition indicating unwillingness, knowing him to be free in person and unfettered in mind, it is not strange that the district attorney did not warn him that the constitution protected him against self-incrimination and that there was a privilege that limited the power of the jury to examine.

This leads to the further conclusion that all persons, unless incompetent to be witnesses (and named defendants in criminal proceedings are under such disability), may be summoned and sworn and examined; that if one of such class be unwilling to testify, upon

the ground that he would become a witness against himself, he must express his unwillingness in some form, and bring himself within the rule that he who would have the benefit of an exemption or privilege must claim it. This conclusion has only apparent exceptions, that may be explained by a consideration of the ways by which compulsion may be exercised, or by absence of fair opportunity to claim the privilege. Compulsion need not be through legal proceedings, wherein the witness is directed to testify by order of the court. Any unlawful action by the district attorney, or by the jury, or other official, that should appear to have impaired the exercise of the free will of the witness in choosing whether he would testify, should be regarded as compulsion. In certain cases it may be immaterial whether such action be regarded as an infringement of the constitutional provision, or an unseemly perversion of the just administration of the law. The court should in either case have inherent power to redress the wrong. But it is considered that such misconduct might be such as to constitute compulsion within the meaning of the constitution. It would seem that the same rule should apply, if there was representation or action amounting to fraud, whereby the witness was not left free to exercise his choice. If a sole defendant were imprisoned upon a criminal charge, and were brought before the grand jury by his jailers, and testified against himself, whereupon an indictment was found, there would be such presumption of duress arising from his condition that the court would set aside the indictment, unless it should appear distinctly that the prisoner wished to be heard. *Boone v. People*, 148 Ill. 440, 36 N. E. 99, illustrates this, where the misconduct was as palpable as the probable compulsion. But it might be that the same presumption would not obtain from the mere fact that one of several wrongdoers gave evidence before the grand jury, taken from the jail to the jury room for that purpose. But none of the features just considered are present in the actions at bar, and reference is made to them merely to meet, approve, or distinguish certain decisions.

But it is urged that the indictment should be dismissed because the now defendants did not know that they were under investigation and subject to indictment, and hence did not demand their privilege, as otherwise they would have done. The defendants' brief, in urging the rule contended for by them, states:

"In these cases the grand jury was seeking information on which to base an indictment. It was impaneled for that object, and no other. The defendants were compelled to appear as witnesses to testify concerning the affairs of the Seventh National Bank. They were the very men who must have been cognizant of those affairs. They testified, and, not merely making statements of such matters as they chose to divulge, in the end they answered all the questions propounded by the district attorney; and the grand jury brought in an indictment against them."

And again:

"It [defendants' contention] merely commands that the party to be accused by indictment shall not be subjected to examination before the grand jury, at least in cases where, as in the case at bar, it is clear as noonday

that the parties thus examined are in imminent peril of indictment, if an indictment is to be found against anybody."

If the danger of indictment was so clearly known to anybody, it was known peculiarly to the defendants, if the allegations of the indictment be accepted as true; for they were in such case the very actors. The grand jury was merely investigating. Knowledge on its part, or that of the United States attorney, came no faster than the witnesses having the information revealed it. As between the grand jury, making progress through the complicated and numerous transactions of a great and busy banking institution, and these defendants, to whom was knowledge more justly ascribable? Was it as clear as noonday to Kimball, Poor, and Rose what the transactions had been; what checks had been drawn by Marquand & Co., by the very hand of Poor; that they had been certified by Rose, under the direction of Kimball; and that at such time the drawer did not have the funds on deposit? The jury knew, and they did not, is the present plea; and they did not refuse to testify because they did not understand that they were in peril of indictment. Such contention is idle on its face, and impairs the merit of their straightforward conduct before the grand jury, when Kimball and Poor placed all their information at its disposal. Cases have undoubtedly arisen where persons have been called to give evidence under such circumstances of ignorance of law, fact, and the occasion of their presence as to amount to misconduct on the part of the grand jury or prosecuting officer in using the same as a basis for indictment, and such instances will arise in the future. Then the courts will meet the facts according to their deservings. But no such condition here exists. The defendants knew the precise inquiry. They were men of affairs. They had opportunity to seek counsel. The jury began in darkness, and came by degrees to the light which, in its view, revealed these defendants as wrongdoers.

This leads to the conclusion that the defendants had full knowledge of the causes of the bank's failure, and in whatever relation they stood to it, and of all the peril which such relation might bring them. A survey of the decisions will reveal the attitude of the courts respecting the general subject under discussion. The defendants refer to authorities where the taking of the evidence of persons afterwards indicted has been condemned. These may be classified as follows: (1) Where a person whose own conduct was specifically under investigation, of which he had not knowledge, was subpoenaed and gave evidence touching matters thereafter the subject of indictment against him. *U. S. v. Edgerton* (D. C.) 80 Fed. 374, 375. (2) Where a person arrested and imprisoned, charged with the crime of murder, was taken before the grand jury and gave evidence without objection (*Boone v. People*, 148 Ill. 440, 36 N. E. 99, and *People v. Singer*, 18 Abb. N. C. 96), where (in the last case) it was deemed immaterial that the district attorney warned the defendant, a woman, not to answer, and refused to ask her questions, leaving the examination to the jury. (3) Where a person charged with an offense was required to attend and testify, presumably knowing that his conduct was a specified subject of investigation. *People*

v. Haines (Gen. Sess.) 1 N. Y. Supp. 55; State v. Froiseth, 16 Minn. 296 (Gil. 260). But in connection with the last case State v. Hawks, 56 Minn. 129, 57 N. W. 455, should be consulted. (4) Where a person accused of a crime was taken before a grand jury, and, without being informed of his right or of the possibility of his evidence being used against him, testified, and it was ruled that the evidence was not admissible against him on the trial of the indictment. State v. Clifford, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518. This case invokes the rule applicable to proceedings before magistrates.

Before mentioning opposing references it may be observed that none of the cases are applicable to the facts presented in the actions at bar. In the Edgerton Case it is inferable that the witness had no knowledge, nor was he warned, that the investigation related to him. It may be worthy of mention that in the Froiseth Case the witness was rendered by a statute of the state an incompetent witness before the grand jury, except at his own instance, although the decision was placed on the constitutional ground; and in Boone v. People the court used language that affords favorable opportunity for limiting the main holding, if occasion should require, for it is said:

"We do not hold that where one is before the grand jury as a witness, and at that time is not charged with crime, and may incidentally be interrogated about a matter, to which he makes answer, and an indictment afterwards is found against him, would require the indictment to be quashed; nor do we hold that every case where one is before the grand jury as a witness, and interrogated about a matter for which he may afterward be indicted, would be of itself sufficient cause to quash the indictment. But in this case it does not appear that the grand jury examined any other witnesses, nor does it appear the indictment was not found on the evidence of the defendant alone. No affidavits are filed by the state's attorney on that question; and where, as here, the defendant charged with crime is taken from the jail and before the grand jury, and interrogated about the matter with which he is charged with crime, such an error must be held fatal to quash the indictment."

There can be no question of the correctness of this decision, nor that of People v. Singer, *supra*; but there is value in noticing the precise reason, and that is that the status of the prisoner in each case was such that he could not go before the grand jury as a free man, but he was taken from prison to meet a specific accusation for murder. The constitutional provision is aimed against compulsory incriminating evidence, and in the Boone and Singer Cases the very condition of the witnesses presumed compulsion. It will not be denied that a man or woman, taken from jail to the grand jury room, perhaps brought to the door in chains, and interrogated by the prosecuting attorney and the jurymen, is not a free agent to choose whether he will or will not answer. Accused, arrested, imprisoned, moved by a will not his own, unprotected by advice, and exposed to the severities of a prosecution conducted *ex parte*, he is not conditioned to assert his right to refuse evidence with that spirit of independence which the law contemplates. But the case of the present defendants has no resemblance to such deprivation of liberty and personal selection of action.

The attorneys for the United States refer for support to People v. Lauder, 82 Mich. 109, 46 N. W. 956, State v. Donelon, 45 La. Ann.

744, 12 South. 922, U. S. v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671, and Thomp. & M. Juries, § 643. In State v. Donelon the facts were similar and the holding contrary to that in People v. Singer, supra; but the tendency of the doctrine stated in the citations is illustrated by the holding in People v. Lauder, where a person, pursuant to a subpoena, attended before a grand jury, gave evidence, was indicted, and upon these facts pleaded that the indictment was invalid. One member of the court dissented from the prevailing opinion, from which the following extract is made:

"And, first, it may be premised that being subpoenaed and appearing before the grand jury was not a violation of his constitutional right, nor being sworn before that body, nor testifying upon any matter that did not criminate himself. All these the law compelled him to do under pains and penalties. But the law did not compel him to give testimony that would criminate himself. The fundamental law expressly declared that he should not be compelled to do so. It was, therefore, a personal privilege, and Mr. Lauder could claim it or not, as he chose. If he gave such criminating testimony voluntarily, it is doubtful if it could be used against him upon the trial. If it was not voluntarily given, it could not be used against him upon the trial. In all cases, where a person's privilege exists for a witness to testify or not, if such witness does testify without objection, he will be deemed to have done so voluntarily. * * * The real complaint made by the plea is that Lauder was subpoenaed to appear before the grand jury, and he appeared in obedience thereto; that he was sworn, was interrogated, and answered all questions. He states that all this was done without having the aid and advice of counsel, and, 'because he did not have the assistance of counsel to bring out all the facts and circumstances of the case,' he testified to the facts material and necessary to prove the truth of the charges. As he was not upon trial for any offense, no exception can be taken to his not having the assistance of counsel; and, as he made no objection to testifying on account of privilege, I do not see why that should be appealed to as a ground for quashing the indictment. * * * A party may waive personal rights, although secured to him by law or by the constitution. He may waive the right to a preliminary examination upon a criminal charge."

In conclusion, it should be said that grand juries are privileged to seek for information from persons most likely to be conversant with the matter under investigation, and are not compelled warily and assiduously to shun such persons, lest it happen that an indictment should in the end be found against them. The theory of limiting grand juries to questioning persons disconnected with a ruined bank as to the cause thereof, in timorous expectation that a less remote search might chance to bring the persons guiltily concerned into the presence and under the examination of the jury, is not consonant with that vigor of inquiry that such exigencies demand. The persons whose duties converged at such bank would be those who should know, and it is of these persons that an investigating grand jury should inquire, not of those who, isolated from its affairs, would be presumed to have no knowledge. While much is due to the conservation of personal rights, the administration of justice should not be fettered by a sentimentality that would paralyze efficient action. The status of persons arrested, legally charged with crime, or objects of complaint therefor before a court, officer, or grand jury, may justify a presumption that such persons gave evidence under compulsion; but witnesses otherwise competent, who are subject to none

of these disadvantages, should be exposed to the usual summons to aid in the investigation of offenders, and to the common responsibility and peril of knowing what incriminating evidence they should withhold. What should be done in cases, if such should arise, where there is ignorance amounting to helplessness, or unconsciousness of the matter under investigation resulting in a denial of the opportunity for self-exemption, is an important consideration, unconnected with the matter at bar.

The general rules applicable to witnesses have been stated and applied to Kimball and Poor; but the last inquiry is, does the case of Rose show that he, at least, was the subject of the compulsion forbidden by the constitution as herein interpreted? To the end that the history of his treatment before the grand jury might be known more definitely than appeared from his own affidavit, the stenographic minutes have been directed to be added to the record. They show that, upon being sworn, Rose, after giving his address, and stating that he had been the paying teller of the Seventh National Bank for several years, identified the books of the bank, and thereupon was asked this question: "Did you make entries in any of those books?" To this the witness replied:

"Counsel has advised me not to answer any questions in regard to the affairs of the Seventh National Bank."

Thereupon the United States attorney said:

"Now, Mr. Rose, let me say to you, first, you are not bound to answer any questions that would tend to criminate yourself, but that must be on that ground; otherwise, if we ask you to appear again, should you decline to answer on general grounds, but not on that, we can take the record and certify it to the court, and you would be compelled to answer by the court. Now, whenever any question is put to you that would tend to criminate you, even in your opinion, in which you may be wrong as to that, it is a matter for you to decide. That is a perfectly good objection. Furthermore than that, I may say that under the statute (section 860) anything that you would say here voluntarily never could be used against you in any criminal prosecution. Now, we want simply, fairly, and justly to get at the facts in this case. You must be the judge of whether you will answer to this grand jury questions put to you, or whether you will have a proceeding brought against you and be brought up for contempt in refusing to answer. You must be guided by your own judgment and by the advice of your counsel."

Thereafter in reply to questions the witness stated that he declined to answer on advice of counsel, naming him, and thereupon the district attorney said:

"Now, I repeat the question I put to you: Did you make entries in any of these books? Now, if in your judgment the answer to that question would tend to criminate you, or subject you to criminal prosecution, you are not bound to answer. If it will not, it is your duty to answer, and give this jury full information. I will state further, Mr. Rose, we want to be absolutely fair and kindly, and take no advantage of anybody here. If you feel that you are in a dangerous position, or a perilous one, I will adjourn your examination until you can have opportunity for a further consultation with your counsel, and allow you to take that further time, and I will call you again before the grand jury. I will take no advantage or press you unduly. We simply want to get at the facts. You understand that I stated to you very clearly that anything that you stated here could not be used against you in any criminal prosecution. In that the statute

entirely protects you, and your own counsel will advise you to that effect. Now, you must be the judge, and take the responsibility."

The witness stated, in effect, that he thought the question would tend to incriminate him, and thereupon he was not compelled to answer the question, and did not answer it at any time during the examination. The district attorney repeated the assurance that the law gave him the right to judge whether he would raise the objection, and added:

"When you claim that privilege under the constitution, it protects you in that right, and we cannot trespass upon it."

The witness having declined to answer the question, the district attorney said:

"In the performance of my duty I must ask you certain questions, and you should conscientiously, under oath, answer the questions or claim protection of your privilege."

Thereupon the witness continued to answer or not to answer questions according to his own free will, without the slightest evidence of compulsion. The evidence that he did give was of a general nature, relating to the usual duties of a paying teller and general courses of business, without material reference to his connection with the checks upon which the indictment is based. The record, on account of the absolute fairness observed toward the witness, dispels instantly any doubt raised by his affidavit, which in its statement of facts tended to differentiate the position of Rose from that of Kimball and Poor.

The other questions to which counsel for defendants have called attention have been examined, and furnish no ground for the relief asked. After careful examination and study of the defendants' brief, in which every phase of the questions here involved is presented, with exhaustive reference to authorities, it is decided that the contention of the government, so far as pertinent to the conclusions here reached, should be sustained.

The motion to quash the indictments is denied, as is the motion to inspect the minutes of the grand jury, other than the part relating to the evidence of Rose.

LINDSTROM v. INTERNATIONAL NAV. CO.

(Circuit Court, E. D. New York. July 17, 1902.)

1. SHIPPING—INJURY CAUSING DEATH ON HIGH SEAS—JURISDICTION.

A steamship company operating an American vessel registered in the port of New York is liable to the administrator of a passenger whom it negligently permits to be washed overboard and drowned in the high seas, under Code Civ. Proc. N. Y. § 1902, conferring on a personal representative the right to sue for the death of his decedent where it was caused by a default for which the latter might have recovered if only injured thereby; since the tortious act was committed on board the vessel, and hence within the territory of the state of New York, though the injury was consummated by the death of the decedent in the high seas.

2. DEATH BY NEGLIGENCE—DAMAGES.

A verdict of \$5,000 awarded to a father, 52 years old, and in poor health, for the negligent killing of his daughter, a domestic servant, 23 years old, who habitually remitted to him about \$3 a month, is grossly excessive, \$1,500 being ample.

Franklin Pierce, for plaintiff.
Robinson, Biddle & Ward, for defendant.

THOMAS, District Judge. This action was tried before the court and a jury, and verdict for \$5,000 rendered. The defendant now moves for a new trial. The plaintiff is the father and administrator of a young woman, who, after several years of domestic service in this country, was returning to her home in Europe, on the steamer *St. Paul*, for the purpose of a visit. During the voyage the vessel shipped a large wave, which violently swept the steerage passengers backwards and forwards on the deck, and some of them in and out of the companionway leading to the cabin. The complaint charges, and the jury found, that by the defendant's negligence the plaintiff's intestate was carried overboard, and drowned in the sea. The *St. Paul* is an American vessel, registered at the port of New York, and when she was on the high seas was a part of the territory of the state of New York. Hence all civil rights of action for matters occurring aboard of her at sea are determined by the laws of that state. *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *The Lamington* (D. C.) 87 Fed. 752, and cases there cited; *St. Clair v. U. S.*, 154 U. S. 152, 14 Sup. Ct. 1002, 38 L. Ed. 936. Therefore the steamship and all persons aboard her, and all duties owing by such persons one to another, are governed by the laws of New York.

The ultimate question is whether the defendant's negligent act or omission on shipboard was the proximate cause of the death, or whether such cause was the drowning in the ocean. If the proximate cause was the negligent act, which took place on the ship, then her death is related to the act or omission in such way that the death must be deemed to have been caused within the territory of the state of New York. The defendant's naked contention is that, whatever the carrier's negligence, and however inevitably it must result in such destruction of a passenger, yet if in fact it bring the passenger into such a status that his life is extinguished by drowning, the tortious act was committed on the ocean, and the statute of the state having dominion of the vessel is inoperative. Hence, if the carrier leave open a port in the bulwark of a vessel under such circumstances of gross negligence that it inevitably results in a passenger walking overboard, yet there is no liability, provided death result from drowning. Should the captain of a vessel deliberately throw a passenger into the sea, still his act, although wrongfully causing death, is not actionable, nor, it would seem, punishable, because the passenger was drowned in the high seas, over which the state has no dominion. This rule would relieve carriers by water from civil liability for all negligence or trespass upon persons on a ship, however gross or violent the same, provided it were so contrived, or did so happen, that the offended person was finally drowned as a result of the tort.

Before proceeding, certain judicial holdings should be stated. In *The Harrisburg*, 7 Sup. Ct. 140, 30 L. Ed. 358, 119 U. S. 199, it was held that, in the absence of an act of congress or a statute of a state giving a right of action therefor, a suit in admiralty could not be

maintained in the courts of the United States to recover damages for negligently causing the death of a human being on the high seas; and that the enabling statute of a state, if applicable (which is not determined), did not authorize the action to be maintained on account of the expiration of the time limited for the same. In *The Alaska*, 9 Sup. Ct. 461, 130 U. S. 201, 32 L. Ed. 923, it appeared that on account of the collision between the British steamship *Alaska* and the pilotboat *Columbia* on the high seas, all members of the crew of the pilotboat were drowned, and it was held that there could be no recovery in admiralty against the steamship on account of the death of such persons. In the opinion it is said:

"It is admitted by the counsel for the libelants that the statute of New York (Code Civ. Proc. § 1902) on the subject of actions for death by negligence does not apply to the present case, because the deaths did not occur within the state of New York, or in waters subject to its jurisdiction."

In that case a foreign vessel collided with a vessel from the port of New York, with the result of casting the members of the crew of the latter vessel into the ocean, where they drowned; and the judgment proceeds upon the ground that the admiralty had no jurisdiction independently of the statute of the state giving the cause of action, and that the statute did not cover the locus in quo of the accident,—that is, the state of New York could not make laws for the place, nor for both the parties. In *Rundell v. La Compagnie Generale Transatlantique* (D. C.) 94 Fed. 366, affirmed 40 C. C. A. 625, 100 Fed. 655, 49 L. R. A. 92 (followed by Judge Townsend in the matter of the petition of *La Compagnie Generale Transatlantique*, owner of the steamship *La Bourgogne*, to limit its liability), the circuit court of appeals for the Seventh circuit determined that there could be no recovery for loss of life, where a passenger on the *Bourgogne* was killed by being drowned, as the result of a collision occurring wholly through the fault of the carrying vessel, which was flying the French flag, and was subject to a French law, which authorized an action for death by wrongful act upon a French ship. The court placed its decision upon two grounds:

"The first is that it does not appear from the libel that the death of the deceased occurred upon the steamship *La Bourgogne*, the averments being merely that he lost his life by drowning, as a result of a collision, and consequent sinking of the vessel; second, that in cases arising in tort upon the high seas the United States district court, sitting in admiralty, cannot enforce the local law of France, even if in terms it applied to the case, which does not appear, but that such cases must be adjudged and governed by the general maritime and admiralty law as understood and administered by the United States courts."

It is considered that the decisions in *The Alaska* and similar cases do not touch the action at bar; and that pursuant to usual and easily stated legal principles the defendant is clearly liable.

The New York statute (Code Civ. Proc. § 1902) provides that:

"The executor or administrator of a decedent, who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued."

This statute means that if A., by act or omission, be guilty of a breach of duty owing to B., whereby B. is injured and killed, B.'s representative; in behalf of husband, wife, or next of kin, pecuniarily damaged by such death, may maintain an action therefor, provided B., had he not been killed, but injured, could have maintained an action for such injury. The intention of the law in New York is that the injured person shall recover for his injuries if he live, and, if he die, his representative shall recover certain damages. *Littlewood v. Mayor*, 89 N. Y. 24, 42 Am. Rep. 271. Two vital provisions of the statute must be observed: (1) Wrongful act or omission must cause the death; (2) the representative may recover for such death when the injured man could have recovered for the injury, had he lived. Hence the questions are: (1) Did defendant's wrongful act proximately produce the decedent's death? (2) Could she have recovered for any injuries received by her, if living?

Had Ahlin, decedent, lived, she could have recovered for the injuries resulting from the defendant's negligence, whether received on shipboard or in the ocean. The wrongful act or omission took effect on shipboard,—that is, territory of New York,—and the case falls within the rule that "liability must be determined by the law of the place where the alleged tortious act was committed or suffered." *The Lamington* (D. C.) 87 Fed. 753. The crucial test is, where was the tortious act committed, not where were the damages consummated. See this subject generally discussed in *The Strabo* (D. C.) 90 Fed. 113. There is no intention to state that a tortious act without injury gives a cause of action; but a tortious act, taking effect and producing injury, creates the cause of action, although the final injury be completed elsewhere. Thus, if A., in charge of ship, strike B, so that he fall overboard and receive injury from the ocean, the tortious act takes effect and does injury on the ship, and brings B. into a condition where he receives further injury. The blow on the ship is the proximate cause, and B. would recover for the damages received on the ship, plus the damages received in the water. The ship, and not the ocean, is the locus in quo where the wrong was committed. There is no law of torts extending to the sea that would authorize recovery; nor, if there were, would it be invoked, for the court looks to the law governing the location of the proximate cause, to wit, the ship. If A. negligently injure B., and the latter wander helplessly, and suffer from exposure, A.'s negligent act is the proximate cause of both the immediate and secondary injury; and it would not matter in what jurisdiction the secondary injury was experienced, nor what the laws of that jurisdiction were. Thus B., injured and disabled in New York, and wandering helplessly to, and encountering to his injury a storm in, New Jersey, would relate his later injury to the tortious act in New York. He would not declare upon a cause of action arising in New Jersey, and the court in New York would regard only the laws of its own state. The representative of the injured person, if the latter die, having an unsatisfied cause of action, may sue. Had Ahlin lived, she could have sued, and recovered for her injury on shipboard and in the water, and she would declare upon a negligent act or omission done or suffered within the state of New York. Hence, if the statute be

valid, her representative may sue for her death proximately caused on shipboard and completed in the sea. Either the statute is meaningless, and the law that she may sue if she live, and her representative if she die, has no efficiency, or the representative may maintain the action, for the very reason that she had a good cause of action founded on the same offense. In either case the negligent act or omission on the ship is the proximate cause. Is the statute valid? Why not? This was a domestic ship of the state of New York, and just as much a part of the territory of New York as if the locus in quo were a strip of land within it. The state may command that a person committing a tort on its soil shall be liable civilly or criminally therefor; it may enact that, if the injured person die uncompensated, his representative may have the recompense in whole or in part. So the state may enact that he who injures another on one of its domestic vessels shall pay therefor, and, if such injury result in death, and be unsatisfied, the tortfeasor shall make satisfaction to his representative. In precise and plainest words the state has so enacted, and the law covers vessels registered in its ports; and for this it had abundant authority, because it was legislating for the government of its own internal affairs. The general statute applies as directly to domestic vessels, although unnamed, as it would to a nonenumerated school district within the borders of the state.

But it is urged that this holding contravenes the decision of *The Alaska*, and kindred cases. There is no analogy whatever. When the state in special or general terms legislates concerning a ship, and what exists or happens on board of her, it has to do with its own domain and subjects, and nothing else. When it gives a cause of action for damages resulting from negligent acts or omissions, in the first instance, to the offended person, or, if he die from the offense, to his representative, it legislates for the government of those who are standing on the soil of New York, and doing or omitting acts as inhabitants of the state. The state exercises no dominion over the sea, nor over those disconnected with its political rule. It defines the supreme law, subject to federal jurisdiction, for an integral part of its territory and the inhabitants thereof. In *The Alaska*, the facts were that an English ship, herself independent of all but English authority, and sailing on the high seas, a place uncontrollable by the state of New York, ran into the *Columbia*, a vessel from New York, and drowned the latter's crew. The English ship, herself beyond the sway of the state of New York, navigated by those who owed no allegiance nor duty to such state, was sailing upon a sea, itself without the supremacy of that state, and did a wrongful act, not on the American ship, hence not upon or within the territory or jurisdiction of New York, but on the ocean, common ground for all nations, but under the municipal sovereignty of none. The state of New York may prescribe how its own ships shall be conducted, the penalties for misconduct thereon; but it may not define how other vessels shall bear themselves with reference to its own ships when on the high seas, nor create causes of action for injuries or deaths produced by such foreign ships. In one case the statute of the state has no extraterritorial effect, in the other it has no

effect, as the offender is foreign to its power, and commits his wrong at a place over which the state has no jurisdiction.

The propositions which lead to the conclusion that the action may be maintained are as follows:

(1) The *St. Paul* was an American vessel, and she and all aboard of her were subject to the municipal law of the state of New York, and hence to the statute creating a cause of action for damages for death by wrongful act or omission.

(2) When a wrongful act or omission, committed or suffered on the soil of the state of New York, or within the limits of its jurisdiction, causes a person's death, his representative may recover certain compensation therefor, if he (the injured one) might have maintained an action for personal injury, arising from the same act or omission, had not death ensued.

(3) Had Ahlin survived, she could have maintained an action for the injury done her by the defendant's wrongful act or omission, whether the entire physical injury was received on shipboard or in the sea.

(4) Hence the present plaintiff may maintain an action for the consequences of the same wrong.

(5) A vital element is that the wrongful act or omission shall be on the soil of New York, and committed or suffered by persons at the time subject to the jurisdiction of the state of New York. It is immaterial that a portion of the damage flowing from the wrong arises in a place over which the state has no jurisdiction.

(6) The state of New York has power to comprehend ships and those navigating them within this statute, because the wrongful act is committed and takes effect upon the ship,—that is, within the territory of the state,—the ship and all thereon being subject to the municipal law of the state.

(7) The decisions of which *The Alaska* is a type involve torts committed or suffered by ships of foreign nationalities on the high seas, or torts committed by a foreign ship on a domestic vessel of a state, both at the time on the high seas; and the state has dominion over neither the offending ship, the place where the tort was committed, nor the persons committing it; hence may not create a cause of action against the offending vessel, her navigators or owners.

These principles are obvious, and require no citation of authority to sustain them. The defendant owed plaintiff's intestate a duty. The jury has found that there was a breach of it. That breach was on the ship. The act or omission constituting the breach was the proximate cause of the injury, whether on the ship or in the sea. The decedent, had she survived, could have sued for her damages for the breach. The statute confers an equal right upon her representative. To sustain his action he refers only to a wrongful act or omission done or suffered on the territory of the state of New York by persons amenable to its municipal law, and at the time actually on its territory and within its jurisdiction.

The verdict of \$5,000 was grossly excessive. The decedent was a chambermaid domesticated in this country, about 23 years of age, who, upon the highest estimate, had been sending her father about

\$3 a month. The father was 52 years of age, and in ill health. His expectation of life was about 10 years. The jury, by its verdict, has appropriated the earnings of the decedent to the father for the period of some 25 years. Where the pecuniary loss is incapable of definite determination, much latitude must be permitted the jury in finding it; and, indeed, it often happens that the verdict has no definite basis. But here the data is sufficiently sure: A young woman, of a given age, of a known earning power, contributing through a series of years to a father of known age and health. The decedent in 10 years would have contributed, upon the basis of her past remittances to her father, the sum of \$360. It was within her power to enlarge that sum. Had she enlarged it to \$80 a year, and had the jury been justified in inferring that the probable duration of the father's life would have been in fact doubled, even then the verdict should not have exceeded the sum of \$1,500, and to that sum it should be reduced. The interest on \$1,500 is more than twice as much as the decedent annually sent her father, so that it would furnish him double the return made by his daughter, and he would have the principal in addition.

In case the plaintiff should not consent thereto, a new trial will be granted upon the ground that the verdict is excessive.

THE SENATOR SULLIVAN.

THE TALLAHASSEE.

(District Court, E. D. New York. July 10, 1902.)

1. COLLISION—THEORY—IMPOSSIBILITY.

A contention, in an action for collision between a steamer and a schooner, that the steamer crossed the schooner's bow, and changed her course within the limits of a few hundred feet, so as to strike the starboard bow of the schooner at a right angle, should be rejected as unreasonable and impossible.

2. SAME—EVIDENCE.

Where, in an action for collision between a steamer and a schooner, the evidence of the officers of each as to the courses of the other and their courses could not be harmonized with the happening of the collision, and the wheel of the schooner was controlled by a young man, whose evidence showed that he had no knowledge of navigation, it will be held that the collision resulted from the fault of the schooner's helmsman.

Davies, Stone & Auerbach (Julien T. Davies and Herbert Barry, of counsel), for the Tallahassee.

Convers & Kirlin and Carver & Blodgett (J. Parker Kirlin and Eugene P. Carver, of counsel), for the Senator Sullivan.

THOMAS, District Judge. The above actions involve a collision between the four-masted schooner Senator Sullivan and the steamer Tallahassee; the former bound for New York, and the latter for Savannah. The collision occurred on November 4, 1899, at about 9:40 p. m., off Seagirt, N. J. The night was dark and clear; the sea was smooth, with a fresh breeze blowing from a westerly direction,

as more particularly noticed hereafter. The schooner's claim is that she was sailing with a fair wind on the port tack, heading N. by E., with proper side lights, a man on the lookout, another at the helm, the mate in charge of the watch, and the captain on deck from time to time; that the bright light, and afterwards the green light, of a steamer were seen about two points from the schooner's port bow; that later the green light was seen across the bow of the schooner from port to starboard, when the steamer suddenly changed her course, showed both lights, shut out her green light, and struck the schooner between the cathead and stem at a right angle; that just as the red light began to show the mate attempted, with the assistance of the man at the wheel, to luff up by putting the wheel hard down, but that the vessel had no time to obey her helm appreciably, and did not more than a quarter to half a point. In other words, the schooner's statement is that, having seen on the schooner's port bow the green light of the steamer, the steamer came across the bow of the schooner until the green light showed on the latter's starboard bow, and that then the steamer suddenly went to starboard so as to show her red light, when away not over one or two lengths, or two or three hundred feet, and half a point on the schooner's starboard bow, and came forward, striking the schooner at a right angle. With the intrinsic improbability of the narration in mind, the claim of the steamer may be considered. It is that she was on a course of S. W. by S. when she saw, about two points on her starboard bow, the red light of the schooner, on a course of N. E. by N. $\frac{1}{2}$ E.; that the second officer ordered the helm to port, and later hard a-port; that the steamer swung to the starboard and windward of the schooner, whose red light traveled across the steamer's stem to about a point on her port bow, and that the vessels were related red to red; that shortly the green light of the schooner showed about one and a half points on the port bow of the steamer, both lights being visible; that the schooner then shut out her red light under her down helm, and showed her green light broad; that, when the green and red lights of the schooner both showed, the captain of the steamer signaled for full speed astern, the order was promptly obeyed, the helm being kept hard a-port, but that about two minutes afterwards the vessels met almost at right angles, the steamer then heading about S. W. by W.; that the impact carried the schooner's head around, so that in the end both vessels were heading in the same direction. From this claim of the steamer it appears that the steamer, seeing the red light two points off her starboard bow, went to starboard, so as to bring such red light on her port hand, in order that the vessels might pass red to red, giving the schooner the entire seaway; that while she was doing this under a hard a-port helm, the schooner left her course of N. E. by N. $\frac{1}{2}$ E., and went about to westward sufficiently to strike at right angles the steamer heading S. W. by W., which involved a change in the schooner's course of about seven points. Hence the schooner's claim is that the steamer in the first instance tried to cross her bows, which would have been error, and after having done so, when within two lengths of her, changed her course about nine points, and caused the collision; while the

steamer claims that, after having changed her course to starboard three points, the schooner meanwhile changed her course seven points, and caused the collision. Is the truth ascertainable? If so, what is it? The steamer asserts that when she first discovered the schooner she saw only her red light, which was two points on the steamer's starboard bow. But the schooner claims that she was heading N. by E. If the steamer was heading S. by W., and the schooner N. by E., the vessels were on parallel courses, and could not have shown green to red, as both parties claim. The steamer, to escape this dilemma, puts the heading of the schooner at N. E. by N. $\frac{1}{2}$ E., and the schooner in turn charges that the steamer was heading E. of S. Either the steamer was not heading S. by W., or the schooner was not heading N. by E. Each vessel, to enforce her contention, alleges that the other was about $2\frac{1}{2}$ or 3 points to the eastward of the course claimed by her; that is, the schooner claims that the steamer was headed about S. S. E. $\frac{1}{2}$ E., while the steamer claims that the schooner was headed N. E. by N. $\frac{1}{2}$ E. It is highly improbable that the steamer was heading easterly of south, and there is a strong probability in favor of her regular course of S. by W. There is not so great improbability in the schooner being farther to the eastward than she claims. In either case the red light of the schooner would be opposed to the green light of the steamer. There was every reason for the steamer porting, rather than crossing the bow of the schooner. But the absurd contention remains that the steamer did cross the schooner's bow, and went about within the limit of a few hundred feet, so as to strike the starboard bow of the schooner at about a right angle. This contention must be rejected as impossible, following similar holdings in *The Laura v. Rose* (D. C.) 28 Fed. 104; *The Fair Wind* (D. C.) 55 Fed. 1017; *The Alene* (D. C.) 74 Fed. 268; *Id.*, 25 C. C. A. 264, 79 Fed. 976; *Id.*, 168 U. S. 710, 18 Sup. Ct. 942, 42 L. Ed. 1212. But if the steamer went to starboard at a distance from the schooner, what caused the collision? There could be but one way of accounting for it, and that is that the schooner luffed, passing from her course of N. N. E. to the westward, so that she was heading, at the time of the collision, N. W. by N. Why should the schooner luff? The evidence of the wind and trim of the schooner as given by her mate is that the wind was unsteady, and from W. to W. N. W.; that all the sails except the topmast staysails were set; and he adds: "We had our sheets hauled aft on account of the wind backing back and forth. Our sails were full, but we were not closehailed. Our sails were full, and our sheets were hauled aft, but we kept them aft on account of the wind backing and filling between W. N. W. and W." The steamer claims that the wind was blowing from W. S. W. to W. At the wheel of the schooner was a colored man, twenty-two years of age, who had been at sea for three years. It is impossible here to point out the grotesque features of his evidence, his wide and wild statements concerning the events of the night, and his ignorance of navigation there or elsewhere. It is enough that he was a totally unfit man to act as helmsman, and likely to commit any error. Yet he was placed at the helm, the compass was some $4\frac{1}{2}$ feet in front of him, and he was

expected to keep his eyes on it, and steer the vessel with reference to it. Upon the examination he was doubtful whether there were 50 or 52 points in the compass. His first evidence showed that the wind was N. by W. or N. N. W., and that he was sailing upon a course of N. by E., although later in his examination he places the wind farther to the westward. This first location of the wind harmonized with his evidence that he could sail within two or three points of the wind. He was asked this question: "Q. Suppose the wind was north, and she was on the starboard tack, closehauled, what course would she steer? A. N. by E., or N. N. E.; something like that." He seemed to be uncertain whether objects were on the lee or windward side of his vessel, or how the green light of the ship appeared when he first saw it. He was asked: "Q. What was the steamer's course when you first saw her, as near as you can figure? A. I don't know. Q. Was she inshore from where you were, or further out? A. Oh, she was inshore, coming out, she was,—the steamer. Q. She was coming out from the shore? A. Yes. Q. Heading what direction? A. Well, she was heading, I guess, about N. E., or something like that. Q. What? A. N. W. I don't know how she was heading. That is the truth." It is a very grave question how this accident happened. That it did not happen in the manner stated by the schooner is beyond peradventure. Did it happen as the steamer claims? One may believe that with difficulty. But either the steamer went to windward and ran into the schooner, or the schooner went to windward and ran into the steamer. It is more probable that such a helmsman as the schooner employed allowed his vessel to luff, and run into the steamer, than that the steamer, with its trained officers, made the aberrating movement claimed by the schooner. It is true that there are defects in the evidence of the crew of the steamer. The mate and master of the schooner testified that they had knowledge of the schooner's compass and course. Indeed, at the very instant preceding and following the collision the schooner's master asserts that he stood before the compass, noticing the precise heading of his vessel. That is not without the domain of possibility, but the evidence of one side must yield, and the probabilities seem to be with the steamer.

Upon the whole case it is a fairer judgment that the schooner's helmsman caused the accident. Therefore there will be a decree against the schooner and in favor of the steamer.

In re OLZENDAM CO.

(Circuit Court, D. New Hampshire. July 8, 1902.)

No. 324.

1. LIENS—ENFORCEMENT IN EQUITY—TITLE OF RECEIVERS.

Petitioners entered into an agreement with a manufacturing company in New Hampshire, by which they agreed to make advances to the company, in consideration of which they were to have the sale of all its product at an agreed commission, and also to have a lien for their advances on all goods of which invoices were sent them, whether actually shipped or remaining in the hands of the company. Invoices

of certain goods were sent petitioners, showing their shipment for sale on account as per contract. The goods were not in fact shipped, but were packed in cases, and set apart in the company's warehouse, to be forwarded on petitioners' order. While so remaining, receivers were appointed for the company, which was insolvent. Petitioners had previously made advances beyond the value of the goods in their possession after the company became insolvent, but without knowledge or reason to know such fact. *Held* that, there being no rule of law in New Hampshire making possession of the goods retained by the company a conclusive badge of fraud, petitioners had an equitable lien thereon for their advances, which they were entitled to enforce against the company or its receivers.

2. SAME—CONSTRUCTION OF CONTRACT.

A manufacturing company contracted to make and furnish to a contractor certain goods which he had contracted to supply to the government. Petitioners made advances to the company under an agreement that it should make the bills for the goods furnished under the contract payable to petitioners; who were to receive all the proceeds, to be applied in payment of such advances. The company was insolvent at the time, but petitioners believed, and had reason to believe, that it was solvent. After a portion of the goods had been furnished under the contract, and petitioners had received the proceeds thereof, receivers were appointed for the company, who came into possession of certain cases of goods which had been marked with the contractor's name, but had not been shipped. The receivers made certain other goods, which they furnished under the contract, pursuant to an agreement with the purchaser that payment therefor should be made to them. *Held*, that the agreement between the company and petitioners gave the latter no lien on the goods themselves, and that they could not recover the undelivered goods which came into the receivers' hands, nor the proceeds of those voluntarily made by the receivers.

In Equity. On petition against receivers.

Taggart, Tuttle & Burroughs, for petitioners.

Chas. B. Barnes, Jr., for complainant and receivers.

Whipple, Sears & Ogden, for defendant and receivers.

LOWELL, District Judge. Viotor and Achelis, the petitioners, were commission merchants in New York City. The Olzendam Company was a manufacturer of hosiery in Manchester, N. H. For some years the petitioners had sold the goods of the company, and had advanced money to it, so that on January 1, 1900, the company was indebted to them. They then agreed to continue to make advances, and in consideration of this and of a reduction of the rate of their selling commission the company agreed that they should sell all its goods. It was also agreed that all goods for which invoices had been or should be sent to the petitioners, whether the goods were delivered to the petitioners in New York or remained in the possession of the company in Manchester, should be security for the general balance due the petitioners, and for all future advances; also that, immediately upon receipt of orders from the petitioners, the company would forward all the goods above referred to which were held in their warehouses. The cases of hosiery here in question were manufactured upon orders submitted by the petitioners after January 1, 1900. The cases were marked by the company with a special number, and with the name of the purchaser of the goods, and an invoice thereof was sent to the petitioners. It was in substantially the following form: Invoice

of — cases of goods forwarded by Fall River Line to New York by the company, and consigned to the petitioners to be sold on their account as per agreement. (Then followed a schedule of the number, the quality, and the contents of each several case.) Case No. — is for order A. B. Case No. — for order C. D. Cases Nos. — “are for stock.” These cases, though described in the invoice as forwarded to the petitioners, were set aside by the company in its warehouse, and were held awaiting shipping orders from the petitioners. They have never been in the actual possession of the latter, and were insured by and in the name of the company. On March 19, 1902, receivers of the company were appointed by this court, and on that date they took possession of all the property belonging to the company, including the goods above described. Shortly thereafter, demand was made by the petitioners upon the receivers to ship said goods. On March 19, 1902, the company was indebted to the petitioners in the sum of \$95,720, of which amount \$15,000 was a specific loan for advances other than those hereinbefore described. The petitioners had in New York, in their actual possession, goods shipped by the company of the approximate value of \$47,020, and the value of the goods here in question was about \$10,541. On March 19, 1902, the company was insolvent, and its assets, including the goods in question, were not sufficient to pay its creditors in full, but on that date, and at all times prior thereto, the petitioners had reasonable cause to believe, and did believe, that the company was amply solvent. This petition is brought against the receivers to compel them to deliver the goods here in question to the petitioners, as security for the debt of the company to the latter.

That the petitioners had not the ordinary lien of factors is plain, inasmuch as they had no possession of the goods. Jones, Pledges, § 462. They claim a lien enforceable, in their favor, by a court of equity, against the company, and against its receivers. After the agreement of January 1, 1900, they might have gone into equity to restrain the company from disposing of these goods. *Sullivan v. Tuck*, 1 Md. Ch. 59; Jones, Liens, § 29. To that extent, they had a lien enforceable in equity. On the other hand, a bona fide purchaser for value would undoubtedly have taken the goods free of the lien. So would an attaching creditor in Massachusetts or New Hampshire, where the rights of an attaching creditor are likened to those of a bona fide purchaser for value. See *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119; *Hodgdon v. Libby*, 69 N. H. 136, 43 Atl. 312. Again, a trustee under the bankrupt act of 1898 would hold these goods against the lien claimed by the petitioners for, by section 70 of the act, he has the rights of an attaching creditor. On the other hand, a voluntary assignee, and a purchaser with notice, would take subject to the equitable lien of the petitioners. *Walker v. Brown*, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865. How stands the receiver? In *Refining Co. v. Payne*, 167 U. S. 127, 147, 17 Sup. Ct. 754, 42 L. Ed. 105, an equitable lien upon sugar bounty to become due was held good against a receiver representing the general creditors. In *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075, an assignee in bankruptcy under the act of 1867 was held to take goods of the bankrupt subject

to an equitable lien like this. It is true that there the lienor advanced the money with which the goods in question were purchased by the lienor, but the validity of the equitable lien was there rested, in whole or in part, upon an agreement to give a lien which had been entered into by the owner of the goods. See the citation from *Story, Equity Jurisprudence*, at 105 U. S. 406, 26 L. Ed. 1076; *Perry v. Board*, 102 N. Y. 99, 105, 6 N. E. 116. To the same effect is the opinion in *Riddle v. Hudgins*, 7 C. C. A. 335, 58 Fed. 490. There, also, the lien was claimed by the vendor of the property, but the court did not rely upon this fact, and said that the lien was enforceable in case of the insolvency of the debtor. See, also, *Winsor v. McLellan*, 2 *Story*, 492, Fed. Cas. No. 17,887; *Alexander v. Ghiselin*, 5 *Gill*, 138; *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740. In *Smith v. Robinson*, 13 *Metc.* 165, no lien but a factor's lien was contemplated by the parties, and, for want of possession, it was held that no factor's lien existed. The Massachusetts cases cited by counsel for the receivers show that the goods in question would pass to an assignee in insolvency. *Moors v. Reading*, 167 *Mass.* 322, 45 N. E. 760, 57 *Am. St. Rep.* 460. As was observed in *Blanchard v. Cooke*, 144 *Mass.* 207, 225, 11 N. E. 83, "The assignee in bankruptcy under the act of 1867 acquired only the rights of the debtor, while an assignee in insolvency acquired something more." See *Haskell v. Merrill*, 179 *Mass.* 120, 60 N. E. 485. Even if it be true that the rule of law in Massachusetts, viz., that title does not pass without delivery of possession, so manifests the public policy of Massachusetts regarding liens of the sort here claimed that a federal court in Massachusetts must hold them void, yet no such rule exists in New Hampshire. See *Adams v. Lee*, 64 N. H. 421, 13 *Atl.* 786; *Thompson v. Esty*, 69 N. H. 55, 45 *Atl.* 566. In the latter case, the retention of possession was held not to be a conclusive badge of fraud, and the claim of the assignee in insolvency was rejected. As to these goods, the prayer of the petitioners must be granted.

The Government Contract. About December 10, 1901, a contract was entered into between the petitioners and the company, by which it was agreed that the petitioners should be allowed a commission of 2 per cent. on all contracts thereafter taken by the company from the United States government. About January 28, 1902, a government contract was entered into between the company and one Taggart of Philadelphia, whereby the company agreed to manufacture and deliver to Taggart 25,000 pairs of socks of a certain sort; Taggart having contracted with the government for their delivery by him to it. On January 29, 1902, the petitioners advanced to the company \$15,000, and opened a new account on that day, called "A. P. Olzendam U. S. Government Account." On the same day, and before the advance was made, the petitioners and the company agreed that the company should fully carry out and perform the contract with Taggart, and that the proceeds from this contract should be paid to the petitioners, to secure their advances, until they should have been fully reimbursed therefor, together with interest and commissions; that in billing the goods the original bills should be made on the company's billheads, and sent to Taggart; that each bill should be stamped, "Payable to

Vietor & Achelis," and that duplicate bills should be sent to the petitioners. The petitioners were induced to make this advance by reason of the contract between the company and Taggart. The total avails of said contract would be between \$6,000 and \$9,000. Several cases of socks were sent to Taggart in accordance with this agreement, and the petitioners have received payment for them. Before the appointment of the receivers, the company had manufactured four other cases of these socks. These four cases were set aside, and marked with Taggart's name and address; they came into the possession of the receivers on March 19, 1902, and still are in their possession, and have not been billed or invoiced. Thereafter the receivers manufactured seven other cases from materials purchased by them, and shipped five cases to Taggart upon his express agreement to accept them on behalf of the receivers, and to make payment for them to the receivers. No payment has yet been made. The receivers have in their possession the two remaining cases. Of the 25,000 pairs called for by the contract, 1,440 have not been manufactured, and the receivers have now ceased to carry on business of the company, and have no material on hand with which to complete the contract. The receivers have refused to carry out the terms of the contract between the petitioners and the company, asserting that they are entitled to all payments from Taggart on account of the five cases delivered to him. On January 29, 1902, the date of the advance of \$15,000 by the petitioners, the company was insolvent, and continued so until the appointment of the receivers. The assets in the hands of the receivers are not sufficient to pay all the creditors, but the plaintiffs had reasonable cause to believe, and did believe, that the company was amply solvent on said date. This petition is brought to obtain the proceeds of the 11 cases mentioned. By its agreement with the petitioners, the Olzendam Company pledged to them the proceeds of the contract, but not the goods themselves with which the contract was concerned; therefore, no lien arose upon the goods themselves. It seems that the petitioners could not have maintained a bill in equity against the company to compel it to deliver to Taggart even those cases of goods which had been marked with his name. The receivers were not obliged to carry out the contract with Taggart; they could have sold these goods to a third party, and could have collected the price. The property coming into the receivers' hands which was not subject to the petitioners' lien was to be disposed of for the benefit of the general creditors, and the receivers could not apply this property for the sole benefit of the petitioners. They could say to Taggart, "We have succeeded to the company's rights and property; we will furnish you the goods as provided in the company's contract; but, as we are not bound to do this, we will do it only on the condition that you enter into a new contract with us to pay us the price of the goods we send you." In effect, this agreement was made between the receivers and Taggart. If these considerations dispose of the petitioners' claim to the four cases, their claim to the five cases and to the two cases is invalid a fortiori.

As to these goods, the petition is dismissed. Costs will be allowed neither party.

CASTNER et al. v. POCAHONTAS COLLIERIES CO. et al.

(Circuit Court, W. D. Virginia. July 31, 1902.)

1. CONTEMPT OF COURT—OFFENSE AGAINST UNITED STATES.

Contempt of a federal court is an offense, within Rev. St. U. S. § 1014, which, with Act May 28, 1896 (29 Stat. 184), authorizes a United States commissioner to arrest, imprison, or bail for an offense against the United States.

2. SAME—AFFIDAVIT FOR WARRANT OF ARREST.

Affidavit for warrant of arrest for contempt of court in disobeying an injunctive order against interfering with work by lawless acts of intimidation need not be made by a party to the injunction suit, but by any one knowing the facts; the acts forbidden being themselves offenses.

3. HABEAS CORPUS—QUESTIONS CONSIDERED.

On petition for habeas corpus by one arrested and committed for disobeying an injunction, the question whether petitioner knew of the injunction cannot be inquired into; this being a matter of defense on the merits, and not material on the question whether the judgment of commitment was void.

Petition for Writ of Habeas Corpus.

V. L. Sexton, for petitioners.

McDOWELL, District Judge. On July 16, 1902, on a verified bill of complaint, I signed an order enjoining numerous named defendants, —striking coal miners,—and all others associated or connected with them, from interfering with the working of the mines of the Pocahontas Collieries Company, either by menaces, threats, or any character of intimidation used to prevent employes of said company from going to or from said mines, or from engaging in mining at said mines. It appears from a petition for writ of habeas corpus this day laid before me in behalf of Miles Hambrick and two others (none of the petitioners being named in the injunction order) that on July 23, 1902, on the affidavit of one A. J. King, warrants for the arrest of petitioners were issued by a United States commissioner for this district; the charge made in the affidavit being that the petitioners had by intimidation sought to prevent certain employes of the above-named company from working, in violation of the above order. The petitioners were arrested, and given a preliminary hearing before the commissioner, and, being unable to give the bond required for their appearance before court, have been committed to jail pending the next regular term of court.

The point chiefly relied on by counsel for petitioners is the alleged want of authority in the commissioner to hold the examining trial and to commit the petitioners.

Section 1014, Rev. St. U. S., reads, so far as material, as follows:

"For any crime or offense against the United States, the offender may, by any * * * commissioner of a circuit court to take bail * * * agreeably to the usual mode of process against offenders in such state * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence."

By Act May 28, 1896 (29 Stat. 184) United States commissioners are given the same powers and duties as had previously been given to cir-

cuit court commissioners. That a contempt is an offense against the United States is not open to question.

In *Fanshawe v. Tracy*, 4 Biss. 490, Fed. Cas. No. 4,643, Judge Drummond said:

"A party who has conducted himself in such a way as to justify the court in punishing him for contempt or for disobedience of its order has committed an offense against the United States."

In *Fischer v. Hayes* (C. C.) 6 Fed. 68, Judge Blatchford said:

"It is well settled that contempt of court is a specific criminal offense."

Citing *New Orleans v. New York Mail Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354.

In *Re Ellerbe* (C. C.) 13 Fed. 530, 4 McCrary, 449, Judge McCrary said:

"A refusal to obey the process of a court of the United States * * * is plainly an offense against the federal government. A proceeding in contempt, in a federal court, is a criminal case, to be prosecuted in the name of the United States."

In *U. S. v. Jacobi*, 1 Flip. 108, Fed. Cas. No. 15,460, the question is quite fully discussed; the court saying:

"I hold that section 17 [section 725, Rev. St.] makes contempt of court a crime against the United States. Now that it is, within section 33 [section 1014, Rev. St.], a crime for which the party may be arrested and imprisoned or bailed, I do not doubt."

See, also, *In re Acker* (C. C.) 66 Fed. 290.

As further tending to show that contempt of court is an offense against the United States, it may be noted that since a very early day the president has been held to have the power to pardon for contempt, under article 2, § 2, Const., giving him the right to pardon for offenses against the United States. In *re Mullee*, Fed. Cas. No. 9,911, and opinions of attorneys general there cited.

Another ground relied upon in the petition is that the affidavit upon which the warrants were issued was not made by a party to the suit.

In *Secor v. Singleton* (C. C.) 35 Fed. 378, it is said:

"In cases where an injunction has been granted to enforce or maintain a merely private right, a proceeding instituted to punish a party for violating the order is very generally regarded as a proceeding to redress a private injury, in which the public have no concern, and for that reason the prosecutor or person filing the information must have an interest in the proceeding differing from that of the general public; otherwise the courts will not entertain the information."

This doctrine is not applicable to the case in hand. The injunction order here forbade acts which are in themselves offenses against the criminal laws of the state. It is a matter of common knowledge that strikes, especially strikes of coal miners, are frequently accompanied by lawless acts of intimidation. The complaint here charges this offense to the petitioners. In such cases the public is interested. The citizens generally are concerned to bring to an end the reign of terror created by the strikers. Certainly in contempts of this character every citizen has a right to make complaint against persons who, in violating the order of the court, at the same time violate the criminal laws of

the state. Moreover, section 1014, Rev. St., provides that the procedure for the arrest and examining trial of offenders shall be "agreeably to the usual mode of process in such state." Certainly the usual procedure in this state, when there has been an offense against the criminal law, is for any person knowing the facts to "swear out" a warrant. I know of no Virginia authority requiring a different course in contempt cases.

It is further alleged in the petition (the evidence taken by the commissioner not being produced) that the petitioners had no knowledge of the injunction order. This is a defense on the merits, but is not now to be inquired into. Presumably the commissioner has heard evidence on this point, and has fairly exercised his judicial functions in deciding that there is probable cause to believe the petitioners guilty of contempt. They could not be guilty if they had no knowledge of the injunction. Habeas corpus is not an appellate writ, and its issue is proper in such cases as this, only where the judgment of committal is void, as for want of jurisdiction. 4 Enc. Pl. & Prac. 816 et seq.; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563; In re Byron (C. C.) 18 Fed. 723; In re Morris (C. C.) 40 Fed. 824; In re Boyd, 1 C. C. A. 156, 49 Fed. 48; Ex parte Rickelt (C. C.) 61 Fed. 203.

It follows that the writ should be denied.

DAVIESS COUNTY DISTILLING CO. v. MARTINONI.

(Circuit Court, N. D. California. July 14, 1902.)

No. 12,910.

1. UNFAIR COMPETITION—WHEN ACTION LIES.

Action for unfair competition, in that defendant sold whisky labeled "Kentucky Club Bourbon," while complainant had previously used the label "Kentucky Club," cannot be maintained; there being no intent by defendant to palm off his goods as manufactured by complainant, his label not being otherwise similar to complainant's, and bearing his own name, and no damage to complainant being shown.

In Equity.

Scrivner & Hopkins, for complainant.

Morrison & Cope, for defendant.

MORROW, Circuit Judge. This is a suit in equity, brought by the complainant, a Kentucky corporation, against the defendant, a citizen of California, for the alleged infringement of a trade-mark, and for fraudulent and unfair competition. The bill alleges that the complainant's predecessors many years ago adopted certain formulæ for the distillation of a pure and wholesome whisky, which product was made at a certain distillery in Daviess county, Ky., of which complainant is now the owner, and is still made at that distillery, according to the same formulæ, and is of the highest excellence; that for upwards of

¶ 1. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

20 years last past the complainant and its predecessors have been engaged continuously in producing at said distillery a whisky known as and named "Kentucky Club" whisky; that said words "Kentucky Club" are a valid and subsisting trade-mark, indicative of the origin and ownership of said whisky, and is of a value of over \$5,000. It is alleged that the defendant has infringed this trade-mark by applying to whisky not distilled by the complainant the said words "Kentucky Club." It is further alleged that the defendant has instituted an unfair and fraudulent competition with the complainant, in that he has continuously for a number of years past been palming off upon the public an inferior and spurious whisky, in the Northern district of California and elsewhere, under the name of "Kentucky Club," thereby falsely and fraudulently representing to the public that his whisky was that of the complainant. It is charged that by means of this trick and fraud the defendant has sold great quantities of an inferior and unwholesome compound, and has inflicted great loss, injury, and damage upon the complainant.

A demurrer was sustained to the first count of the bill, in which protection was claimed for the use of the words "Kentucky Club" as a trade-mark, thus eliminating the element of a technical trade-mark, and leaving the action dependent solely upon the alleged unfair competition by the defendant.

The defendant denied generally the charges of the complaint, and as matter of defense alleged that on the 1st day of December, 1896, prior thereto, and ever since that time, he was and has been continuously engaged in the wholesale liquor business in the city and county of San Francisco, state of California; that, being desirous of appropriating a trade-mark and label for a certain brand of whisky which he was then contemplating placing upon the market, he selected the words "Kentucky Club Bourbon," and upon learning from the secretary of state of California that no claim to a trade-mark for such words had ever been made in the state, the defendant caused to be filed in the office of said secretary of state an affidavit stating that he was in the exclusive use and possession of a certain trade-mark containing said words, and thereafter received notice that his said trade-mark and label were duly registered in said office. The defendant alleges that at no time prior to the registration of said trade-mark, and not until a month or two prior to the commencement of this action, did he have any knowledge of or information concerning the use by the complainant of the words "Kentucky Club," nor had he heard of complainant's whisky vended under said name. It is alleged that the labels and markings of defendant's goods are entirely dissimilar to and different from those of complainant, and that defendant has never sold any whisky under the name "Kentucky Club" which did not bear in prominent letters defendant's own name and address. It is further alleged that the whisky sold by defendant as "Kentucky Club Bourbon" is a blend of which a Kentucky whisky comprises all but 2 per cent. That such Kentucky whisky is imported from Kentucky by defendant, purchased from Jesse Moore-Hunt Company. It is alleged that defendant's transactions in and concerning his "Kentucky Club Bourbon"

have been wholly fair at all times, and that he has never at any time sold his article or any other whisky as and for the product of complainant. That he has always sold it as a blend of his own, and all purchasers from him have had knowledge that it was such.

It has long been settled that in cases of unfair competition the action is based upon deception, unfairness, and fraud, and that this fraud should be generally proved, and not left to inferential evidence alone. This rule is far more strictly followed in cases of unfair competition than in cases involving a technical trade-mark, where fraud will be presumed from the wrongful use of the trade-mark, without regard to the intent. The United States courts have repeatedly held the intent to deceive the public an indispensable element in the fraud charged in unfair competition, and that "this intent and the fraud in which it inheres may be, and generally must be, proved, by circumstances, by facts, by sales, by a course of action." *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.*, 43 C. C. A. 511, 104 Fed. 243; *Hilson Co. v. Foster (C. C.)* 80 Fed. 897. In the case at bar the evidence clearly shows that there was no intent on the part of the defendant to palm off his goods as those manufactured by the complainant, or any intent whatever to mislead or deceive the public with regard thereto. The question of intent, therefore, being removed from consideration, complainant could only have relief from its alleged wrongs if the acts of the defendant, however innocent in intent, resulted in such damage to complainant as will be taken cognizance of by courts of equity.

It appears from the evidence that at the time of the adoption of the words "Kentucky Club Bourbon" as a trade-mark by defendant, the complainant was selling very little, if any, of its "Kentucky Club" whisky in this city and county, and that even at the time this suit was brought the complainant's product was not known to many of the largest liquor dealers here. They testified that they had never come in contact with it, and their only acquaintance with it was in the printed lists or quotations of some liquor publications. The complainant itself does not show that it has lost any sales by reason of defendant's product. Under these conditions, no misrepresentation to the public having been shown, and no damage to the complainant by the alleged invasion of its private rights, the elements of an action for unfair competition are wholly wanting. *Centaur Co. v. Marshall (C. C.)* 92 Fed. 605; *American Washboard Co. v. Saginaw Mfg. Co.*, 43 C. C. A. 233, 103 Fed. 281, 50 L. R. A. 609; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604, 9 Sup. Ct. 166, 32 L. Ed. 535.

Let a decree be entered for the defendant.

MITCHELL et al. v. A CARGO OF LUMBER.

(District Court, E. D. New York. July 10, 1902.)

1. SHIPPING—CHARTER PARTY—PORT OF DISCHARGE.

Where a ship was chartered from Halifax to the port of New York, she cannot be compelled to discharge at New Rochelle, on Long Island Sound; that place being neither within the port of New York geographically, nor as defined by Greater New York Charter 1901, § 864, etc.

2. SAME—WAIVER.

Where consignees of a cargo illegally required the consignee of a vessel to unload at a certain point, which he refused to do, the fact that he also refused because his vessel would not lie afloat at that place did not constitute a waiver of his claim that the cargo consignees had no right under the charter to compel a delivery there.

Benedict & Benedict (R. D. Benedict, of counsel), for libelants.

Rounds & Dillingham (Ralph S. Rounds, of counsel), for claimant.

THOMAS, District Judge. On the 7th of November, 1901, the brigantine Atrato, some 98 feet in length, and drawing $12\frac{1}{2}$ feet, laden with lumber, arrived at Hunter's point, in the port of New York, on a voyage from Halifax, after touching at City Island. On this day Walford, the ship's consignee, asked Stetson, Cutler & Redman, the consignees of the cargo, for discharging orders, and was informed that such orders could not be given at that time. On the afternoon of the same day the cargo was sold, deliverable at New Rochelle. On or about the 8th of November, the captain of the Atrato called upon Stetson, Cutler & Redman, and was informed by Cutler that the cargo had been sold at New Rochelle. The captain stated that he had heard that there was not a good bottom at the New Rochelle dock, upon which Cutler informed him that he was confusing the intended berth with the other dock at New Rochelle, and that the bottom was absolutely good. The question of paying the extra towage and pilotage came up, and Cutler stated that, as the vessel had come from City Island to New York upon Walford's direction, Walford should pay these expenses, but as the captain went out of the door, Cutler said to him that he would do what was right. From this time forward the consignees of the cargo and ship were in discord, and debated their rights, and what they would and would not do, and what they could and could not be compelled to do; the consignee of the ship insisting that by right he could not be forced to discharge at New Rochelle, and that he would not discharge there, unless a safe berth was guaranteed and towage and pilotage paid, while the consignees of the cargo asserted the right to order the vessel to that point, but expressed no withdrawal of their claim that Walford should bear the expenses of towage and pilotage until the afternoon of November 12th. On November 11th Walford wrote a letter to the consignees of the cargo, stating that he had directed the captain to investigate the New Rochelle dock, and inclosed a bill for demurrage for one day. Again, on November 12th, he wrote the consignees that the vessel would be discharged at Erie

Basin, beginning the 13th. About 4 o'clock in the afternoon of the 12th, the consignees of the cargo caused a letter to be delivered to Walford, for which he receipted, in which, through their counsel, Rounds & Dillingham, they stated that the discharge must be at New Rochelle; that "they are willing to pay any extra expense that may properly arise in connection with the discharge of said schooner in accordance with their direction"; and that the discharge at Erie Basin, or any place other than Mahlstedt's dock, New Rochelle, would be at the risk of the ship. The discharge began at Erie Basin on November 13th, and was completed. The present action is for the freight, and the defense is breach of the contract of carriage.

The proposed berth at New Rochelle has a bottom of soft mud, several feet deep. There are no rocks, and nothing to injure a sound vessel, unless, perchance, a stray brick or stone mixed with the mud. The water is six or eight feet deep at low water. Approaching the channel the depth is about six feet, and the water rises to about nine feet. The depth of the water in the channel depends on the direction of the wind. With the westerly wind that had of late prevailed the depth of the water was decreased. Vessels drawing 12½ feet and over frequently discharge at this dock, but no vessel can discharge there without being aground a portion of the time, and such is the case with the majority of the lumber docks in the city of New York. Most lumber vessels have straight bottoms, but the *Atrato* is shaped with a sharper keel, and would not lie as evenly as a round-bottomed vessel, unless she settled down into the soft mud. The evidence tends to show that vessels as sharp as the *Atrato* do lie aground safely while discharging. It is probable that she, if in good order, could have lain aground at the New Rochelle dock without injury. The extent of that injury is not clear, and the evidence touching it is too meager to permit a definite conclusion. The consignees of the cargo evidently expected to sell the same at New Rochelle, and hoped to have a report from the vessel at City Island, which is near New Rochelle. Had a report been made from that point, there would have been no question of extra pilotage or towage back to New Rochelle, but the consignee of the ship was not informed that there was any such desire on the part of the consignee of the cargo, and, as the ship was chartered for New York, there was no reason why she should not have come forward to that point. Nevertheless, this situation caused the irritation and disagreement.

One of the principal questions to be decided is whether a ship laden with lumber, chartered from Halifax to the port of New York, may be ordered to New Rochelle for discharge. New Rochelle is on the Sound. It is neither within the port of New York geographically, nor as defined in section 864 of the charter of New York of 1901, or at an earlier time. See Laws 1897, c. 378, § 864; Consol. Act 1882, c. 15, tit. 3, § 803; Id. c. 15, tits. 2, 3, §§ 758, 760. Vessels laden with lumber usually come through the Sound to the East river, and it is the practice without exception, yet not always without protest, for vessels, upon being ordered so to do, to go to New Rochelle and discharge; but in such case the consignee of the

cargo always pays the extra towage or pilotage. This practice indicates a compliance with the wishes of the consignees of the cargo, to whom the vessels must look for business, but it does not establish that a vessel bound to the port of New York must, pursuant to its contract of carriage, after her arrival there, go back through the Gate, and out again into the Sound, to a point beyond the limits of the port, for the purpose of discharge. The very practice shows that the vessel goes, not by reason of the primary contractual obligation; otherwise the extra towage or pilotage would not be paid. If the vessel were bound to deliver at New Rochelle pursuant to her charter, such concession would not be made to the ship. Nevertheless, whatever the motive, constraint, or compulsion, the custom is to go upon payment of extra expenses; but the practice does not enlarge the port of New York, nor change the terms of the contract. The following findings are justified by the evidence: (1) The berth at New Rochelle was safe for sound vessels. Whether for a vessel injured, and in the condition of the *Atrato*, is beyond present conclusion. (2) Walford refused to go unless he could have the safety of his vessel guaranteed in her berth, and her towage and pilotage paid; each and every of which demands were at the earlier time refused by the consignees, and the payment of towage and pilotage only acceded to, in the language quoted on the 12th, after the vessel had gone to Erie Basin for discharge. (3) The claimant had no contractual right to order the vessel to New Rochelle for discharge. The decision of Judge Brown in *Devato v. 823 Barrels of Plumbago* (D. C.) 20 Fed. 513, sustains the holding that New Rochelle is not within the limits of the port, as recognized by the state. (4) The claimant is not relieved from this illegal position taken by them, even though it should appear that Walford refused, among other things, to go because his vessel could not lie afloat at that place, as he did contemporaneously claim that there was no legal right to send the vessel there, and evidently he did not intend to relinquish his legal rights save on the terms stated. (5) It does not satisfactorily appear that Walford refused to discharge at any berth in the port of New York where he could not lie afloat. He probably stated that such was his right, but he was ordered to no other berth, and any abstract discussion of his right in that regard is not material.

The libelants should have a decree.

EDISON v. AMERICAN MUTOSCOPE CO.

(Circuit Court, S. D. New York. May 3, 1902.)

1. COSTS—DISBURSEMENTS—PREMIUMS PAID FOR APPEAL AND SUPERSEDEAS BONDS.

Premiums paid a surety company for appeal bond and supersedeas bond by a successful appellant are taxable in the circuit court as legitimate and proper disbursements.

2. SAME—PRINTING EXHIBITS.

The expense of printing exhibits is not taxable as a disbursement in the circuit court in the Second Circuit, where no order directing the printing was made, and it does not appear that the original exhibits could not have been used.

On Appeal from Clerk's Taxation of Costs.

See (C. C.) 110 Fed. 660.

D. W. Cooper, for the motion.

Dyer, Edmonds & Dyer, opposed.

LACOMBE, Circuit Judge. Two of the items disallowed by the clerk, to wit, the premiums paid for appeal bond and for supersedeas bond, should be allowed. The court of appeals in the Sixth circuit disallowed a similar charge when sought to be taxed as costs; the only reason stated being that "there is no authority for taxing such an item." *Lee Injector Mfg. Co. v. Pemberthy Injector Co.*, 48 C. C. A. 760, 109 Fed. 964. There is authority, however, for taxing legitimate and proper disbursements which are rendered necessary by rules of practice as disbursements in the circuit court, and these premiums seem to be such disbursements. The printing of defendant's exhibits in the circuit court was properly disallowed under the settled practice in this circuit, no order specially directing the printing being shown, and the original exhibits being presumably in proper shape to submit to the circuit judge. The requirement of the circuit court of appeals that more than one complete printed set of exhibits shall be furnished, so that each judge who sits on the hearing of the appeal may have one, may be a good reason for taxing cost of printing them as a disbursement in circuit court of appeals, but it does not change the situation so far as the circuit court is concerned.

¶ 1. See Costs, vol. 13, Cent. Dig. § 659.

WILLIAMS v. CRABB et al.*

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 800.

1. FEDERAL COURTS—JURISDICTION—REMEDIES GIVEN BY STATE STATUTE.

A state cannot by legislation confer a substantive right or remedy in the way of a suit inter partes upon its own citizens that will not be available to the citizens of the other states, nor can it by any device restrict such right or remedy thus made available to enforcement in its own courts, the conditions of citizenship being such that it would otherwise be enforceable in the federal courts.

2. SAME—SUIT TO CONTEST WILL.

Where the statutes of a state confer upon a state court of equity original jurisdiction of suits to contest the validity of a probated will, a circuit court of the United States has concurrent jurisdiction of such a suit in which the amount in controversy is sufficient and the parties are citizens of different states.

3. EQUITY—JOINDER OF CAUSES OF ACTION—MULTIFARIOUSNESS.

Two causes of action, one for setting aside a will and the other for setting aside a deed, both made by the same person, and alleged to have been procured by the fraud and undue influence of one of the defendants, may be joined in the same bill, without rendering it multifarious, where the rights of the other defendants will not be prejudiced thereby, although they claim interests in different portions of the property in controversy through their codefendant; nor is it an objection to such joinder that the statutes of the state require the issue with respect to the will to be submitted to a jury, since a court of equity has power to conform to such requirement.

4. SAME—PARTIES—PRACTICE OF FEDERAL COURTS.

To a suit in equity by one of the two heirs at law of a decedent to set aside a will and a deed executed by such decedent for fraud and undue influence, and to recover complainant's share of the property, the other heir is not an indispensable party, and a federal court will not require his joinder where it would oust its jurisdiction.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

S. S. Gregory and Frank Crozier, for appellant.

Levy Mayer, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This was a suit in equity, brought by the appellant, a citizen of Michigan, against the appellees, citizens of Illinois, to set aside the will of one Ellen Williams, a sister of the appellant, for fraud and undue influence, and also to set aside and cancel a deed of certain real estate situate in the city of Chicago, made by Ellen Williams to the appellee Christopher C. Crabb, on the like grounds of fraud and undue influence, and have him charged with a trust in relation to the real estate alleged to be held under the will and deed. There is other incidental relief prayed for in the bill, as the appointment of a receiver, but these are the grounds of the action and the principal relief sought, the purpose of the suit being to recover from Crabb a one-half interest in the real estate so held by him, and to set aside as a cloud upon the complainant's title the will and deed alleged

* Rehearing denied.

to have been obtained by fraud. The allegations of the bill are, in substance, as follows: That on September 2, 1896, at the city of Chicago, Ellen Williams died, unmarried and without issue, leaving as her sole heirs at law her brother, the complainant, John Jay Harvey Williams, and her sister, Helen Alexander; that at the time of her death she was seised in fee of certain described real estate, situate in Chicago, of much value; that for some time prior to her death the land was held by the Chicago & South Side Rapid Transit Company under a lease purporting to have been executed by Ellen Williams on June 15, 1892, and that lots and parcels of land were still in possession of the South Side Elevated Railroad Company under a lease dated October 1, 1897, executed by the defendant Christopher C. Crabb, who claims to hold the premises under the will of Ellen Williams and under a warranty deed executed to him by Ellen Williams, the company paying therefor an annual rent of \$6,165; that at the time of her death Ellen Williams was also seised in fee of certain other lands in Chicago, now occupied and in possession of a person known and styled as "Nellie Tuttle," under a lease to her by defendant Crabb, who claims title to the land by virtue of the last will and testament of Ellen Williams; that on January 8, 1894, a deed by Ellen Williams, dated on December 13, 1893, was filed of record in the recorder's office of Cook county, purporting to convey such lands in fee to defendant Crabb. The bill further charges that, although the title to the lands appears of record in the defendant Crabb, the purchase price thereof was paid by him out of the funds of Ellen Williams, and on her behalf and by her direction, and that the title thereto was held in trust by Crabb for Ellen Williams, as he, the said Crabb, had admitted to divers persons; that a house, costing \$95,000, was built by Crabb upon the premises, and paid for out of the funds of Ellen Williams, and that he held the lands in trust for the use and benefit of Ellen Williams, upon a mere naked legal title without equity; that after the death of Ellen Williams, Crabb seized, and still holds possession and enjoys, the rents and profits of the said premises; that the will of Ellen Williams, under which defendant Crabb claims to hold the land, dated on May 19, 1896, was on September 10, 1896, admitted to probate before the probate court of Cook county, Ill., and admitted to record as the last will and testament of Ellen Williams, and letters testamentary issued thereon to Crabb, as the executor, without bonds, as directed in the will. The will is set out verbatim in the bill, the effect of which is to devise all of the testatrix's estate, real and personal, to Christopher C. Crabb, and to appoint him her sole executor, with request that he be not required to give any bond or security as executor. That on the 17th day of August, 1896, there was filed in the recorder's office of Cook county a warranty deed by Ellen Williams, dated on May 19, 1896, purporting to convey to Crabb the premises known as No. 47 Congress street and No. 2131 Dearborn street, in Chicago, Ill., setting out the deed and description of the land in full. The bill further charges that the writing purporting to be the last will and testament of Ellen Williams was not such; that she was not aware of the contents, but that the same was procured by the fraud of the defendant Crabb, and should be set aside and annulled; that prior to the making of the will Crabb was,

and for many years had been, the attorney in fact and confidential agent and adviser of Ellen Williams, and the manager of her business affairs, and was intrusted with the care and custody of her property; and that he, starting as her agent some years before, in small matters, gradually assumed and took upon himself the entire control of her business and affairs, and was so trusted and acquired such influence over her mind that she was almost entirely excluded from any participation in the management of her own estate, and was almost entirely controlled and dominated in the conduct of her estate by Crabb, who, having such control, retained and instructed his own solicitor to draw up the will, directing him to make himself (Crabb) the sole executor, without bonds, and to vest her entire estate in him upon her death. Similar allegations are made in regard to the procurement of the deed to Crabb, that it was obtained from Ellen Williams by the same fraud and undue influence. Then follow allegations to the effect that early in her life Ellen Williams, who was living with her parents in humble circumstances, had been led astray by one much above her station, left her home, and led an immoral life, and for many years conducted, under the name of "Lizzie Allen," a house of prostitution in Chicago; and that the defendant Crabb, then a clerk in a dry goods store in Chicago, became acquainted with her, and fastened himself upon her and her estate, and became a parasite in such house of prostitution, managing and directing it for her; that Crabb, for many years before her death, professed to be her lover, and passed much of his time in her apartments; that while so pretending and deceiving Ellen Williams he was sustaining relations with a person calling herself "Frankie Leland," who now claims to be his wife; that upon Ellen Williams' death Crabb removed her from her house of prostitution, and installed therein as keeper the said Frankie Leland, who entered into the private apartments of Ellen Williams, and conducted the house of prostitution for the benefit of the defendant Crabb for some months, when Crabb, claiming to own the same, sold all the furniture, fixtures, etc., to Nellie Tuttle, a public woman, for a large sum of money, who is now conducting the business under contract with Crabb. Wherefore the complainant asks that an issue be made whether the writing so admitted to probate be the last will and testament of Ellen Williams or not, and that the said warranty deed to Crabb be declared null and void, and set aside, and that an undivided one-half of the premises be declared to vest in complainant in fee simple. The defendants Christopher C. Crabb and Frankie Leland appeared, and filed their demurrer to the amended bill, the principal grounds insisted upon being: (1) That the bill was multifarious in seeking to set aside a will and a deed and to declare a trust, and asking for a partition of the property; (2) that Helen Alexander, the sister of complainant, and his coheir, was an indispensable party to the bill, and alleged in the bill to be a citizen and resident of the state of Illinois; (3) that the federal court was without jurisdiction of the case made by the bill. The court below sustained the demurrer, and dismissed the bill, upon what ground does not clearly appear, no opinion being filed.

It is claimed by appellant's counsel that all of the grounds of the demurrer except the one of multifariousness were overruled by the

court, but the decree shows that the bill was dismissed for want of equity. That in this case must mean for want of jurisdiction, as upon the merits of the allegations no question has been or could be made against the sufficiency of the bill to make a case for setting aside both the will and the deed. And, granting the want of jurisdiction to set aside the will for fraud, it is clear that the court would have jurisdiction to set aside the deed. The bill shows an equitable case for setting aside the deed for fraud, and, if within the jurisdiction of the court, the complainant should not be dismissed out of court because a greater measure of relief is demanded than he is entitled to, unless there have been joined irreconcilable and inconsistent causes of action. In the original bill Helen Alexander was joined as one of the defendants, the same demurrer being put in; but being a citizen, as was alleged and is conceded, of the state in which the suit is brought and where the defendants reside, it was thought that the court would not have jurisdiction of the suit, for want of proper diverse citizenship of all the parties, and therefore the complainant amended his bill, omitting his sister as a defendant, and not joining her as a complainant. The principal question argued in this court was the one of jurisdiction, it being urged with earnestness and force that, the case involving the setting aside of a will already allowed and admitted to probate by the probate court of Cook county, the United States circuit court has not jurisdiction of the case for the purpose of setting it aside. It is, no doubt, well settled by authority, both in this country and in England, that, under the general powers of a court of chancery in England, or a court of equity in this country, a bill to set aside a will for fraud cannot be entertained, except under special circumstances. This is because the proof and allowance of wills has always properly belonged, formerly in England to the ecclesiastical courts, and in this country to the courts of probate, or to the courts especially empowered by the statutes of the states to pass upon the proof and allowance of wills. But these adjudications go not upon any ground connected especially with a want of jurisdiction in the federal courts, but upon the more general ground that they are not cases either of common law or general equity jurisdiction, but belong especially to the ecclesiastical and probate courts, which have always exercised jurisdiction over this class of cases. It has not been made a question of the jurisdiction of any particular court, but one of jurisdiction in equity. But in those states where equity jurisdiction is extended by the legislature over cases to set aside wills after probate for fraud, there would seem to be no good reason why the jurisdiction of the federal court, the requisite citizenship existing, should not be concurrent with that of the state courts, as in other cases. The jurisdiction of the federal court has never been denied on the ground that the courts were federal courts, but on the ground that this class of cases are not the subject of legal or equitable jurisdiction, and so was denied equally to the state and to the federal courts. If the state courts of general equitable jurisdiction may, under the law, entertain these cases by suit originally brought there, and not coming up on appeal from the probate court so as to form part and parcel of the probate proceedings for the probate of wills, it is difficult to see why the federal courts should not entertain a concurrent jurisdiction when the requisite di-

verse citizenship exists. Otherwise this class of litigants would not be placed upon the same footing as litigants in other cases, where the jurisdiction of the court is conceded. These cases seem to come fairly within the provision of the jurisdiction act of 1888, giving original jurisdiction in all civil cases at law and in equity arising between citizens of different states. It is well settled that rights and remedies, legal or equitable, provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the federal courts, and that the terms "law" and "equity," as used in the constitution, although intended to mark a distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by the statutes of the states, but new forms of remedies, to be administered in the courts of the United States according to the nature of the case. A state cannot, by its legislature, confer a substantive right or remedy in the way of a suit *inter partes*, upon its own citizens, that will not be available to the citizens of the other states; nor can it, by any device, restrict such right or remedy thus made available, to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the federal courts. By any other view it would be in the power of a state by legislation to deprive citizens of other states either of the new right or remedy given by the state statute or of the forum granted by the federal constitution and laws. The citizen of another state cannot be compelled to make such election, or to accept a remedy upon condition that he forego the constitutional forum to which he would otherwise be entitled. *Railway Co. v. Whittons*, 13 Wall. 270, 20 L. Ed. 571; *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200; *Boom Co. v. Patterson*, 98 U. S. 406, 25 L. Ed. 206; *Bigelow v. Nickerson*, 17 C. C. A. 1, 70 Fed. 113, 30 L. R. A. 336; *Darragh v. Manufacturing Co.*, 23 C. C. A. 609, 78 Fed. 7. And in *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded because, by the laws of the state, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res* which is the subject of the litigation is entitled to administer it. *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Bank v. Horn*, 17 How. 160, 15 L. Ed. 70; *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 454, 16 L. Ed. 749; *Hook v. Payne*, 14 Wall. 255, 20 L. Ed. 887.

Section 7 of chapter 148 of the Revised Statutes of Illinois, so far as is important to the consideration of this case, is as follows:

"Provided, however, that if any person interested shall, within two (2) years after the probate of any such will, testament or codicil in the county court, as aforesaid, appear, and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the

practice in courts of chancery in similar cases, but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all of the parties concerned, saving to infants or (and persons) non compos mentis, the like period after the removal of their respective disabilities. And in all such trials by jury, as aforesaid, the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence, and to have such weight as the jury shall think it may deserve."

It is peculiarly within the province of courts of equity to set aside deeds of conveyance for fraud, and this statute in express terms confers a like power upon the state courts of general chancery jurisdiction in regard to probated wills. No doubt has been raised in regard to the power and jurisdiction of the proper state court of general equity jurisdiction to entertain such a suit as this to set aside a will in a proper case. If the courts of equity of the state can do it, there is no reason to deny concurrent jurisdiction to the federal courts as between citizens of different states. The question is of importance, and, the authorities on the subject being not uniform, we have given it careful consideration. We think, both upon principle and the weight of authority, the jurisdiction should not be withheld. So far as the supreme court has spoken upon the subject, if it cannot be said to be fairly adjudicated, it has clearly been in favor of the jurisdiction. That court said, in *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524, Judge Field rendering the opinion:

"In the Case of Broderick's Will the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country from the full jurisdiction over the subject of wills vested in the probate courts and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the federal courts, sitting in the states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties. There are, it is true, in several decisions of this court, expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of congress. The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the judiciary act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties."

Again, the court say, in the same opinion:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a monument of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the en-

forcement of a decree alleged to have been obtained upon false and insufficient testimony."

In *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, it was held that:

"Circuit courts, as courts of equity, have no general jurisdiction for annulling or affirming the probate of a will. Jurisdiction as to wills, or their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte*, and merely administrative, it is not conferred; and it cannot be exercised by them at all, until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties."

The same principle seems also to have been conceded in the Case of *Broderick's Will*, 21 Wall. 509, 22 L. Ed. 599, where the supreme court, speaking through Mr. Justice Bradley, says:

"The statute of 1862 has been referred to, which gives to the district courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment, or perjury. Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the states. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties. But the statute referred to cannot affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit."

In *Richardson v. Green*, 9 C. C. A. 565, 61 Fed. 423, this question, under a similar statute of Oregon, came directly before the United States circuit court of appeals of the Ninth circuit. Very much like the case at bar, that case was brought to cancel a certain deed purporting to have been made by Philanda Terwilliger to her daughter, and also to cancel a will devising to the daughter certain real estate. The circuit court had overruled a demurrer to the bill, upon which a decree was entered, which was affirmed by the circuit court of appeals. It was held that the proceeding under the laws of Oregon to contest the validity of a will which had already been admitted to probate, being a suit between parties, was one of which the United States court may take jurisdiction, when the amount in controversy is sufficient, and the parties are citizens of different states. Judge Knowles, delivering the opinion in chief, says:

"The suit for contesting a will after the probating of the same in Oregon is undoubtedly one between parties, and binding only the parties thereto. Here it will be seen that, if a suit is essentially a suit of a civil nature for equitable relief, and it is customary to prosecute the same in any state court where the action arose, whether the same is a county court, or a probate court, or a district or circuit court, the proper federal court will have concurrent jurisdiction of the same with such state courts, where the amount is sufficient, and the parties are citizens of different states, as prescribed by the United States statutes. It should be observed, also, that when it is customary for such state courts to hear and determine such equitable suits, a United States court, under proper conditions, may hear them."

And Judge McKenna, in his concurring opinion, says:

"I concur in the reasoning and conclusion of my associate as to the deed and will, and think both are forgeries. I believe, also, that the authorities

cited by him establish that courts of equity, by virtue of their general authority to enforce equitable rights and remedies, have no power to avoid a will, or to set aside its probate on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of courts of probate. But where such a remedy is given to a state court by an action inter partes, the remedy may be adopted by the federal courts, if the controversy is between citizens of different states."

The proper distinction between a proceeding to probate a will in common form and contesting the validity in a court of equity after being probated, is properly drawn in *Brodhead v. Shoemaker* (C. C.) 44 Fed. 518. It is there said:

"Under section 2423 of the Code of Georgia, a proceeding to probate a will in common form is a probate proceeding pure and simple, the probate and record not being conclusive upon any one interested in the estate adversely to the will, and, if afterwards set aside, not protecting the executor in any of his acts further than the payment of the debts of the estate. Under the same section, and sections 2424 and 2427 of the same Code, a proceeding to probate a will in solemn form is a proceeding inter partes to establish the will conclusively and as a muniment of title; and when, in such a proceeding, the heirs at law are brought in, and they contest the validity of the will and the capacity of the testator, an issue or controversy is formed or made which can be classified as a suit at law. From the statutes cited, and the record of the case as made up to the time of removal, it appears perfectly clear that the proceeding pending in the superior court of Floyd county, Ga., taken in connection with the removal statutes of the United States, was a suit in which there was a controversy removable by the defendants to the circuit court of the United States for the Northern district of Georgia, upon compliance with the conditions prescribed in said removal statutes; and this, within the rule laid down by the supreme court in *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006."

In *Kirby v. Railroad Co.* (C. C.) 106 Fed. 551, in the United States circuit court for the Southern district of Iowa, the jurisdiction is conceded. In that case the court say (page 556):

"Neither by an original action nor by an attempted removal from a state court can this court acquire jurisdiction so as to probate a will, or appoint an administrator, or in determining the validity of a will preliminary to the appointment of an executor or administrator. That is clear. And it is equally clear that this court will take jurisdiction to contest the validity of a will already admitted to probate, if a controversy of the requisite amount and the parties citizens of different states," etc.

The case of *Oakley v. Taylor* (C. C.) 64 Fed. 245, decided by the district judge of the Eastern district of Missouri, is, no doubt, an authority for the appellees. The statute in that state was similar to that in Illinois, except that it provided for contesting the rejection as well as the allowance of a will by the probate court. The court in that case declined the jurisdiction because it was doubtful, and was derivative, and not original, and the statute, not in form, but in effect, provided for appeal from a probate to a state circuit court.

Reed v. Reed (C. C.) 31 Fed. 49, is cited as an authority against the jurisdiction, and such it may be, though, according to the opinion in that case, by Judge Welker, it was a case of attempted removal from a state court of proceedings under special statutory proceedings classed with special remedies, and which make the common pleas court of that state an assistant to the probate court in the probate of wills and settle-

ment of estates. These two cases seem to be more nearly in point against the jurisdiction than any other cases cited.

Copeland v. Bruning (C. C.) 72 Fed. 5, is also relied upon as an authority for appellees, but the case is clearly distinguishable from the one at bar. That was a case of removal, and the ground upon which a motion to remand was made was that a proceeding to contest the validity of a will which has not been admitted to probate is not a suit at common law or in equity, but is a proceeding to determine whether the will is valid, and entitled to probate; and the holding of the court was that the federal courts have no jurisdiction, either original or upon removal from a state court, of a suit instituted to determine the validity of a will, as a preliminary step in determining whether its probate should be granted or not.

The cases of *In re Cilley* (C. C.) 58 Fed. 977, and *Wahl v. Franz*, 40 C. C. A. 638, 100 Fed. 680, are also relied upon as authority for the appellees, but are clearly distinguishable from the case at bar in that they were cases to establish the original probate of a will. *In re Cilley* is a strong case upon the points decided, and the opinion by Aldrich, J., concurred in by Judge Colt, is able and exhaustive; but so far as the case being an authority against the jurisdiction in a case like the one at bar, it is an authority the other way, so far as the opinion of the court could be an authority upon a question not directly involved in the case,—as the court in the opinion expressly recognize the jurisdiction of the federal courts in a case like this. The court, in their opinion, say:

"The petitioner places great stress upon a class of cases like *Gaines v. Fuentes* and *Ellis v. Davis*, which put in issue the validity of wills. An examination of these cases will disclose that they are not inconsistent with the repeated declarations of the supreme court that federal courts have no jurisdiction over the probate of wills, and the apparent confusion arises from the fact that the cases either came from the territorial courts or from states where, by statute, courts of equity have been clothed with jurisdiction to entertain bills to set aside wills on the ground of fraud. *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524, was a direct proceeding to annul a will already established, based upon a local law vesting the ordinary courts with jurisdiction to that end. Mr. Justice Field, in sustaining jurisdiction in that case, reaffirms the doctrine of the *Case of Broderick's Will*, that by jurisdiction of courts of equity as established both in England and in this country, independent of the statutes, a bill will not lie to set aside a will or its probate. 'And,' he says (page 21), 'whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But,' he says, 'that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the federal courts, sitting in states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties,'—thus distinctly putting the decision upon the local law conferring equity jurisdiction, and disclaiming that jurisdiction exists over probate proceedings coming from a state where courts of equity are not clothed with such statutory power. And *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, was a bill in equity to recover property, and to set aside a will already established. The court, in its opinion, expressly distinguishes the case then under consideration from those involving proceedings to establish wills, over which it disclaims jurisdiction, and likewise puts the decision sustaining jurisdiction to administer relief in that particular case upon the ground that the law ob-

taining in the state authorized suits in equity to annul and set aside the probate of a will."

The case of *Wahl v. Franz*, supra, decided by the circuit court of appeals for the Eighth circuit, is relied upon perhaps more than any other to fortify the position taken by appellees against the jurisdiction. But that case was decided by a divided court, Sanborn, J., delivering a vigorous and able dissenting opinion. As we understand the case, it was essentially one for the probate of a will, and it was held that a proceeding for the probate of a will is not a suit of a civil nature at law or in equity, within the meaning of the federal judiciary act of 1888. The law provided for an appeal to the circuit court of the state as a part of the machinery for the probate of a will, and it was held that the proceeding in that court was not removable to the United States circuit court under the act of congress. The distinction seems to have been taken that in the case of an appeal the appeal forms a part of the machinery provided by the state law for the probate of wills, and, unless the will is probated, the United States court cannot have jurisdiction.

In view of these express adjudications of the circuit courts and of the circuit courts of appeal with so many recognitions of the jurisdiction by the supreme court, there would seem to be little ground for doubt of the jurisdiction of the federal courts in such a case; and we have no hesitation in holding that the want of jurisdiction alleged cannot be sustained.

The other grounds of demurrer, the jurisdiction being conceded, do not seem formidable; the objection for multifariousness and want of parties being more under the control of the court, to be adjudged and administered so as to best preserve the rights of the parties and do justice to all. In the judgment of the court the bill is not multifarious. It may be said that two causes of action, one for setting aside a will and the other for setting aside a deed, are joined; but, if so, they are both of an equitable nature, and, what is more, both grow out of the same transaction and subject-matter, which is the fraud and gross overreaching alleged to have been practiced by Crabb upon the deceased, Ellen Williams. These two causes for equitable relief, growing, as they do, out of the same circumstances of fraud and undue influence, may properly be united in the same bill. They will naturally depend upon substantially the same proofs and circumstances, and nothing would be gained by separate suits. It is difficult to believe that the interests of any of the defendants can be jeopardized by uniting the two causes of action, if they can be said to constitute two causes. It is very true that the interests of all the defendants are not identical, but that is by no means necessary. They all have an interest, however,—Crabb as the principal defendant, and who is charged with a trust in case the deed and will are set aside; and the others as having some interest under and derived from him. Certainly the relief sought is not wholly disconnected, but is properly asked, as growing out of the same transaction. The rule in regard to multifariousness is not very well settled, and each case must depend mainly upon its own facts and circumstances. If the court can see that justice to all parties may be done, it will exercise a discretion not to put the complainant out of

court for such a cause. In *Brown v. Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468, the supreme court say:

"It is contended by the appellant that the decree below should be reversed on the ground that the cross-bill is multifarious. In *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368, this objection was urged against a bill, and in considering the objection the court say: 'There is, perhaps, no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule; and that conclusion is that each case must be determined by its peculiar features.' So, in *Gaines v. Chew*, 2 How. 619, 642, 11 L. Ed. 402, 411, the court say: 'In general terms a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. In illustration of this it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. It is well remarked by Lord Cottenham in *Campbell v. Mackey*, 7 Sim. 564, and in 1 Mylne & C. 603, 'to lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case must be governed by its own circumstances, and, as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interest may have arisen under distinct contracts.'"

It is not indispensable that all parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Addison v. Walker*, 4 Younge & C. 442; *Parr v. Attorney General*, 8 Cl. & Fin. 435; *Worthy v. Johnson*, 8 Ga. 238. The rule, so far as there is any rule upon this subject, is perhaps as well as anywhere stated by Mr. Justice Harlan in *Sheldon v. Packet Co.* (C. C.) 8 Fed. 769, as follows:

"It has been held by the supreme court of the United States to be impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness or misjoinder of causes of action. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Barney v. Latham* (Oct. term, 1880-81) 103 U. S. 205, 26 L. Ed. 514. The court must necessarily exercise a large, though, of course, a sound, discretion in allowing the union in the same suit of matters which do not alike or equally affect all the parties. Each case must depend upon its special circumstances, and the necessities which may arise out of the due administration of justice in that case. As a general rule, the court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant whose object was not simply to harass his adversary, but to ascertain what were his just legal rights. As to the general propositions, there can be no doubt under the authorities."

See, also, to the like effect, *Von Auw v. Fancy Goods Co.* (C. C.) 69 Fed. 448; *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55, and cases cited; *Barcus v. Gates*, 32 C. C. A. 337, 89 Fed. 783; *Bank v. Sprague* (C. C.) 8 Fed. 377; *De Neufville v. Railway Co.*, 26 C. C. A. 306, 81 Fed. 10.

Under these authorities, it seems clear that the objection for multi-fariousness cannot be sustained.

If, in regard to the will, it be objected that under the Illinois statute an issue must be made up for trial by jury, while the question of fraud in the procurement of the deed might be tried by the court, the answer is that the objection is neither grave nor insuperable. A court of equity is elastic in its procedure, and can adapt itself to the varied circumstances of a case in order to do justice. It is not uncommon for a court of equity to impanel a jury to try questions of fact, and especially questions of fraud; and it may set aside or disregard verdicts, according to the justice of the case. Quite likely the court might order one jury to try both issues, or it might try one by one jury and the other by another, or one by a jury and the other by the court. The verdict of the jury under the issue made up under this statute might, no doubt, be set aside by the court, if it should appear to be against the justice of the case. So that there is no hard and fast rule to prevent the court from meting out justice according to the principles of equity, which it is its prime function to administer.

Nor can the objection prevail that Helen Alexander is not made a party defendant or a party complainant with her brother, having an equal interest in the estate of her sister with the complainant. She is not an indispensable party. The ground of demurrer is that she was not made a defendant, but she has no interest adverse to that of the complainant, and so should not be made a defendant. It is not objected that she is not made a co-complainant. She would have been a proper party complainant, and possibly a necessary, as distinguished from an indispensable, party. *Railroad Co. v. Zeigler*, 39 C. C. A. 431, 99 Fed. 114. By the original bill Helen Alexander was made a party defendant, and she was alleged to be a citizen of Illinois. In the amended bill she was not made a party, nor is there any allegation as to her citizenship, but the demurrer alleges that she is a citizen of Illinois. The briefs of counsel on both sides concede that she is a citizen of the same state with the defendants, and we think the court may assume that to be the fact; so that, if she were made a party, the requisite citizenship to give the federal court jurisdiction would be wanting, as the court would, in determining the question of jurisdiction, arrange the parties according to their interests in the controversy, and, her interest being with the complainant, she would be placed on that side, which would deprive the court of jurisdiction, as one of the complainants in that case would be a citizen of the same state with the defendants. It seems clear that under the adjudications that would be a good reason that the court should not require her to be brought in. In *West v. Randall*, 2 Mason, 181, Fed. Cas. No. 17,424, one of the beneficiaries in a trust deed filed a bill against the trustee to secure settlement of the estate. The other beneficiaries were not made parties, and it was objected that they were indispensable. The opinion was

delivered by Mr. Justice Story, who decided that the other beneficiaries were not indispensable parties, basing his decision upon the propositions that, if they were brought into court, they would oust jurisdiction of the court, and that there was no controversy with them which required their presence. It was insisted by counsel in that case, as in this case, that a decree would not close the matter, but would leave the absent parties to again litigate the whole matter, and thus vex the defendants with double inconvenience and perils. Judge Story said, "This is certainly true, and it is as certain that they could not be plaintiffs here without ousting the present plaintiff of his remedy here." While admitting the general rule that all parties of interest must be before the court, he said:

"The rule is not, then, so inflexible that it may not fairly leave much to the discretion of the court; and upon the facts of the present case, it being impossible to make other heirs plaintiffs consistently with the preservation of the jurisdiction of the court, or to make them defendants from any facts which can be truly charged against them, I should hesitate a long while before I would enforce the rule, and, if the cause turns solely upon this objection, should not be prepared to sustain it."

And in *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289, Chief Justice Marshall delivering the opinion, the court says:

"It is contended that he [the plaintiff] is a tenant in common with the others, and ought not to be permitted to sue in equity without making his co-tenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy, of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not like the discretion of parties,—an inflexible rule, a failure to observe which turns the party out of court because it has no jurisdiction over his cause,—but, being introduced by the court itself for the purposes of justice, is susceptible of modification for the promotion of those purposes. In this case the persons who are alleged to be tenants in common with the plaintiffs appear to be entitled to a fourth part, not of the whole contract, but of a specially described portion of it, which may or may not interfere with the part occupied by the defendant. Neither the bill nor the answer alleges such an interference, and the court ought not, without such allegation, to presume it."

In *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, it was held that in a bill in equity by one distributee of an estate against the administrator it is not indispensable that such distributee make the others parties, if the court is able to proceed to a decree, and do justice to the parties before it without injury to absent parties equally interested. The court says:

"But this rule, like all general rules, being founded in convenience, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons equally interested in the litigation, but who cannot conveniently be made parties to the suit. *West v. Randall*, 2 Mason, 181, Fed. Cas. No. 17,424; *Story, Eq. Pl. 89 et seq.*"

These adjudications are also in line with equity rule No. 47, which is as follows:

"In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made

parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

According to the decision of the United States court already cited, this is not a proceeding in rem, but a suit inter partes. Considered simply as a suit to set aside a will, already probated, for fraud, it is not a proceeding in rem. But in its largest aspect it is a suit to recover complainant's one-half interest in the valuable estate, of which he is one of two heirs. It is not simply a suit to contest a will, or the legal probate thereof, but it is to establish the right of the complainant to the possession and enjoyment of real estate, and to relieve his title thereto from incumbrances fraudulently put upon it, which cloud the title. At common law ejectment would lie, but the complainant's remedy under our system is by bill in equity. Nobody will be bound by any decree except the parties thereto. Without being joined as complainant, and without bringing suit on her own behalf, Helen Alexander's interest in the estate cannot be affected by a decree in favor of this complainant. The defendant Crabb cannot justly complain that the suit is not brought to recover the entire estate of Ellen Williams, rather than a one-half interest. The utmost consequence that could follow would be that the defendants might be subjected to another suit by Helen Alexander, but that would be no hardship compared with turning the complainant out of court, who would now, no doubt, be barred, under the statute, from commencing another action so far as the will is concerned.

The decree of the court below is reversed, and the cause remanded for further proceedings.

JUDD et al. v. NEW YORK & T. S. S. CO.

(Circuit Court of Appeals, Third Circuit. July 15, 1902.)

No. 18.

1. CARRIERS—ACTION FOR LOSS OF GOODS—QUESTIONS FOR JURY.

A steamship company received from a connecting carrier a consignment of wool, which it placed in its shed adjoining the dock to await shipment, and while there the shed and its contents were destroyed by fire, which originated in an adjoining shed owned by others. Both sheds were of wood, and very dry, and the one in which the fire originated contained a large quantity of jute, which was very inflammable, and particularly exposed to danger from fire. In an action by the owner to recover the value of the wool, there was evidence tending to show that the company had knowledge of the condition of the adjoining shed, and that it had no watchman, and little, if any, fire protection; also that while defendant employed a watchman its shed was not as well constructed to withstand a fire from the outside as others along the docks, and that there were no fire hydrants within easy reach, as there were in the case of other sheds. *Held*, that upon such evidence the question whether defendant exercised due care for the protection of plaintiff's goods was one upon which reasonable men might fairly differ, and which it was the province of the jury to determine.

2. SAME—LIABILITY AS WAREHOUSEMEN—LOSS OF GOODS BY FIRE.

The fact that a carrier which placed goods received for shipment in its warehouse took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law for the destruction of the goods from a fire originating on adjoining premises which it did not own nor control, although such fire was so violent that it was impossible to prevent it from spreading to its own building, where it had full knowledge of the manifest danger to its own premises arising from the specially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances, it may have been culpable negligence, and a breach of duty as a bailee for hire, to place the goods in such warehouse.

8. SAME—ACTION—EVIDENCE.

In an action by the owner of goods against a carrier to recover for their loss by fire through the alleged negligence of defendant, evidence to show that plaintiff has received a conditional payment on account of the loss from an insurer and to establish an estoppel against the insurer is irrelevant, and inadmissible, the right of action being in the plaintiff upon the contract, and unaffected by any subsequent transaction between him and the insurer.

Acheson, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See 112 Fed. 1023.

John F. Lewis, for plaintiffs in error.

N. Dubois Miller, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This was an action in tort, brought by H. C. Judd and Root, of Hartford, Conn., plaintiffs below and plaintiffs in error here, against the New York & Texas Steamship Company, popularly known as the "Mallory Line," the defendant in error, to recover the sum of \$26,538.88, the value of 869 bales of wool, destroyed by fire on July 2, 1896, while in the custody of the defendant, at Galveston, Tex. This wool came into the possession of the defendant by a shipment from the interior of Texas, on the 27th of June, 1896, upon two bills of lading of the San Antonio & Aransas Pass Railroad Company. At Galveston, it was taken charge of by the defendant, to be shipped to Hartford, Conn., by one of its steamers scheduled to sail a week later, and while awaiting shipment, was stored in a frame shed on the Gulf front, known as the "Santa Fé Shed," owned and occupied by defendant. This shed was about 400 feet long, and was situated a few feet, on its north side, from the wharf front to which it was parallel. It had what was known as a shell roof—that is, a board roof covered with tar paper and pitch, upon which shells had been placed while in a soft state. Immediately adjoining this shed, and separated from it only by a frame partition, was a shed known as the "Labadie Shed," owned by the Galveston Wharf Company, and occupied by the Galveston Bagging Company. This shed was 475 feet long. It was in line with the "Santa Fé Shed," and, like it, ran

¶ 2. Liability of carriers as warehousemen, see note to *Wade v. Lumber Co.*, 20 C. C. A. 529.

parallel with the wharf front, which was on its north side only a few feet away. It had the same pitch and shell roof that the other shed had, was open its entire length on the south side, to the height of from 12 to 16 feet, and, like the "Santa Fé Shed," was built of Texas pine. Along this south side ran numerous railroad tracks, along which switch engines operated off and on day and night, frequently throwing sparks while so running, and witnesses testified that fires had several times that summer been started from these sparks. The uncontroverted evidence was, that in this "Labadie Shed" there had been stored, for a period of several months prior to the destruction of plaintiffs' wool, between 6,000 and 8,000 bales of jute butts, and it is likewise uncontroverted that this is a highly inflammable material, which would instantly ignite from a spark. It is not denied that this jute had become dry and loose, and was scattered all over the floor and near the railroad tracks. The testimony also showed that this shed was without a watchman or fire appliances of any kind, and that it was a resort for loafers and tramps, who were seen there every day on top of the bales, playing cards or sleeping. It was also in evidence that a long season of drought had preceded the fire, in consequence of which all the sheds had become dry and inflammable. The testimony tended to show that the "Labadie Shed" was not built as a warehouse for storage purposes, but was adapted only for the temporary care of merchandise about to be transshipped, the cars coming down on the open south side, and the vessels lying at the wharf front on the north side. These conditions, as to which there was no conflict of testimony, were such as ought to have been known by defendant's agents and officers. Defendant's watchman, however, testified that he had observed the unprotected situation of the "Labadie Shed" and the fact that it was the resort of idle persons, and had mentioned it to the defendant's agent, who visited the wharf every day, and also to the superintendent. There was also testimony tending to show that proximity to such a shed was dangerous, because it was open on the south side and free to access by everybody, and unprotected from the sparks of passing locomotives. There was also testimony tending to show that, while there were some barrels of water and buckets in the "Santa Fé Shed," in which the plaintiffs' merchandise was stored, there were no fire hydrants near the shed, and no hose on hand sufficient to make available the fire hydrants that were from 100 to 300 feet away, alongside of other sheds. There was also evidence tending to show that other sheds along this water front, used for similar purposes, were differently constructed, being built with standard 18-inch fire brick partition walls extending above the roof and supplied with hydrants, hose and fire pumps. This being the condition of things, a fire broke out in the "Labadie Shed" on the afternoon of July 2d, burning so fiercely and spreading with such rapidity as to be beyond the control of the fire department of Galveston, when it arrived upon the scene. The fire spread rapidly to the "Santa Fé Shed," and in a short time, it with its contents was entirely destroyed.

The learned judge of the court below submitted the case to the jury, and in doing so, delivered a charge at some length, in which, after discussing certain aspects of the case with which we are not here concerned, used the following language:

"There remains, therefore, what seems to me to be the only question that I should be justified in submitting to you, and for the present, I shall submit to you. For the present, I say to the jury that the question is a question of fact for their determination, and they will take the evidence and decide upon it. I shall reserve the question for further consideration, whether there is any evidence to go to the jury in support of the plaintiffs' claim. For the present I shall ask you to determine whether the defendant was negligent in the only particular that is left, viz.: whether having received the wool and having put it into its shed, it omitted any duty which it fairly owed to the shippers, under all the circumstances disclosed by the evidence.

"Negligence, as you know, is the absence of due care according to the circumstances of any particular case. A man's duty varies according to the circumstances in which he is put. There are times when his duty may be more exigent than at another time. Circumstances and surroundings may be such as to call for more care at some times than at other times. Therefore, it is impossible, in most cases, to lay down any general rule. All that a court can say to a jury is what I have just said to you, that negligence is the absence of care according to the circumstances of the particular case. For example, take the testimony as you have heard it, consider the surroundings of this place of storage, of this shed, consider the material of which it was made, its neighborhood to other structures, the precautions that they took against fire, the proximity to the railroad, the presence or absence of a watchman in their own shed and in the neighboring shed, and other circumstances that the testimony may disclose. I do not pretend to narrate them exhaustively. Take all that may bear on the defendant's duty, and decide whether it did what a reasonable, prudent man, under all the circumstances, would have done. It certainly owed the duty of care to the shipper. Did it discharge that duty? For example, did it have sufficient appliances to put out any ordinary fire, such as under ordinary circumstances might fairly be anticipated? Of course, it was not bound to have appliances at hand such as would enable it to keep off fire from its premises under all circumstances. It did not guaranty that no fire could spring up that would attack its warehouse successfully. All that the duty of care could impose upon it would be to provide such reasonable precautions as a prudent man would ordinarily take. It had, as you will recall, various appliances. The testimony will enable you to determine what they were, and you must decide whether they were fairly sufficient under all ordinary circumstances. They did watch these premises to a certain degree, I do not know how much. The testimony does not seem to disclose that it was negligent in that particular. The jury will determine how that was."

We quote this passage from the charge, not because there is any exception to it by the plaintiffs in error, for, as will be seen hereafter, what the court said or did not say in its charge, is not before us for review; we only refer to the passage just quoted as a clear and proper statement of the law applicable to the case, as far as it was submitted to the jury, without commenting upon the language of the court, which seems to confine the question of negligence to the period of time after the wool had been received and put into the defendant's shed. It appears from the record, that after the jury had been out for a number of hours, they came into court and asked for further instructions, and the learned judge of the court below instructed them, briefly, as follows:

"Gentlemen: Your communication to me states that you desire me to explain more fully what constitutes negligence and concerning the amount of care the defendants were obliged to use prior to July 2d, or upon that date. I am very much afraid that I cannot be able to do more than repeat what I said to you before. I cannot lay down any rule for you to follow, with regard to this case, except the rule that I have given you, that negligence is the absence of care according to the circumstances. What sort of care

did the circumstances that have been proved fairly require? What would an ordinarily prudent man have been likely to do in caring for property intrusted to his charge? I cannot say, for example, there seemed to have been five hydrants there and there ought to have been six, or that there seemed to have been a two inch nozzle from the hydrant and there ought to have been a three or four inch nozzle. It is impossible for me to give instructions of that kind to the jury. The law does not lay down any rules in such detail and, in cases of this sort that are indeterminate in their nature, it requires the jury to consider all the surrounding circumstances and then decide what would have been done by an ordinarily prudent man under such circumstances and in such surroundings, in caring for property intrusted to his charge.

"I trust I make that clear. It is really all that I can say to you. I cannot take up these details and say, 'Now, in my opinion this work was carelessly done,' or 'This was not carelessly done.' It is not for me to do that at all; and I must turn the whole subject over to you, for you to apply the rule that I have just indicated."

We quote this supplementary instruction, for the reason stated in regard to the quotation from the first charge of the court; that is, because it repeats with admirable clearness and emphasis the distinction that the learned judge at first made, with reference to the facts of this case, between the functions of the court and jury. Afterwards, the jury returned, and announced to the court that they were unable to agree upon a verdict. Whereupon, the learned judge of the court below directed them to render a verdict for the defendant. This the jury accordingly did.

The action of the court below, in thus withdrawing the question of negligence from the jury and directing a verdict for the defendant, was excepted to by the plaintiffs, and is the ground upon which, what we regard as the principal assignment of error is based. The whole of the evidence has been made part of the record, by bill of exceptions duly sealed, and we have carefully considered the same in connection with the assignment of error just referred to.

The power of a court, when the evidence in a case has been closed, to withdraw it altogether from the jury and direct a verdict for plaintiff or defendant, as the one or the other may be proper, is a very important and salutary one. Where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it, the practical assertion of this power is salutary and promotive of the ends of justice, and does not conflict with the constitutional right to a trial by jury. The proper function of a jury does not begin, until there has been evidence submitted to it of facts, from which, in such a case as this, negligence may be reasonably inferred. If there has been no evidence adduced by the party upon whom the onus of proof is imposed, establishing or tending to establish such facts, there is nothing for the jury to consider, and it is the duty of the court to say so, and not leave the issue to be determined by the possible caprice or prejudice of those composing the jury. This is now the well-settled doctrine and practice of both English and American courts, and has been sanctioned by numerous decisions of the supreme court of the United States. *Ryder v. Wombwell*, L. R. 4 Exch. 36; *Jewell v. Parr*, 13 C. B. 916; *Toomey v. Railway Co.*, 3 C. B. (N. S.) 150; *Giblin v. McMullen*, L. R. 2 P. C. 335; *Railway Co. v. Jackson*, 3

App. Cas. 193; *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Improvement Co. v. Munson*, 14 Wall. 448, 20 L. Ed. 867; *Commissioners v. Clark*, 94 U. S. 284, 24 L. Ed. 59; *Motey v. Granite Co.*, 20 C. C. A. 366, 74 Fed. 155.

It is, however, equally important that a court should not, merely upon its own conclusion, as to what should be the proper determination of a question of fact, invade the province of the jury, and substitute its own judgment for theirs, when that question is one about which reasonable men might differ.

A careful reading of the evidence in this case, as it is presented in the record, inclines us to consider the question of negligence in this case, to be one "about which reasonable men may fairly differ." There was certainly testimony tending to show a condition of more than ordinary hazard in and about the premises, in which plaintiffs' goods were stored by the defendant. Defendant was a bailee for hire, and owed to the plaintiffs the duty of bestowing upon the goods committed to its charge, the care which an ordinarily prudent person would take as to his own property, under the circumstances surrounding him. The plaintiffs had no part in the selection of the place of deposit. We cannot say that in this case there was no evidence which the jury could consider, tending to show, on the part of the defendant, a want of that due care, in providing for the safety of plaintiffs' goods, which, under the peculiar circumstances existing, it owed to the plaintiffs. There was evidence adduced on the part of the plaintiffs, which at least tended to show a more than ordinary fire hazard, to which goods stored in the "Santa Fé Shed" were necessarily subjected, and there was also evidence tending to show a want of adequate precautions against such hazard on the part of the defendant. The evidence may have been, and probably was, conflicting as to the appliances usually found in such places in cities, for the prompt extinguishment of a fire, but there certainly was some testimony to the effect that there were no fire hydrants within easy reach of this highly inflammable "Santa Fé Building," and none at all readily available for the "Labadie Shed," in which were piled up thousands of bales of jute, much of which had become loose and was scattered about the floor. This material was admitted to be highly inflammable, and it was testified that it was specially exposed to ignition from passing locomotives or from the carelessness of the tramps that infested the shed. Furthermore, it is not denied that there was no watchman of this shed at all.

The learned judge of the court below, in the passage from his charge, which we have already quoted, correctly defined, in general terms, the degree of care required by law from the defendant, in regard to the wool received from the plaintiffs, and correctly instructed them that a want of care, thus defined, would be culpable negligence on the part of the defendant, for which it would be liable to the plaintiffs, and that, whether such culpable negligence was established by the evidence, was a question of fact for their determination upon all the evidence in the case.

But the attitude of the court below, as regards one phase of the general question, as to whether there was culpable negligence on the part of the defendant, or not, must now be noticed. Certain language

used by it seems to sanction the contention of the defendant here, that if proper precautions had been taken against fire on its own premises, no responsibility attached to it by reason of a fire starting on, and communicating from, adjoining premises, not owned or occupied or controlled by it, and which was so violent in character as to defy any resistance that could possibly be opposed to it. This contention practically ignores the responsibility attaching to defendant, by reason of the manifest danger to its own premises, arising from the specially hazardous conditions existing on the adjoining premises. To the proposition involved in this contention, we cannot agree. The evidence tending to show these dangerous conditions, and the special hazard of fire to defendant's property, arising therefrom, is not contradicted. We have already called attention to the fact that there was testimony tending to show that these conditions were known to and recognized by certain controlling officers of the defendant company, and we again repeat that the danger, as testified to, was so manifest and open as to affect the defendant with knowledge, even in the absence of direct testimony in that regard. It will not do to say that, because these conditions existed upon adjoining property not under the control of the defendant, they could not be guarded against. A dangerous condition on one's own property may exist by reason of, and be entirely owing to the existence of, dangerous conditions on an adjoining property. This is especially true as to the danger of fire. This dangerous condition, though derivative and not primary, if it is recognized, can be guarded against. Special watchmen placed near the adjoining property may diminish this danger, and it might be avoided altogether, so far as movable property is concerned, by declining to expose it to the risk, or by removing it therefrom. Whether the situation was unusually hazardous to the knowledge of the defendant, and whether, if it were, it was negligence in defendant, in the face of such hazard, to place the plaintiffs' wool in the "Santa Fé Shed," or whether, having placed it there, it took such additional precautions as were available and proportioned to the special danger involved, were questions for the jury, under all the evidence in the case. *Hardman v. Railroad Co.*, 27 C. C. A. 407, 83 Fed. 88, 39 L. R. A. 300; *Thomas v. Lancaster Mills*, 19 C. C. A. 88, 71 Fed. 481; *Tanner v. Railroad Co.*, 108 N. Y. 623, 15 N. E. 379; *Hewett v. Railroad Co.*, 63 Iowa, 612, 19 N. W. 790.

The evidence bearing upon this phase of the case, as well as that more especially concerning the provisions made by the defendant itself, for protection against fire on its own premises, all being relevant to the general question of negligence on the part of the defendant, was, in our opinion, such as to require a submission of that question to the consideration of the jury, and we are of opinion that the court erred in withdrawing it therefrom.

It would not be necessary to notice the second assignment of error, were it not that the disposition of this case will involve a new trial, and it is important that the views of this court should be expressed in regard to the subject-matter of that assignment.

Evidence was admitted, against the objection of the plaintiffs, to show that the wool was insured in the Insurance Company of North

America, and that the insurance money had been paid to plaintiffs, under an agreement that the money should not be repaid, unless plaintiffs were able in this suit to recover it. This evidence was offered by defendant, avowedly for its bearing upon the question of negligence. It was to show that the insurance company was the real plaintiff, and that as it, with other insurance companies, had a uniform rate of premium for insurance on the sheds, it was estopped, as real plaintiff, from saying that the risk was unusually hazardous.

The payment made by the insurance company to the plaintiffs was, as shown by the receipt in evidence, a conditional loan, and not a payment. It did not destroy plaintiffs' right of action against the defendant, nor put the insurance company in the situation of a real or nominal plaintiff, so that its admissions or conduct could be taken in any wise to affect the real plaintiff by estoppel, or otherwise. Even if the loss had been out and out paid, the equitable right of subrogation inuring to the insurer, would only authorize him to use the name of the insured in an action against one, whose failure of duty to the insured caused the loss. There is no contract or privity between the insurer and the defendant. In *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154, the court say: "By the strict rules of the common law, it (the right of the insurer) must be asserted in the name of the assured, but in any form of remedy, the insurer can take nothing by subrogation but the rights of the assured, and if the assured have no right of action, none passes to the insurer." The rights in litigation in this case are those which accrue out of the contractual relations existing between the plaintiffs and the defendant company. No others are the subject of discussion or determination, and nothing that passed between the plaintiffs and the insurance company can affect those rights. The transaction between the insurance company and the assured was, therefore, without relevancy, and was incompetent as evidence in the case.

The judgment of the court below is reversed, and a venire de novo awarded.

ACHESON, Circuit Judge. I dissent from the judgment of reversal in this case. The bill of lading under which the defendant company received and held the plaintiffs' wool contains a stipulation exempting the company from liability for loss by fire. Now, it appeared in the plaintiffs' own case that the wool was destroyed by fire which originated, not on the defendant's premises, but elsewhere, and spread irresistibly to the defendant's wharf shed, causing its total destruction, together with its entire contents, including the wool. It was therefore incumbent upon the plaintiffs to show clearly that the defendant was guilty of negligence which occasioned or contributed to the loss complained of. In my judgment, the plaintiffs wholly failed to show this, and there was no evidence to support a verdict against the defendant.

It appeared that the port of Galveston was provided along its water front with wharf sheds, precisely like the defendant's "Santa Fé Shed,"

designed and used for the temporary storage of goods in transit, and that they were habitually used by transporters engaged in the same business as was the defendant, to temporarily house goods in the possession of the carrier awaiting shipment. The plaintiffs were chargeable with knowledge of the conditions at the port of Galveston in respect to the accommodation of goods in transit and of the common method there practiced by transporters of handling and caring for goods awaiting shipment at the wharves. Undoubtedly the plaintiffs' Texas agent, who selected the Mallory Line for the transportation of the plaintiffs' wool, well knew that if upon the delivery by the railroad company of wool at the defendant's wharf there was no vessel in port to receive it the wool would be stored in the defendant's wharf shed until the next incoming vessel arrived. I cannot, then, agree to the statement to be found in the opinion of the court: "The plaintiffs had no part in the selection of the place of deposit." This, I think, is a serious misapprehension. The parties must be taken to have dealt with each other with regard to the common and notorious practice at the port of Galveston as to the storage of goods in transit. The plaintiffs had no right to expect the defendant to depart from the ordinary course of business. It would have been an unusual thing for the defendant to remove the wool from its wharf and store it elsewhere, and, indeed, this could not have been done except at the defendant's risk, not to speak of the expense.

The evidence was convincing that the "Santa Fé Shed," in which the defendant placed the plaintiffs' wool, was built of the same materials and in the same manner as the other wharf sheds in the port of Galveston, and that in construction it was as safe from the hazard of fire as any of the wharf sheds used for the temporary storage of goods in transit by other persons or companies engaged in the same business at that port. The shell roof was regarded as fireproof, and was rated by insurance companies as equal for safety to a tin roof or a slate roof. It clearly appeared, I think, that the defendant made reasonable provision, such as a prudent man would ordinarily make, to meet and arrest any ordinary fire. Testimony as well on the part of the plaintiffs as on the part of the defendant showed that in the "Santa Fé Shed" there was an ample supply of barrels and buckets, properly distributed, all filled with water, and also, according to the defendant's witnesses, a number of hand grenades. There was no hydrant within the shed, but the defendant company had on its premises, within easy reach of the "Santa Fé Shed," private hydrants or fire plugs,—three according to the plaintiffs' witness, and five according to the defendant's witnesses,—each supplied with hose, and the several lengths of hose would be coupled together in an emergency. Moreover, the defendant kept on its premises several watchmen, on duty day and night, one being on duty in the "Santa Fé Shed" at the time the fire started.

But, even if it appeared that the "Santa Fé Shed" lacked some of the usual appliances for the prompt extinguishment of fire, that circumstance would have no importance here. No precautions or vigilance within any reasonable limits could have availed to avert this loss. The wool was destroyed in an overwhelming catastrophe. The fire

was beyond control before it touched the "Santa Fé Shed." The fire department of the city of Galveston—summoned by telephone—was promptly on the ground, with its appliances, while the fire was yet confined to the pile of jute butts in the "Labadie Shed." But the roof of that shed soon took fire, burning fiercely and with great rapidity. Then the fire spread quickly and resistlessly to the "Santa Fé Shed." The firemen with all the appliances of the city fire department at their service were unable to arrest the fire until after the "Santa Fé Shed" and its contents were entirely consumed.

The fire occurred soon after midday, and commenced in the pile of jute in the "Labadie Shed" at a point about 30 feet in from the south side of the shed, and about 50 feet from the "Santa Fé Shed." How the fire originated did not appear and is not known. Certain it is that it was not due to any act of the defendant company or its servants. Nor could the defendant have done anything to prevent the fire. The defendant had no control whatever over the "Labadie Shed" or any right of supervision. The occupant, the Galveston Bagging Company, was engaged in a lawful business, the making of jute bagging, and had a legal right to store jute in that shed. Jute was and is imported into Galveston, and there used, in large quantities; for Galveston is a great cotton shipping port, and out of jute is made the bagging which covers all exported cotton.

It is difficult to perceive how the employment by the defendant of additional watchmen on its premises (as suggested in the opinion of the court) would have tended to prevent or mitigate this fire. The intimation in the opinion that the defendant should have declined to put this wool in its wharf shed for temporary keeping while awaiting shipment upon one of its vessels is a surprising suggestion. If the mere temporary storage in its wharf shed of this wool involved negligence, then the defendant could not have stored therein for any length of time any goods in transit except at its peril. The result would be that the defendant could not conduct business in the approved and customary way at the port of Galveston because the occupant of adjoining premises had in store a lawful article of commerce, much dealt in at that port, and which the evidence shows is not a whit more inflammable than is cotton, and little more inflammable than is Texas wool itself. These three commodities—jute, cotton, and wool—are the principal articles of import and export at the port of Galveston, and they are constantly brought into proximity at the wharves of that port. All this (which the evidence demonstrates) these shippers, the plaintiffs, must be presumed to have known. Against the risk from contact with jute and cotton they protected themselves by insurance on this wool.

I am not able to bring myself to the view that the defendant company incurred any liability to the plaintiffs growing out of the presence of jute in the "Labadie Shed" or the manner in which that shed was kept by its occupant.

Upon the whole case, I do not see how the court could have permitted a verdict for the plaintiffs to stand. The case, I think, was one for peremptory instructions in favor of the defendant, under the rule laid down by the supreme court in *Patton v. Railroad Co.*, 179 U. S. 658,

21 Sup. Ct. 275, 45 L. Ed. 361, and enforced by this court in *Railroad Co. v. Martin*, 49 C. C. A. 474, 111 Fed. 586.

I think that the trial judge was entirely right in directing the jury to find a verdict for the defendant, and I would affirm the judgment.

RYLAND v. HOLLINGER et al.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,668.

1. CORPORATIONS—CORPORATE EXISTENCE—COMMENCEMENT.

Rev. St. Mo. § 2492, provides that officers of a corporation shall file with the secretary of state a copy of the articles of association, that the corporate existence shall date from the time of such filing, and that a certified copy of a certificate of the secretary of state that the corporation is organized shall be filed in the office of the recorder of deeds of the county in which the corporation is organized. *Held*, that on a compliance with such requirements the corporate existence commenced.

2. SAME—COMPLIANCE WITH STATUTES.

The statutes relative to corporations require filing of a certified copy of the articles, establishment of an office, election of officers, and payment for stock. Rev. St. Mo. §§ 961, 1283, provide for the collection of stock subscriptions, and section 1024 gives a remedy where there is a failure to keep an office in the state. *Held* that, as to such acts required to be done after the formation of the corporation, failure to perform them for a brief time could not affect the status of the corporation.

3. SAME—TERMINATION OF EXISTENCE.

In respect to such acts the right of the corporation to continued existence can only be questioned by the state in a direct proceeding.

4. SAME—LIABILITY OF STOCKHOLDERS.

Neither stockholders nor promoters can be held liable, individually or as partners, on contracts made or liabilities incurred by an existing corporation.

5. SAME.

In Missouri, if persons who sign articles for incorporation contract debts or incur liabilities in the name of the projected corporation, before all acts necessary to bring the corporation into existence have been performed, such persons may be held liable as partners.

6. SAME—PLEADING—COMPLAINT.

In an action against the incorporators of a corporation to hold them liable as partners on a note transferred by it the complaint alleged that the note was sold by the corporation and the proceeds received before any certificate of incorporation was issued by the secretary of state, and that such proceeds were retained and used. *Held*, that the complaint was bad on demurrer for not alleging any indorsement by the corporation prior to the issuance of the certificate by the secretary of state.

7. SAME—COMPLAINT—ALLEGATIONS.

When in a suit to hold incorporators liable as partners on a transaction had before corporate existence the complaint alleged the articles of association were signed "on or about" a certain date, the allegation must be taken against the pleader, as meaning the articles were signed on or before the date named.

8. SAME—CONSTRUCTION OF COMPLAINT.

In an action against incorporators to hold them liable as partners on a note indorsed by them on behalf of the corporation prior to the issuance of a certificate by the secretary of state, the complaint alleged that the articles of incorporation were signed and acknowledged on or about

September 29th. The allegation was followed immediately by allegations that the articles were filed in the office of the recorder of deeds at Kansas City, and a certified copy thereof filed in the office of the secretary of state, who issued to the parties the certificate of incorporation. No other date than the one first given was stated as the date of any of these acts. The acts were stated in connected sequence, the word "and," wherever omitted, being understood. It was alleged the note was made "on or about September 29th." *Held*, that the pleading, by proper construction, alleged the issuance of the certificate by the secretary of state on or prior to September 29th, when the note was made; and, had the complaint alleged an indorsement prior to the issuance of the certificate, such allegation would have been rendered nugatory by the other allegations.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by Isaac P. Ryland against E. C. Hollinger and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

In this action the plaintiff in error seeks to recover of the defendants in error and others, as copartners using the firm name of A. J. Gillespie Commission Company, and one T. Kinahan, upon seven promissory notes, for varying amounts, all made at Kansas City, Kan., September 29, 1898, by said Kinahan, and payable, with interest as stated, to the A. J. Gillespie Commission Company, or order, at the Interstate National Bank, Kansas City, Kan., at specified dates, and all indorsed, "A. J. Gillespie Commission Co., by J. S. Hollinger, Pt.," which notes said A. J. Gillespie Commission Company transferred for value, before maturity, and which are held and owned by the plaintiff, and are unpaid, and were duly protested for nonpayment. The facts set forth in the amended petition, on which it is claimed that the defendants in error are liable as partners, are, in substance: That they, with other defendants named, on or about the 29th day of September, 1898, signed and acknowledged articles of agreement for incorporation under the name of the A. J. Gillespie Commission Company, located at Kansas City, Jackson county, Mo.; its capital being \$100,000, in shares of \$100 each. That such articles were executed in accordance with the laws of the state of Missouri, and were filed in the office of the recorder of deeds at Kansas City, Mo., and a certified copy thereof filed in the office of the secretary of state of that state, who issued to such parties a certificate of incorporation. It is further alleged that, though the persons executing the said articles subscribed for stock of such corporation, they never intended to take, and have not taken, any of the stock; and have not, and never intended to have, any office of such corporation in the state of Missouri, but to have its only office in the state of Kansas; and that the notes in suit were made and delivered to the A. J. Gillespie Commission Company, and by that company sold, and the proceeds received, before any certificate of incorporation was issued by said secretary of state; and that such proceeds went into the treasury of said association, and were retained and used after the issuing of said certificate. There is, however, no allegation that any of said notes were so indorsed by the A. J. Gillespie Commission Company, or transferred or delivered by that company to any one, before the said certificate of incorporation was issued. The defendants in error demurred to said amended petition on the ground that it did not state facts sufficient to constitute a cause of action against them. The demurrers were sustained, and, as the plaintiff elected to stand by this pleading, judgment was rendered in favor of the defendants who had demurred.

R. E. Ball and N. H. Loomis, for plaintiff in error.

G. W. Hurd and T. E. Dewey, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The amended petition alleges that the articles of agreement for incorporation of the A. J. Gillespie Commission Company were signed and acknowledged in accordance with the laws of Missouri, and for amounts of stock aggregating its entire capital, "on or about" the 29th day of September, 1898, and were filed in the office of the recorder of deeds at Kansas City, Mo., where by the articles the corporation was located, and a certified copy thereof filed in the office of the secretary of state of Missouri, who issued to the incorporators a certificate of incorporation. These were all the steps necessary to form and constitute a valid corporation, the existence of which began when the secretary of state issued the certificate of incorporation. Rev. St. Mo. § 2492.

2. Other allegations of the amended petition seeking to assail the validity of the corporation are irrelevant, as they relate to matters to be done after the corporation had come into existence. The recording of a certified copy of the certificate of incorporation, establishing an office in the state for the transaction of business, election of resident directors, and payment for the stock subscribed, are all acts to be done after the corporation had become an existing body. Rev. St. Mo. §§ 961, 1283, provide for the collection of stock subscriptions, and Id. § 1024, gives the remedy where there is failure to keep an office in the state. As to any of these acts to be done after the corporation became an existing body, there could be no failure affecting its status or corporate rights within the brief time covered by these allegations of the amended petition; and as to such matters the right of the corporation to continued existence can only be questioned by the state in a direct proceeding. *Smelting Co. v. Richards*, 95 Mo. 106, 8 S. W. 246.

3. Neither stockholders nor promoters can be held liable, individually or as partners, on contracts made or liabilities incurred by an existing corporation. In Missouri it is held that, if persons who sign articles for incorporation contract debts or incur liabilities in the name of the projected corporation before all acts necessary to bring the corporation into existence have been performed, such persons may be held liable as partners. *Hurt v. Salisbury*, 55 Mo. 310; *Richardson v. Pitts*, 71 Mo. 128; *Martin v. Fewell*, 79 Mo. 401; *Carpenter Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163.

4. The serious question in the case is raised by the tenth assignment of error, based on the allegation of the amended petition that the notes in suit were "executed and delivered to the said A. J. Gillespie Commission Company, and by them sold, and the proceeds thereof received by said company, before any certificate of incorporation was issued by the secretary of state of the state of Missouri; and that said proceeds went into the treasury of said association, and were by them retained and used after the issuance of said certificate." If this allegation can be held to state acts done by the signers of the articles, which incurred liability in the name of the corporation, before the secretary of state issued the certificate of incorporation, and if such statement is not nullified as being repugnant to and inconsistent with other

and more particular allegations of fact in the same pleading, it will sustain that assignment of error; otherwise it will not. The sole acts done which incurred any liability in the name of the corporation were the indorsement of the corporate name upon the notes, and their delivery so indorsed. But it is not alleged in the extract above quoted, nor elsewhere in the amended petition, that any of the notes were indorsed in the corporate name or delivered to any one before the secretary of state had issued the certificate. The averment that they had, before the certificate was issued, sold the notes and received the proceeds, which were put into the treasury of the corporation after the certificate was issued, states no fact from which any obligation in the name of the corporation could arise. The only obligation ever incurred rests on the indorsement in the corporate name, which, for aught that is alleged, may have been made after the certificate was issued, and when the proceeds were placed in the treasury of the corporation, though the notes had been bargained and proceeds paid over to go to the corporation upon indorsement and delivery of the notes. A pleader is required to state material facts with directness and reasonable certainty, and upon demurrer it cannot be held sufficient that the pleading contains loose statements, from which the existence of material facts, not alleged, may be surmised. Again, the whole of the above-quoted allegation is so plainly repugnant to the other allegations of the same pleading that it is nullified. A pleading must be considered as a whole, and construed upon demurrer most strongly against the pleader wherever its allegations are doubtful or inconsistent. It is averred that the articles for incorporation were signed and acknowledged "on or about the 29th day of September, 1898." It is not alleged that these acts were done after that date, and, applying the rule just referred to to this averment, it must be held equivalent to an allegation that the articles were so executed on or shortly before the date named. This is followed immediately by allegations that the articles were filed in the office of the recorder of deeds at Kansas City, Mo., and a certified copy thereof filed in the office of the secretary of state, who issued to the parties the certificate of incorporation. No other date than the one first given is stated as the date of any of these acts. "When in one continued sentence, or in several sentences connected with the conjunction 'and,' several facts are stated, the time, though only once alleged, will apply to each fact." 1 Chit. Pl. 274. These several acts are stated in connected sequence, and whenever the conjunction "and" is omitted between any of the clauses it is understood and implied, so that, if now written in, it would make no shade of change in the sense. It follows that under proper construction this pleading alleges that all these acts, including the issuing by the secretary of the certificate of incorporation, occurred on or shortly prior to September 29, 1898. It devolved on the plaintiff to show, and, of course, to allege with certainty, that these acts, or some of them, occurred after the indorsement of the notes in suit, in order to present any case against these defendants. Statements of facts, purposely made vague, and which, if accepted with all their vagueness, can only cast doubt, surely state no case. That the statements are purposely made vague is manifest from the fact that most of these allegations are

concerning matters of public record, which the plaintiff could hardly learn of without learning also of the dates connected with the same.

Turning to the allegations concerning the notes, the first note counted on is alleged to have been made "on or about September 29, 1898." The other six notes are alleged to have been made on September 29, 1898, and the copies of the seven notes attached to the pleading show that all bear that date. All other acts connected with said notes, including their indorsement and transfer, were necessarily subsequent to the making, and not earlier than September 29, 1898. It must therefore be held that the amended complaint, when properly construed, avers facts showing that the corporation came into existence not later than September 29, 1898, the very day when the notes were made and delivered to the company, according to the same pleading; and therefore that the allegation that the notes were sold and the proceeds received, etc., before the certificate of incorporation issued, is, on the face of the pleading, a futile attempt to aver that, although all these matters occurred on the same day, yet the issuing of the certificate was later as an undefined matter of moments. But in respect to such matters a day is an indivisible unit of time. And even had the pleading alleged, as it does not, that the indorsement of the notes was before the certificate issued, such allegation would have been nugatory, and contradicted by the other averments.

The demurrers were properly sustained, and the judgment is affirmed.

HILLIKER v. HALE.

(Circuit Court of Appeals, Second Circuit. May 16, 1902.)

No. 109.

1. CORPORATIONS—ACTION AGAINST STOCKHOLDER—LIMITATION.

Under the law of Minnesota, as settled by the decision of its supreme court, a suit to enforce the statutory liability of stockholders in a corporation may be brought at any time after the corporation has been adjudged insolvent, notwithstanding the pendency of proceedings to sequester and administer its property under the state insolvency law; and an action brought in New York against a resident of that state to enforce his liability as a stockholder in a Minnesota corporation, which is not commenced until more than six years after the corporation has been declared insolvent and a receiver appointed under the insolvency law, is barred by limitation, whether the six-years limitation of Minnesota or the three-years limitation of New York is applied.

2. SAME—RECEIVER—RIGHT TO SUE IN FOREIGN JURISDICTION.

A receiver appointed by a court under its general equity powers, to enforce and collect judgments rendered against stockholders of an insolvent corporation upon their statutory liability, to institute and prosecute proceedings against nonresident stockholders for the enforcement of such liability, and to hold all money collected subject to the further orders of the court, is merely an agent of the court, without any extra-territorial power, and is not vested with any title to the cause of action against a stockholder in favor of creditors of the corporation which will support an action at law by him against such stockholder in another jurisdiction.

¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 1090, 1092.

In Error to the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon writ of error to review a judgment of the circuit court, Northern district of New York, in favor of defendant in error, who was plaintiff below. 109 Fed. 273. Plaintiff "as receiver for the collection and enforcement of the liability of stockholders of the Northwestern Guaranty Loan Company," sued defendant, who was a stockholder of that company, a Minnesota corporation, to charge him with liability for the debts of said corporation to its creditors. The action was tried before the court without a jury, and there is no dispute as to the facts.

Section 3, art. 10, of the constitution of Minnesota is as follows: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The Statutes of Minnesota of 1894 (chapter 76) have the following provisions, which have been referred to on the argument:

"Sec. 9. Whenever a judgment is obtained against any corporation incorporated under the laws of this state, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representatives, the district court within the proper county may sequester the stock, property, things in action and effects of such corporation, and appoint a receiver of the same."

"(Sec. 17) (Sec. 5905). Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.

"(Sec. 18) (Sec. 5906). The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.

"(Sec. 19) (Sec. 5907). If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases.

"(Sec. 20) (Sec. 5908). Upon a final judgment in any such action to restrain a corporation or against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among its creditors.

"(Sec. 21) (Sec. 5909). In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"(Sec. 22) (Sec. 5910). If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

"(Sec. 23) (Sec. 5911). Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

The facts are as follows: At all the times hereinafter mentioned defendant

was a citizen and resident of New York and a stockholder of the Northwestern Guaranty Loan Company. On May 16, 1893, this corporation confessed judgment to the Northwestern Fuel Company for the sum of \$213. On May 17, 1893, a petition was made by a judgment creditor under the general insolvency act of Minnesota (chapter 143, Laws 1881) praying that the company be adjudged insolvent. Upon the return of the petition and the appearance of the company by attorney it was adjudged May 20, 1893, that said company was and for a long time had been insolvent, and the Minneapolis Trust Company was appointed receiver of said company, with power and authority to take possession of all the property of the debtor. This receiver duly qualified and is still acting as such receiver. In February, 1894, one Rogers, a judgment creditor of the guaranty company with execution returned unsatisfied, in behalf of himself and of all other creditors of the said company, brought suit in the proper district court in Minnesota against it, its receiver and all its stockholders, including the defendant in this action, for the purpose of "enforcing the stockholders' liability, for an accounting of the debts and assets of said corporation, the ascertainment of the deficiency, the apportionment and assessment of such deficiency amongst the several stockholders, and for the appointment and designation of a receiver for the purpose of enforcing and collecting such assessment or ascertained liability." This suit was manifestly brought under section 17 of the laws above quoted; only resident stockholders were served. The Minnesota court on February 7, 1897, entered judgment against the resident stockholders for sums amounting to the respective holdings of each stockholder. It also "for the purpose of enforcing and collecting said judgments and all thereof, and any and all liabilities thereon or in any wise connected therewith, and disbursing the amount so collected," appointed the plaintiff, William E. Hale, "as receiver, * * * authorized and empowered and directed to take any and all appropriate or necessary steps or proceedings for the purpose of collecting said judgment, * * * and to take all necessary or appropriate steps or proceedings against the nonresident stockholders * * * for the enforcement and realization upon their stockholders' liability, and to that end * * * to institute and prosecute all such actions or proceedings in foreign jurisdictions as may be necessary or appropriate."

Hale brought this suit against the defendant, setting forth these facts, and also alleging that the indebtedness of the guaranty company above all assets was greatly in excess of the entire amount, which could be realized by contribution from all the stockholders to the full extent of their holdings. Judgment was asked for \$30,000, defendant holding 300 shares of stock, and the decision of the circuit court giving judgment as prayed is now brought here for review.

C. C. Van Kirk, for plaintiff in error.

H. M. Boutelle, for defendant in error.

Before LACOMBE and TOWNSEND, Circuit Judges.

PER CURIAM. Out of the many questions which have been argued here two only need be considered.

Concededly the guaranty company was a "moneyed corporation." It was held by this court in *Hobbs v. Bank*, 37 C. C. A. 513, 96 Fed. 396, 41 C. C. A. 205, 101 Fed. 75, that the three-years statute of limitations (Code Civ. Proc. N. Y. § 394) applied to suits like this against stockholders in such corporations; and it was intimated by part of the court that that period might be reduced, when there was a shorter statute of limitations in the home state. The statute of limitations in this state still remains three years; the statute of limitations in Minnesota for like actions is six years. Gen. St. 1878, p. 707. This action was begun September 16, 1899. As appears from the statement of facts, the guaranty company was adjudged to be insol-

vent May 20, 1893. If the cause of action against the defendant arose then, it would be barred by either statute. In courts outside of Minnesota there is conflict as to when such cause of action arose; but we are of the opinion that such question should be decided in conformity with the decisions of the Minnesota courts, and they speak with no uncertain sound.

In *Olsen v. Cook*, 57 Minn. 552, 59 N. W. 635, an action was brought under this very statute (section 17) to enforce the statutory liability of stockholders of a bank. The plaintiff was a judgment creditor, with execution returned unsatisfied. The bank had made an assignment under the insolvent law (Act 1881). Defendants demurred on the grounds that there was another action pending (to wit, the insolvency proceedings under Laws 1881, c. 148), and that the complaint did not state a cause of action, on the theory that stockholders can be held to their statutory liability "only after the corporate assets have been fully administered and found to be insufficient," and that a stockholder is not liable to action for such liability "where it does not appear that the corporate assets proper have been fully administered and a deficiency ascertained," and that the action was "prematurely brought." The court overruled the demurrers, holding that:

"Chapter 76, §§ 17-23, inclusive, authorize an action by creditors to enforce the statutory liability of officers, directors, and stockholders; and while, in such an action, it would be required of the complaint to show a necessity to resort to that liability in order to satisfy the corporate debts (which the complaint in this case does) it certainly would not be required of it to show to what extent such resort is necessary, or to show that the corporate assets have been exhausted without satisfying the debts. Section 18 reads: 'The court shall proceed thereon [on the complaint filed under section 17] as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.' Section 19: 'If, on the coming in of the answer, or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed without appointing any receiver to ascertain the respective liabilities of such directors and stockholders and enforce the same by its judgment as in other cases.' Section 20 provides that upon final judgment in such an action the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its creditors. Section 21 provides that, if the property of the corporation is insufficient to satisfy its debts, the court shall enforce the payment of anything unpaid on the shares of stock, or so much thereof as is necessary to satisfy the corporate debts; and section 22, that if the debts remain unsatisfied the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. Section 23 provides for calling in creditors other than those bringing the action. It is apparent from these sections that, where resort to the statutory liability is shown to be necessary, the creditor need not, before bringing the action, exhaust his remedies against the corporate property. That may be done in the action itself."

The court held that the pendency of insolvency proceedings to sequester, convert, and apply on the corporate debts the proceeds of the corporate assets was no bar to the bringing of an action to enforce statutory liability under section 17, although the amount required to make up the deficit is not yet ascertained.

"In such a case [says the court] there would be nothing to prevent the court determining at once the maximum liability of each officer, director, and stockholder, as it might do if it also appointed a receiver to administer the corporate assets. It is true that before determining how much should, within that maximum, be collected from each, it would have to await the result of the other proceeding. But, if it appointed a receiver to administer corporate assets, it would, for the same purpose, have to await the result of the proceedings of its own receiver. We think such an action may be brought pending the insolvency proceeding, that this is such an action, and that consequently it was not prematurely brought."

We have not been referred to nor have we been able to find any decision by a Minnesota court which in any way modifies the views expressed in *Olsen v. Cook*, supra. Under the statute as thus construed, action might have been brought to enforce statutory liability of any and every stockholder of the guaranty company at any time subsequent to May, 1893. The cause of action then arose, and, inasmuch as this action was not begun until more than six years later, it is barred equally by the New York and by the Minnesota statute, whichever applies.

We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the *Rogers Case*. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything, so far as appears, except to his office of receiver. The order and decree, in terms, make him a mere agent of the Minnesota court. That court undertook to authorize him to sue nonresidents in other jurisdictions; moneys collected to be "held by him subject to the further order of this court (the Minnesota court) in the premises." The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired and sue upon such claim here in accordance with the principles stated in *Association v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order. He was made an arm of the court, with which the court attempted to reach outside of its territorial jurisdiction, and the attempt, it seems to us, was futile. The court could not reach beyond the limits of its jurisdiction through a receiver any more than it could through a marshal or a sheriff. The authority which it sought to give to the plaintiff became a dead letter when he passed beyond the boundaries of the state. This is substantially what was held in *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, which has never been reversed. There a statutory receiver appointed in New York was authorized by the court to go into another jurisdiction to collect a claim. The court held that he could not there maintain an action at law, and said as follows:

"He [the receiver] has no extra territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction, to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

The rule in this circuit, as laid down in *Sands v. Greeley*, 31 C. C. A. 424, 88 Fed. 130, is as follows:

"When a foreign receiver is obliged to invoke the aid of the court of another state in asserting his title to assets within its jurisdiction, such court will not, in the exercise of comity, recognize his title to the prejudice of the citizens of its own state, who have fairly acquired title to the assets, either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens. * * * This is because he is appointed by a court which derives its jurisdiction from state laws which have *ex proprio vigore* no extraterritorial force, and the effect of which in other states depends wholly on the comity of the state in which their application is invoked. But by the comity extended by the several states of the Union to one another, not only from motives of respect but from consideration of mutual convenience, the right of a receiver to possess himself of assets located in a state other than that of his appointment is everywhere recognized and enforced, subject to the qualification mentioned."

Association v. Rundle, *supra*, which concerns the powers of an official vested by statute with title to corporate assets, simply emphasizes the distinction made in *Booth v. Clark* between one who, under any name, is given by statute a title which he can assert anywhere, and one who is appointed receiver under the ordinary power in equity, and is a mere agent or officer of the court. Of the receiver in *Booth v. Clark* the court says:

"He is a representative of the court, and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession."

The court cannot take in execution property not within its legal jurisdiction. A creditors' bill, by which equitable assets can be reached, is a substitute for the common-law execution, and can be brought only in the same jurisdiction. *Tubeworks Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070. That the court cannot send its marshal or sheriff outside of its jurisdiction to seize property cannot be disputed. Upon the same principle, it can send no other officer or agent to collect moneys outside of its territorial limits. By force of statute, a court may in a particular case vest in a person called a receiver—or called by any other name—title to a chose in action, and that title may be asserted elsewhere; but an officer acting merely as an arm of the court cannot sue beyond the jurisdiction of the court. *Brigham v. Luddington*, 12 Blatchf. 237, Fed. Cas. No. 1,874; *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332, 181 U. S. 186, 21 Sup. Ct. 555, 45 L. Ed. 810; *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830, approved in *Marshall v. Sherman*, 148 N. Y. 27, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; *Railway Co. v. Kent*, 87 Hun, 329, 34 N. Y.

Supp. 427, approved in *Stoddard v. Lum*, 159 N. Y. 274, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541.

The plaintiff was not appointed receiver in the Rogers Case under the authority of any statute. His appointment was only a method adopted by the court under its general powers as a court of equity, upon the theory that it was necessary in order to enable it to grant the relief to which the parties to that suit seemed to it to be entitled. Whatever authority was given to the plaintiff was given to him as a mere agent of the Minnesota court. See *Hanson v. Davison* (Minn.) 76 N. W. 254. It would seem, therefore, under the decisions of the federal courts, that this plaintiff could not maintain an action at law in a foreign jurisdiction.

The judgment of the circuit court is reversed.

FRANKLIN v. BROWNING.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,682.

1. NOTES—INDORSEMENT—EFFECT.

A note indorsed "Pay to the order of B., demand and notice waived," is an undertaking on the part of the indorser that he will pay the note to the holder at maturity if not paid by the maker.

2. PLEADING—PHRASES—UNDERSTANDING AND AGREEMENT.

The phrase "understanding and agreement" in a pleading imports an oral agreement.

3. NOTES—INDORSEMENT—PAROL EVIDENCE.

Parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, or add to, or subtract from, the absolute terms of the written contract.

4. SAME—RIGHTS OF HOLDER—SECURITY.

Though a note in terms gives a lien on cattle, there is no duty on an indorsee to follow the cattle; his right against the indorser being absolute.

5. SAME—CONSTRUCTION—LIEN.

A note read: "I promise to pay * * * for wintering cattle branded N. S. Cattle wintered by F. to stand good for payment of this note, and is to be paid from first shipment of cattle." Held that, no cattle being described, so as to be capable of identification, no authority being given to take possession of cattle, but there being merely an agreement to pay from a certain fund, no lien was conferred by the note.

In Error to the United States Court of Appeals in the Indian Territory.

In his complaint the plaintiff (defendant in error) alleged that the defendant (plaintiff in error) on April 27, 1895, being indebted to him in the sum of \$480, in satisfaction thereof transferred to him two promissory notes, the payment of which he "guarantied absolutely." One of said notes was as follows:

"\$380.

Vinita, I. T., April 1, 1895.

"Three months after date I promise to pay to the order of G. W. Franklin the sum of three hundred and eighty dollars, value received, for wintering

† 4. See Bills and Notes, vol. 7, Cent. Dig. § 691.

cattle branded N. S. Cattle wintered by G. W. Franklin to stand good for the payment of this note, and is to be paid out of the first shipment of said cattle, and is to bear 10 per cent. interest from due. N. Skinner."

The date and the purport of the other note was the same, except that it was for the sum of \$100, payable one day after date, and bore interest at the same rate from its date. Each note was indorsed as follows: "Pay to the order of P. G. Browning, demand and notice waived, G. W. Franklin;" and the last mentioned note was further indorsed: "Credited by cash on the within October 5, 1895, \$65." Nonpayment, excepting the \$65, was alleged, and judgment prayed for the amount due. Defendant answered, admitting his indebtedness to plaintiff April 27, 1895, and that in satisfaction thereof he then indorsed and transferred to him said two notes, but denied that he "guaranteed absolutely" the payment of the notes, "except as appears indorsed thereon," and denied any indebtedness to plaintiff; alleging that Skinner, the maker of the notes, was a resident of the Indian Territory, and solvent; that the notes were given "for wintering about two hundred head of N. S. cattle, of which said brand there were about two thousand head, worth about \$50,000; that said cattle were at that time in the Cherokee Nation, and said notes were intended to, and did, secure to the defendant a lien on all of said N. S. cattle for the payment of the debt therein expressed; that said notes were indorsed by defendant to plaintiff with the understanding and agreement that plaintiff would protect and enforce said lien, and collect the amount of said notes when due out of said cattle, and subject them to the payment of said debt; that when said notes became due and payable, said cattle had not been removed from the Cherokee Nation; but plaintiff, in utter disregard of the defendant's right, and in violation of his said agreement and of the defendant's urgent request to enforce said lien, wholly refused and neglected so to do, although the same was admitted by said Skinner to be just and due, but trifled with said security, and negligently permitted said Skinner to ship said cattle out of the country, and suffered said lien to be lost, and since which time said Skinner has become wholly insolvent." The plaintiff demurred to this answer, as not stating facts sufficient to constitute defense to the complaint, or to entitle defendant to any relief. The court sustained the demurrer, and the defendant refusing to plead further, judgment was rendered in favor of the plaintiff, which, upon appeal, was affirmed by the United States court of appeals for the Indian Territory.

John B. Turner, for plaintiff in error.

W. H. Kornegay, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

That the defendant indorsed each of the notes "Pay to the order of P. G. Browning, demand and notice waived, G. W. Franklin," is admitted by the answer. These indorsements are contracts in writing, made in the transfer of the notes for value. The obligation assumed by the indorser by such indorsement is as certain and free from doubt or ambiguity as if fully set forth in express words. 1 Dan. Neg. Inst. § 717. As the indorsement waives demand and notice, the agreement of the indorser is that he will pay the notes to the indorsee or holder if they are not paid by the maker at maturity. The defense pleaded seeks to change and make different this obligation of defendant under his written indorsement by alleging a contemporaneous "understanding and agreement," to the effect that the defendant should not be liable upon his indorsements unless plaintiff had diligently protected

an alleged lien upon cattle, and neglected no means of collecting the notes through such lien. The words "understanding and agreement" import an oral agreement, and it is not stated to have been in writing. But the contract of indorsement, like every other written contract, must be held to contain all the terms of the final agreement between the parties relative to the obligation of the indorser. "It is a firmly settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, or add to, or subtract from, the absolute terms of the written contract. 2 Pars. Bills & N. 501; Specht v. Howard, 16 Wall. 564, 21 L. Ed. 348;" Forsythe v. Kimball, 91 U. S. 291, 23 L. Ed. 352. Merely as holder of the notes so indorsed, no duty was cast upon the plaintiff to look after or follow the cattle, even if the terms of the notes gave a lien upon any cattle. No cattle were delivered to or put in the care or charge of plaintiff. After the notes became due and remained unpaid, the defendant was absolutely liable for their payment. He could not require the holder to pursue the maker or any security. His right was to pay the notes to the holder, and assume the control and collection of them himself. Ross v. Jones, 22 Wall. 576, 22 L. Ed. 730, and cases cited. But the language of the notes is ineffectual to give any lien upon any cattle. No cattle are described so as to be fairly capable of identification. The answer states that the cattle wintered by defendant were about 200, and that Skinner had about 2,000 of the same brand, and claims that the lien covered them all, and was not confined to those wintered by defendant, and which alone are mentioned in the note. It is needless to consider this claim. The note gives no authority to take possession of or sell any cattle. It appears to be an agreement that Skinner will regard those cattle as the property from the sale of which he will pay the notes, and will make such payment from the first shipment; which implies that he is to continue to have full dominion over the cattle, and unrestrained power to dispose of the same. It is a promise to pay the notes out of the proceeds of the sale of the cattle. This creates no lien. Cook v. Black, 54 Iowa, 693, 7 N. W. 121.

The judgment is affirmed.

THE JAMES A. LAWRENCE. THE COMANCHE. THE CAR FLOAT
NO. 1.

(Circuit Court of Appeals, Second Circuit. May 14, 1902.)

Nos. 93, 94.

1. COLLISION—STEAM VESSELS CROSSING—FAILURE TO MAINTAIN PROPER
LOOKOUT.

The claim of a tug that her failure to have a proper lookout at the time of a collision with a crossing steamer did not contribute to the collision, because she was the privileged vessel, and maintained her course and speed as required by the rules, is not sustained by evidence which shows that she did change her course before the collision, even though it was done in extremis.

Appeals from the District Court of the United States for the Southern District of New York.

These causes come here upon appeal from decrees of the district court, Southern district of New York, holding the steamship Comanche and the steam tug James A. Lawrence both responsible for a collision between Car Float No. 1, in tow of the Lawrence, and the steamer. 97 Fed. 351.

Henry W. Goodrich, for the Lawrence.

Henry G. Ward, for the Comanche.

Lawrence Kneeland, for Brooklyn Wharf Co.

Before LACOMBE and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The collision took place about 4 a. m. of December 30, 1897, under the following circumstances: The tug, with the car float on her port side, left the foot of Montague street, Brooklyn, bound to the Erie Railway docks at Jersey City. She came in collision with the Comanche, bound in from sea to her pier in the East river, just below the Brooklyn Bridge. The collision occurred 300 or 350 feet off the South Ferry slip. The tide was strong ebb, the night fairly clear, lights could be seen easily. The stern of the Comanche struck the car float about 15 feet aft of the forward port quarter. Both were damaged. "The evidence as to the time when the vessels were seen by each other, and as to their lights and signals, is," as the district judge says, "extremely confused and uncertain"; but two propositions are abundantly established by the proof. The Comanche was in fault, because, having the Lawrence on her starboard hand, she nevertheless attempted "to cross the bows of the tug and float, and go to the left, in violation of the rules and statutes." By not appealing, she concedes that she was in fault. The other proposition, abundantly proven, is that the Lawrence had no lookout. The car float projected nearly 100 feet in advance of the stern of the tug, and there were cars on it. These obstructed the view from the pilot house. The master was at the wheel of the tug; the mate was on top of the cars. In case of a light or whistle from the port side, he reported it to the master, and gave him orders what signals to sound, and how to navigate. There was no one else on lookout, and it is quite manifest that touching all vessels approaching on the port side the mate was navigator, and the master merely a wheelsman. Manifestly this was a fault, and the contention usually urged that it did not contribute, because, nevertheless, the approaching vessel was seen a long distance off, cannot be maintained, because the vessels were quite close together when they saw each other. The rules require that when vessels are crossing as these were, so as to involve risk of collision, the privileged vessel shall keep her course and speed. If, therefore, the tug did in fact keep her course and speed, her navigation would be free from fault, and it would make no difference whether her navigator was enlightened by a proper outlook or not.

The appellant contends that the absence of lookout cannot be held to have contributed to the accident, because knowledge of all the

facts which could have been obtained by a perfect lookout would not have altered the duty of the Lawrence in respect to her navigation. We are unable to accept this conclusion, because we are not satisfied from the evidence that the Lawrence did keep her course. Her master, acting as wheelsman, testified:

"Griffen [the mate] said: 'Captain, there is a steamer showing red light, and blowing us one whistle, a couple of points on our port bow.' He gave me orders to blow one long whistle, which I did, and continued my course and speed; if anything ported a little more, as much as I dared, towards the Battery. The change was a little more to port, so that she headed a little more on the New York shore."

Then he heard two short whistles from the Comanche, and Griffen reported that the steamer had altered her lights. Thereupon, "by direction of the mate, [he] gave one whistle, and slowed down." At the time of the second signal,—two whistles,—he had ported, and was heading more into the New York shore. Griffen, the mate, who was conducting the navigation from the top of the cars, testified:

"I reported to the captain 'a steamer on the port bow, showing a red light and masthead.' * * * I told him to port the wheel, and he ported it. Q. Had you changed your heading from the time of the first signal up to the time of collision? Yes, sir. * * * We put our wheel hard aport, and just at the instant of collision we were heading nearly for the Staten Island ferry."

It is suggested that this change was made in extremis. The district judge thought that the change was too great, and occupied too much time, to be so considered; but even if it were, that would not change the situation. If the fault found against the tug was changing her course when the rule told her to keep it, such error might be condoned, because she was in extremis. But the fault found, on undisputed evidence, is failure to have a proper lookout, and when the excuse offered therefor is that, despite the absence of lookout, she navigated in conformity to the rule, such excuse is not made out by showing that she failed so to navigate because she was in extremis. On the record we cannot say that she would have found herself in extremis if she had maintained a proper lookout, and therefore cannot excuse that fault.

The decrees are affirmed, with interest and costs.

WALKER et al. v. MOSER et al.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,677.

1. NEW TRIAL—DISCRETION OF COURT—REVIEW.

An order granting or refusing a motion for a new trial is in the discretion of the trial court, and not reviewable.

2. JUDGMENT—CONTROL BY COURT.

The jurisdiction of the court over a cause and the parties continues after the term at which judgment is rendered, if during the term a motion

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 477, 588; vol. 3, Cent. Dig. 3862, 3864.

respecting the judgment is entertained or allowed, and held open for further consideration.

8. NEW TRIAL—GRANTING MOTION—SUBSEQUENT TERM.

Where, at the term of court at which a judgment is rendered, an order granting leave to file a motion for a new trial is entered, and the matter is not disposed of at such term, the court has jurisdiction to decide the motion at a subsequent term.

4. SAME—UNFINISHED BUSINESS.

When no judgment is entered on a verdict during the term at which the verdict is rendered, the cause passes over to the next term for entry of judgment, disposition of a motion for a new trial, and any other action that might be taken in the case.

5. SAME—RECORDS OF COURT—PRESUMPTION.

An order granting a new trial, as entered of record in the circuit court, showed that it was made "at the November, 1900, term, and on the 12th day of April, 1901." It was contended that April 12, 1901, could not have been in the November term, because a term fixed by statute to be held at another place in the district on the third Monday in January would intervene. *Held*, that the contention was of no merit, since, if the business of the November term made such course desirable, it might have been continued to a date beyond the January term, and it would not be presumed that the court had committed unapparent error or falsified its records.

In Error to the Circuit Court of the United States for the District of Nebraska.

This action was brought to recover the damages alleged to have been sustained by Emma Walker, widow of Charles Walker, deceased, and by Irene Walker, their infant daughter, by the death of said Charles Walker, alleged to have been killed at Ashland, Neb., February 7, 1900, by being thrown from a buggy drawn by horses driven by himself; the misadventure being caused by his intoxication from liquor just previously given and furnished him by defendant John Moser in that defendant's saloon in said Ashland. The action was based upon chapter 50 of the Compiled Statutes of Nebraska, and the bond of said Moser given pursuant to section 6 of that chapter, on which bond the other defendants were sureties. Plaintiffs claimed damages in the sum of \$15,000. Defendants answered, admitting the execution of the bond, and that Moser was engaged in the retail liquor traffic at Ashland, and denying the other allegations of the complaint. Trial was had at the October, 1900, general term of the circuit court, and at its close, on October 26, 1900, the verdict of the jury was rendered in favor of the plaintiffs for the sum of \$2,250. Afterwards, on November 1, 1900, in the same term, an order was entered by the court in that cause granting leave to the defendants to file a motion for a new trial by November 15, 1900, and such motion in writing, asking for a new trial of said action for specified reasons, was filed on the same day. Afterwards, at the November, 1900, term of said court, and on the 17th day of December, 1900, before disposing of said motion for a new trial, judgment was entered upon said verdict, in favor of the plaintiffs and against the defendants, for the sum of \$2,250 damages and the costs of suit. Afterwards, in the same November, 1900, term of said court, on the 12th day of April, 1901, the court, upon hearing, entered an order setting aside and vacating said verdict and judgment, and granting a new trial of said cause. Afterwards, at the October, 1901, term of said court, on the 11th day of October, 1901, said cause was again tried, and a verdict rendered by the jury in favor of the plaintiffs for the sum of \$800, upon which judgment was then entered in favor of the plaintiffs and against the defendants for that sum and the costs of suit.

Lionel C. Burr, Charles L. Burr, and E. E. Spencer, for plaintiffs in error.

Jesse L. Root (Matthew Gering, on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

That an order granting or refusing a new trial rests in the discretion of the trial court, and is not reviewable, has been the uniform holding of the federal courts. It is needless to cite authorities, but many will be found in 1 *Desty*, Fed. Proc. (9th Ed.) 661.

The argument that the decision of the motion for new trial came too late, because made after the term had ended at which the verdict was rendered, is not sound. A cause, and the parties to it, are before the court until the end of the term at which the final judgment of the court is entered; and the jurisdiction of the court over the cause and the parties continues after such term, if during the term a motion respecting the judgment is entertained or allowed, and held open for further consideration. "It is a general rule of the law that all judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule, equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them." *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 997. "Whatever parties are bound to take notice of at one term they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance. In this case the motion to allow a reargument went over as unfinished business, and carried the parties with it. The proceeding was in all material respects like a motion for a new trial filed in time at one term and not disposed of until the next. Under such circumstances a judgment or decree, although entered in form, does not discharge the parties from their attendance in the cause. They must remain until all questions as to the finality of what has been done are settled. The motion when entertained prolongs the suit, and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding." *Goddard v. Ordway*, 101 U. S. 745, 751, 24 L. Ed. 237.

The November term is fixed by act of congress to begin on the second Monday of that month. In 1900 it began on November 12th. The order entered at the October term, permitting the motion for new trial to be filed by November 15th, and the fact that such motion was not disposed of at the October term, caused it to go over as unfinished business to the November term, carrying over the cause and the parties. Such would have been its effect had judgment been entered at the October term upon the verdict. But no judgment in the cause was entered at that term, and the cause necessarily, and irrespective of the pending motion for new trial, passed over to the November term for the entry of judgment, and any other action that might be taken in the case.

The order granting a new trial, as entered of record in this case, shows upon its face that it was made "at the November, A. D. 1900, term of said court, and on the 12th day of April, 1901." Counsel for plaintiffs in error argue that April 12, 1901, could not have been in the November, 1900, term because a term fixed by statute to be held at another place in the district on the third Monday in January would intervene. But, if the business of the November term made such course desirable, that term might have been continued to a date beyond the January term. This court will not presume that the circuit court has committed errors not made to appear, nor that it has falsified its records. The court having at the proper time allowed the motion for new trial to be filed, it would pass from term to term as unfinished business in the cause, until disposed of. It is unnecessary to consider the effect of plaintiffs' participation in the subsequent trials.

The judgment is affirmed.

ORMAN et al. v. SALVO.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,741.

1. PLEADING—DEFECTS—WAIVER.

Where defendants did not, by any pleading or otherwise, before the trial, raise any question of variance in respect to their own proper names, but in their answer adopted as their own the names by which they were designated in the complaint, it was too late upon the trial to first make that objection.

2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—SUBMISSION OF ISSUE.

A servant assisting in the making of an excavation was sleeping in a tent near the work, when a stone thrown by a blast fell through the tent, injuring him. In an action for the injuries, evidence was conflicting as to whether he had been warned of the blast. *Held*, that the question whether the warning of the blast was given plaintiff was fairly left to the jury, with instruction that if he had such warning, and failed to go to a place of safety, he was not entitled to recover.

3. SAME—FELLOW SERVANTS.

A servant assisting in the making of an excavation was sleeping in a tent near the work, when a piece of rock thrown by a blast fell through the tent, injuring him. In an action against the master, it appeared that plaintiff was boarded and lodged in the tent by the master, and that at the time of the accident the "shift" to which he belonged was not at work. *Held*, that the fellow-servant doctrine had no application, inasmuch as at the time of the accident plaintiff was not a fellow servant of any of the other servants.

4. SAME—DUTY OF MASTER.

It was the duty of the master to give plaintiff timely warning of the blast.

† 3. Who are fellow servants, see notes to *Railroad Co. v. Smith*, 8 C. C. A. 668; *Railway Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286.

See Master and Servant, vol. 34, Cent. Dig. § 383.

In Error to the Circuit Court of the United States for the District of Colorado.

In the month of July, 1900, the partnership firm of Orman & Crook, defendants below, were engaged in the construction of a railroad grade between Colorado Springs and Cripple Creek in Colorado, and employed in that work a large number of men, who, to keep the work in progress, were divided into day and night shifts; the night shifts working from 7 o'clock in the evening until 6 o'clock the next morning, and the day shifts the remainder of each day. Antonio Salvo, the plaintiff below, was, at and for some time prior to the injury complained of, a laborer in the employ of defendants, and boss of a night shift of such laborers, engaged in the excavation of a tunnel, near the opening of which other shifts of defendants' employes were excavating a cut; all such excavations being in rock, which had to be loosened by blasting. The defendants boarded and lodged the laborers working with plaintiff in tents, which they had provided and placed so near to this work of excavation that the tents were in danger from falling rocks whenever a large blast was exploded in the cut; and as the men slept in these tents during the hours when their shifts were not at work, it had been the custom for the men in charge of such blasting to cause the men sleeping in these tents to be awakened and warned of the danger, that they might seek places of safety before the explosion of such large blasts. On July 10, 1900, about 3 o'clock in the afternoon, and while the plaintiff and other men of his night shift were asleep in one of these tents, a blast in the work of excavating the cut, wherein about 35 pounds of giant powder and 8 kegs of black powder had been placed in a hole 18 or 20 feet deep, was exploded, and thereby pieces of rock were thrown upon and through the said tent, striking the plaintiff, and breaking an arm and a leg. There was contradictory testimony as to whether, before the explosion of such blast, warning had been given to the plaintiff or to the other laborers then occupying the same tent.

W. H. Bryant (C. S. Thomas and H. H. Lee, on the brief), for plaintiffs in error.

George P. Steele, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

As the defendants did not, by any pleading or otherwise, before the trial, raise any question of variance in respect to their own proper names, but in their answer adopted as their own the names by which they were designated in the complaint, it was too late upon the trial to first make that objection.

The question of whether warning of the coming blast was given to the plaintiff was fairly left to the jury, with instruction that if he had such warning, and failed to go to a place of safety, he was not entitled to recover.

The argument principally relied on by defendants' counsel—namely, that if the plaintiff was not warned of the coming danger, the failure to give such warning was the negligence of a fellow servant—cannot be maintained upon the pleadings and evidence in this case. To permit the application of the fellow-servant doctrine, the injured servant must at the time of the injury not only be serving the same master, but be engaged in the same employment with the negligent servant who caused the injury. Wood, Mast. & Serv. § 435. The

answer admits that defendants furnished the tent for boarding their employes, and for their lodging, and that it was the custom and rule of defendants to have one of their employes warn every one in the vicinity of a blast of the fact that it was about to be discharged, and that plaintiff was at the time of this blast in the tent, resting between his intervals of labor. The evidence shows without contradiction that plaintiff was boss of a night shift, and was not engaged in work, but resting and sleeping in the tent from 6 o'clock in the morning till 7 o'clock in the evening every day, and that the blast which caused his injury was discharged about 3 o'clock in the afternoon, during his time for rest and sleep. Plaintiff occupied the tent, not as a boarder or tenant, but as a servant of the defendants, and his board and lodging was received in part compensation for his services. Wood, Mast. & Serv. § 155. But while engaged at his meals or wrapped in slumber he was performing no services for the master, and being in the performance of no employment, but obtaining and enjoying compensation from the master, he was not during such time the fellow servant of any of the employes who were at work, about which he was in no way engaged or assisting. He was not in the condition of a servant who is being conveyed in a car to his work, but was as much separated from it as if he had been sleeping in his own home a mile away. The master, who had furnished him this lodging, located at a place made dangerous by the discharging of blasts in conducting the master's business, owed him the duty of giving him timely warning, to enable him to avoid the danger. The verdict determined the fact that this duty was not performed, and that plaintiff's injuries resulted from this failure. There were no errors in the rulings or charge of the court which are prejudicial to the defendants, and the judgment is affirmed.

HEINE SAFETY BOILER CO. v. FRANCIS BROS. & JELLETT.

(Circuit Court of Appeals, Third Circuit. June 30, 1902.)

No. 11.

1. CONTRACTS FOR BOILERS—CONSTRUCTION—"NOMINAL HORSE POWER."

In a contract for furnishing boilers for heating a building, it appearing that the words "nominal horse power" had no technical meaning in the trade, a requirement that each boiler should have a "capacity of 140 nominal horse power" must be construed as meaning its rated or professed horse power as distinguished from its capacity above or below its nominal horse power which it might actually develop when in use.

2. SAME—BREACH.

A contract for furnishing boilers for heating a building required that they should have a capacity of 140 nominal horse power, and that they should meet prescribed tests to determine their evaporating capacity under ordinary firing and their maximum capacity. *Held*, that each of such three requirements was an essential element of the contract, and that the boilers did not comply with the contract as to nominal horse power where the manufacturer admitted that they were rated at the shop, in accordance with its usual rules, as 130 horse power boilers.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See 105 Fed. 413, and 112 Fed. 900.

J. H. McNeal and Joseph J. De Kinder, for plaintiff in error.

Frank P. Prichard, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. By the written contract between the Heine Safety Boiler Company and Francis Bros. & Jellett, the former company agreed to furnish and erect for the latter company two boilers, each "having a capacity of one hundred and forty (140) nominal horse power," and each to be "capable of evaporating forty-two hundred (4,200) pounds of water, from and at 212 degrees Fahrenheit, per hour, with ordinary firing," and at a specified test to determine their maximum capacity, each boiler to show "an equivalent evaporation of not less than 5,200 pounds of water per hour from and at 212 degrees Fahrenheit." Thus, by the terms of the contract, the boilers in respect to capacity were to comply with three requisites, namely: They were to have—First, a nominal capacity of 140 horse power; second, a capacity of evaporating 4,200 pounds of water per hour and at 212 degrees Fahrenheit, with ordinary firing; third, a maximum capacity of evaporating 5,200 pounds of water per hour from and at 212 degrees Fahrenheit, at a prescribed test.

The parties who negotiated and concluded this contract, on the one side and the other, were experienced boiler makers and skilled engineers. Presumably, then, the descriptive words of the contract were intelligently and aptly chosen. It cannot be supposed that the provision that each boiler should have "a capacity of one hundred and forty nominal horse power" was meaningless or superfluous. The natural inference is that the stipulation as to a nominal capacity of 140 horse power, in the mutual understanding of the contracting parties, had a meaning different from either the stipulation relating to the designated capacity with ordinary firing or the stipulation as to maximum capacity under the prescribed test. Indeed, the uncontradicted evidence shows that an evaporation of 4,200 pounds of water per hour, from and at 212 degrees Fahrenheit, would produce only about 121 horse power, and that the evaporation of 5,200 pounds of water per hour, from and at 212 degrees Fahrenheit, would produce about 151 horse power. It is therefore demonstrable that the stipulated "capacity of one hundred and forty nominal horse power" meant something different from either of the other two designated capabilities. The boilers were to fulfill, not one or two of the prescribed conditions, but all three of them.

It appears that the words "nominal horse power" have no technical meaning in this trade. Therefore they are to be taken here in their ordinary sense. The descriptive phrase, "one hundred and forty nominal horse power," means, we think, the rated or professed capacity of the boilers as distinguished from the capacity above or be-

low their nominal horse power which they might actually develop when in use.

Under the evidence it was for the court to construe the contract, including the words respecting nominal horse power. The judge could not strike out those words nor ignore them as meaningless. The only thing to be done was to give them their ordinary signification, and it seems to us that the court rightly read the phrase, "having a capacity of one hundred and forty nominal horse power," as describing a boiler having such a rated or declared capacity.

Now, Mr. Meirer, the president of the Heine Safety Boiler Company, testified that every boiler that comes out of the company's shop is given a rating which is termed the "rated capacity of the boiler," and that this rating "is made up partly from the consideration of the amount of the heating surface and partly from our experience,—largely from our experience." And he also testified that the boilers in question, furnished and erected by the Heine Safety Boiler Company, were its "standard 130 horse power boilers"; that according to its "shop-rating" they were the company's "130 horse power boilers." Now, how can it be said that a boiler whose shop-rated and declared capacity was only 130 horse power fulfilled a stipulation calling for a boiler having a capacity of 140 nominal horse power? We are of opinion that upon the uncontradicted evidence the court below was right in holding that the Heine Company had failed to comply with the contract, in that the boilers it furnished and erected had a rated and professed or nominal capacity of 130 horse power only.

We find no error in this record, and accordingly the judgment of the circuit court is affirmed.

STEDMAN v. BANK OF MONROE.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,708.

1. BANKRUPTCY—UNLAWFUL PREFERENCE—EVIDENCE.

The bankruptcy act (section 67d) provides that liens given or accepted in good faith, and not in contemplation of or in fraud on the act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by the act. Prior to bankruptcy a bankrupt had given a mortgage for \$3,500 to secure \$3,000 loaned to him at the time of the mortgage, and \$500 borrowed by him more than four months before bankruptcy. It appeared from the evidence that the indebtedness of the bankrupt of which the bank had knowledge was small compared with what it understood to be the value of his assets, that it believed that \$2,800 of the indebtedness was to be paid from such loan, and it did not appear that he believed himself insolvent. *Held*, that as to the \$3,000 the mortgage was valid.

2. SAME.

The taking of the security where six-sevenths of the debt secured was a then present loan did not raise any presumption that the creditor had any belief that the debtor was insolvent.

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 255.

Appeal from the District Court of the United States for the Southern District of Iowa.

Bankruptcy proceedings against William T. Sinnard, a retail clothing merchant of Monroe, Jasper county, Iowa, were instituted by the filing of creditors' petition June 4, 1900. On June 29, 1900, after adjudication, the matter was referred to S. S. Ethridge, referee in bankruptcy, at Des Moines. On July 21, 1900, the Bank of Monroe filed with said referee its proof of secured debt, under oath, stating: "That W. T. Sinnard, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said Bank of Monroe in the sum of \$3,500, with interest at 6 per cent. per annum from April 2, 1900. That the consideration of said debt is as follows: Money loaned by said bank to said Sinnard at the following dates: \$500 about January 1, 1900, and \$3,000 April 2, 1900. That no part of said debt has been paid. That there are no set-offs or counterclaims to the same, and that the only securities held by the deponent for said debts are the following: A chattel mortgage upon his stock of merchandise then in Monroe, Jasper county, Iowa, dated April 2, 1900, and recorded April 3, 1900, in Book 228, page 134, record of said county, and the said mortgage is hereto attached. To evidence the above debt said bank holds two notes, the first a renewal of the loan made about January 1, for \$500; the second for \$3,000, given for money loaned to said Sinnard at the time the said note and mortgage were given. Said notes are hereto attached. Said Bank of Monroe hereby waives and surrenders its security upon said \$500 note, being the amount of the past indebtedness at the time the mortgage was executed, but insists upon and claims a first lien upon the stock of merchandise and its proceeds, for the security and payment of said note of \$3,000, dated April 2, 1900." Other creditors of said bankrupt, on July 23, 1900, filed with said referee objections to the allowance of this claim of the Bank of Monroe as a secured claim, alleging that at the time of the giving of said chattel mortgage Sinnard was indebted to said bank on another note for the sum of \$1,500, for which the bank held as collateral a note belonging to said Sinnard, which was secured by a real estate mortgage, which note and mortgage were converted by said bank into money, and the \$1,500 note thus extinguished; that at said times, and prior thereto, said Sinnard was insolvent; and that the bank had reasonable cause to believe that said chattel mortgage was intended to give said bank a preference over any other creditor. Said bank thereafter, on September 28, 1900, filed anew the proof of its secured claim, withdrawing its waiver of security as to the \$500 note. After hearing the testimony adduced, the referee, March 23, 1901, made his findings and decision as follows: "I find that on the 2d day of April, 1900, William T. Sinnard, the bankrupt herein, was a retail clothing merchant doing business at Monroe, Jasper county, Iowa. That on that date he gave to the Bank of Monroe a chattel mortgage on his entire stock of merchandise for the sum of \$3,500, to secure the payment of \$500 of pre-existing unsecured indebtedness and \$3,000 loaned to him by the bank at the time the mortgage was given. That he was at the time insolvent. That he had a stock of clothing and fixtures which cost about \$8,800. That a large portion of said stock was old, and that he had no other property. That he was at that time indebted in the sum of \$8,300, and was contingently liable as surety in the additional sum of \$1,750. That he told the bank he wanted the \$3,000 to pay his spring bills and secure the discount allowed by his mercantile creditors for early payments. That at the time he borrowed the \$3,000 he owed the bank, in addition to the \$500 before mentioned, \$1,500, evidenced by a note signed by Sinnard and his wife, Ulda Igo Sinnard, secured by a note for \$1,600, belonging to the wife and secured by a mortgage on real estate. That on the 19th day of April, A. D. 1900, Sinnard made an assignment under the state law to one F. S. Burberry, and on the same day delivered the stock of merchandise and fixtures to said assignee. That on or about the 4th day of May, 1900, said assignee sold the entire stock of merchandise and fixtures, upon competitive bids, to the highest bidder for the sum of \$5,150. That the petition in bankruptcy was filed June 4, 1900, by certain creditors of the bankrupt. I con-

clude that as to the \$500 of pre-existing indebtedness the mortgage was a preference, and therefore invalid. That as to the \$3,000 loaned at the time the mortgage was given the mortgage is valid. It is therefore ordered that the trustee pay out of the funds in his hands to the Bank of Monroe the sum of \$3,000, with interest at six per cent. per annum from April 2, 1900. That the claim of said bank for \$500 be allowed as an unsecured claim, to participate in the distribution of the funds applicable to the payment of such claims."

The matter was brought before the district judge by petition for review, and pursuant to his order the referee made further findings to the effect that when said chattel mortgage was given the bank had knowledge of indebtedness of Sinnard for merchandise, \$2,800; to the Bank of Monroe, unsecured, \$500; to the same bank, \$1,500, secured by collateral note belonging to Sinnard's wife; and to the State Savings Bank of Monroe an amount unknown, but which Sinnard said was small; that the Bank of Monroe knew that Sinnard had a stock of clothing that cost \$3,800, and loaned him the \$3,000 for the purpose of paying the \$2,800 owed for merchandise; and that the bank at the time the chattel mortgage was given did not know, nor have reasonable cause to believe, that Sinnard was insolvent, unless the proposal to give and the giving of that mortgage charged it with knowledge of his insolvency. Upon the hearing before the district judge the order of the referee sustaining the validity of the chattel mortgage and establishing it as a lien upon the fund in the hands of the trustee in the amount of \$3,000 was affirmed.

George Wambach, for appellant.

Carroll Wright, James P. Hewitt, and Craig T. Wright, for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The bankrupt act (section 67d) provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Aside from other provisions of the bankrupt act, this recorded chattel mortgage would have been a valid security for the prior as well as of the then present loan, according to its terms and purport. It was not illegal, and its continued security of the prior loan merely failed because the bankruptcy of the mortgagor intervened within four months of the giving of the mortgage, and the security, under the terms of the act, became as to the prior loan a preference. But no such result followed in respect to the \$3,000 actually loaned when the mortgage was given. As to that sum the security of the mortgage was valid under the terms of section 67d, unless it was given in contemplation of bankruptcy or in fraud of the act. A careful examination of all the testimony in the case has led us to the conclusion that on the 2d day of April, 1900, when the Bank of Monroe loaned Sinnard \$3,000 and took this chattel mortgage, it did not believe, and had no reasonable cause to believe, that Sinnard was insolvent, or that it was intended thereby to give a preference. The evidence shows that the indebtedness of Sinnard, of which the bank had any knowledge or information, was small compared with what the bank understood

to be the value of his assets, and that the bank then understood that \$2,800 of such indebtedness was to be paid from the loan then made to Sinnard. The mere fact of taking the security where six-sevenths of the debt secured was a then present loan does not raise any presumption that the creditor had any belief that the debtor was insolvent. It is even very doubtful whether the debtor, Sinnard, then believed himself to be insolvent, and it is reasonably certain that the mortgage was not made even on his part in contemplation of bankruptcy, as the fact that he did actually apply the money then borrowed from the bank to the discount and payment of his merchandise bills shows that he expected his business to continue.

The chattel mortgage was a valid security for the \$3,000 loaned when it was given, and the order and decree appealed from are affirmed.

DE LAMAR v. DE LAMAR MIN. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1902.)

No. 774.

1. PATENTS—ANTICIPATION—PROCESS FOR RECOVERING METALS FROM SOLUTIONS.

The Waldstein patent, No. 607,719, for a process for extracting precious metals from cyanide solutions by the use of zinc dust as a precipitating agent, and the agitation of the solution until the precipitation is complete, is void for lack of invention and anticipation; every step in the process having been disclosed in prior patents and publications. The additional feature of claims 2 and 3, in requiring the use of a "definite quantity" or the "exact quantity" of zinc dust sufficient to precipitate the contained metals, does not render the process patentable, since the proper proportion is not given, nor the means for ascertaining it; and, conceding that such fact does not render the claims fatally defective, the patentee not being the inventor of the use of zinc dust by means of agitation as a precipitating reagent, the public is free to use such quantity as may be required to best produce the desired result.

Appeal from the Circuit Court of the United States for the District of Idaho.

For opinion below, see 110 Fed. 538.

Dickson, Ellis & Ellis, for appellant.

John H. Miller, Richard Z. Johnson, and Richard H. Johnson, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was brought for the alleged infringement of certain letters patent, No. 607,719, and issued July 19, 1898, for an alleged invention, by one Waldstein, for "certain new and useful improvements in processes for the recovery of precious metals from their solutions." The relief sought was an injunction, an accounting, and damages. Among the defenses set up by the answer of the defendant were lack of novelty and invention, anticipation, no infringement, and a want of sufficient description of the alleged invention. The court below held the patent void, and the case is brought here by the plaintiff.

The invention claimed being only for improvements in well-known processes, and in no sense one of a pioneer character, the patentee must be held to a strict construction of his claims. *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; *Westinghouse v. Power-Brake Co.*, 170 U. S. 562, 18 Sup. Ct. 707, 42 L. Ed. 1136.

The specification and claims of the patent are as follows:

"My invention relates to the recovery of the precious metals from their solutions by the use of definite quantities of a finely divided precipitating reagent in a state of agitation. In this specification, wherever I use the term 'zinc' I mean to be understood as referring, not only to zinc from which all impurities have been removed, but also to commercial zinc, which ordinarily contains a small percentage of other metals, such as lead, bismuth, arsenic, cadmium, and antimony. Zinc and zinc alloys and amalgams in the form of shreds, threads, turnings, shavings, and granules have heretofore been used as precipitating reagents in processes for the recovery of precious metals from their ores where an aqueous solution of a cyanide has been used as a solvent for the contained minerals, but in all those various forms the zinc must necessarily be supplied in excess of the quantity actually required for the precipitation, inasmuch as, means not having been heretofore provided for keeping the divided zinc in a state of agitation, each fiber of the filtering-mass must contain a sufficiency of the metal to give to it such an amount of stability as will resist the compression of the flowing solution. Otherwise, the comminuted zinc packs closely, and either prevents the passage of the solution altogether, or separate channels are formed in the compressed mass, through which the solution flows without coming in contact with the intervening mass. In the manufacture of zinc products, there is evolved as a by-product a very fine powder known as 'zinc dust,' which has very little commercial value. It is therefore very cheap, and is in the most desirable form for precipitating purposes, as it can be supplied in exactly the quantity which the metals in the solution may require; thus doing away with the difficulty heretofore experienced of fouling the solution, which always occurs where an excess of zinc is provided, as has heretofore always been done. In the practical manipulation of ores the solution, after the metals have been precipitated from it, still contains a large amount of the original solvent, which can be utilized for the treatment of fresh ore. It is therefore important that the solution so reused should not contain any zinc. In the practical working of my process, the ores are first subjected to the action of an aqueous solution of the solvent. It is then drawn off into another receptacle, and a test is made to determine the exact quantity of zinc dust which that body of solution requires. The solution is then drawn off into a precipitating-tank, and the predetermined amount of zinc dust is added to the solution. In its finely divided state, the zinc dust would settle to the bottom of the precipitating-tank, and effectually resist the percolation of the solution. Therefore, I provide for the precipitating-tank a revolving shaft, to which are attached one or more paddles or agitators, which, being set in motion, disperse the zinc dust throughout the whole mass of the contained solution; the agitation being continued until all the minerals in the solution have been precipitated. The solution is then ready for regeneration, and subsequent reuse, without being fouled or tainted by the presence of unabsorbed zinc. The valuable precipitate is then passed through a filtering-press, and the precious metals recovered according to well-known processes. I do not claim pulverized or mechanically divided zinc. I only claim zinc dust. Zinc dust, or, as it is sometimes known in the markets, 'zinc fumes', is the material which is found in the prolongation of the condenser in the distillation of zinc for the manufacture of various zinc products, such material resulting from a cooling of a portion of the zinc while in a state of vapor. It is an admixture of metallic zinc and zinc oxid. Wherever I use the term 'zinc dust' in this application, I refer to zinc and zinc oxid produced in the manner above described, or by some equivalent process, and, therefore, what I do claim as my discovery, and desire to protect by letters patent,

is: (1) The process of extracting precious metals from cyanide solutions, which consists in treating said solutions with zinc dust, to wit, the herein-described material, composed of zinc and zinc oxid, in a state of agitation substantially as described. (2) In the process of extracting precious metals from cyanide solutions, the use, as a precipitating reagent, of a definite quantity of zinc dust in a state of agitation, the quantity of said zinc dust being supplied in only a sufficient quantity to thoroughly precipitate the contained metals, substantially as described. (3) The process for extracting and recovering precious metals from their ores, and which consists essentially of the following steps: First, subjecting the ore in a powdered state to the action of an aqueous solution of a cyanide; second, supplying to the solution charged with the precious metals that quantity of zinc dust determined to be exactly sufficient to precipitate said metals; third, agitating said solution and said zinc dust until said metals are precipitated, and said zinc dust is absorbed; fourth, recovering the precious metals from the valuable precipitate of the preceding step by filtration, or other process, substantially as described."

It is thus seen that what is first claimed by the appellant is zinc dust in a state of agitation; second, a definite quantity of zinc dust in a state of agitation, sufficient only in quantity to thoroughly precipitate the contained metals; and, by the third claim, the process for extracting and recovering precious metals from their ores, consisting of certain specified steps, the first and fourth of which are beyond all question old, and the second and third of which steps consist in supplying to the solution charged with the precious metals the exact quantity of zinc dust ascertained (without telling how) to be sufficient to precipitate the said metals, and agitating the solution and zinc dust until such metals are precipitated, and the dust absorbed. The record shows that in an affidavit filed in the patent office by Waldstein, November 30, 1897, in support of his application for a patent, it is stated that he made his discovery "on or about the 15th day of July, and not later than the 15th day of August, 1894." It is not pretended that he discovered zinc dust. And although we find in the specification the words, "I do not claim pulverized or mechanically divided zinc; I only claim zinc dust," the very next clause of the specification itself shows, what other portions of the record abundantly establish, that zinc dust, or zinc fumes, as it is also called, had long been a well-known article of commerce, being a product resulting from the cooling of zinc while in a state of vapor. Indeed, in the brief of counsel for the appellant is the express declaration: "We do not pretend that Waldstein invented or discovered zinc dust, nor do we claim that he invented the atomic weight theory, or that he invented agitation. This fallacy permeates the argument against the patent throughout." It may be added with equal truth that he did not invent the theretofore well-known cyanide solution, consisting of an aqueous solution of cyanide of potassium, with which pulverized ores are, and for many years before Waldstein's time had been, treated for the purpose of extracting the metals therefrom. The record shows that the use of zinc in various forms, for precipitating copper and the precious metals from cyanide solutions, was well known in the art long before Waldstein's alleged discovery. As early as April 21, 1866, the Scientific American, of New York, being asked how to recover gold from a plating solution which was spoiled by adding direct, a nitro-muriate solution of gold to the common cyanide solution, published the following answer:

"The bath is probably not injured. To recover the gold, put stick of bright zinc into the solution. Zinc will precipitate gold from any solution."

The Paraf-Javal patent, issued in France, July 31, 1866, No. 72,466, shows that zinc was not only then known and used in the art of precipitating metals, but that form of it known as zinc dust, and that, the finer the metal used as the precipitant, the better the result. In the description in that patent, which was for "improved chemical processes," it is said:

"To obtain the metals in a powdered form, they are precipitated from their solutions by other metals, such as zinc, iron in bars, ingots, sheets, or particles larger or smaller in size. I obtain the best results by making the precipitation with the metals in a powdered state. The finer the powder the better the result. If I wish to obtain tin in the form of a powder, I take the solution of a tin salt,—for example, protochloride of tin more or less concentrated; for example, 1:B,—and I dilute the same very slowly with zinc dust, iron dust, etc., stirring the same sufficiently. * * * There are a thousand methods of using zinc dust in dyeing with indigo. * * *

In the Paraf English patent of August 1, 1866, for "improvements in deoxidation and precipitation," it is said:

"I replace the usual reductors entirely or partially by zinc, using by preference this metal in the impalpable state,—one or two parts of zinc; two or four parts of quick lime; three to four parts of indigo have given me very good results,—the usual mode of working being employed. I also find that zinc in powder reduces metals in finer powder than in plates or grains, and I reserve to myself the use of metals in powder for the precipitation of metals."

An English patent, No. 10,223, and issued July 14, 1888, to MacArthur and Forrest, for "improvements in extracting gold and silver from ores or other compounds," sets out their method of treating a cyanide solution containing gold and silver by causing it to pass through a mass of metallic zinc in a state of fine division. In the patent issued by the United States to MacArthur and Forrest December 24, 1889, and numbered 418,137, for a "process for separating gold and silver from ore," in which the cyanide process is used as the separating agent, it is said:

"The cyanide solution containing the gold or silver is next made to pass through a sponge of zinc, whereby said metal is precipitated from the solution, and retained in the sponge. The zinc sponge is preferably composed of fine threads or filaments of zinc. These zinc threads are formed in shavings cut by a turning-tool from a series of zinc disks held in a lathe; or the sponge may be formed by passing molten zinc at a temperature just above the melting point through a fine sieve, and allowing it to fall into the water. The sponge thus formed presents a very large contact surface for the solution, and it does not become easily choked."

In an article published in the Engineering and Mining Journal, of New York, on the 6th day of August, 1892, it was said, in referring to the MacArthur-Forrest patents:

"It is possible that the special experience acquired by the company holding these patents may be of value to those introducing the process, but it appears certain that the use of both cyanide of potassium in solution for dissolving gold and silver, and of finely divided zinc for precipitating them from those solutions, were well known long before the MacArthur-Forrest patents were granted or applied for, and that the process can therefore be used without liability for payment of any patent right or royalty."

In an article entitled "Mixed Metals or Metallic Alloys," by Arthur H. Hiorns, the date of which publication does not appear from the record, but is said in one of the briefs to have been in 1890, reference is made to the fact that zinc displaces gold, silver, and other metals from their solution; and it is said that "in the form of fine dust it is obtained in large quantities, mixed with zinc oxide, and forms a valuable reducing agent." Not only was zinc dust here, and in some of the previous references, distinctly suggested as a precipitant of the precious metals from their solutions, but throughout the testimony on both sides of this case it is shown that in such precipitation the chemical action is purely a surface one, and, therefore, it required but the exercise of ordinary common sense to know that, the larger the surface of the precipitant, the quicker and more effective must be the precipitation. This fact is distinctly admitted by Waldstein himself, in his deposition, where he says:

"The object of the zinc being to reduce the gold from its solution to its metallic state by the action of zinc on the double salt of cyanide of potassium and cyanide of gold, it is very natural that, the larger surface of zinc that would come in contact with the solution containing the gold would be, the quicker action. Therefore, the first use of zinc in plates was changed into the use of shreds or small particles of zinc. This very fact that this was done led me to my discovery that, if I could put the full surface of zinc contained in zinc dust in the finest possible division, I would achieve the desired result more fully."

D. K. Tuttle, a witness called by the appellant, and at the time of giving his deposition a melter and refiner in the mint of the United States at Philadelphia, having stated that zinc turnings were usually employed in the precipitation of the precious metals from cyanide solutions, and being asked why the turnings were used instead of sheet zinc, answered:

"The reason, as I understand it, is the increase of surface,—an attempt, in other words, to approach, as near as they can, a greater state of division, as the action is purely a surface one. X. Q. 33. That is to say, the greater the exposed surface of the zinc, the greater the precipitation of the precious metal? A. The more rapid and complete the precipitation of the precious metal. X. Q. 34. This has been known to the art a great many years, hasn't it? A. It has. X. Q. 35. For how long to your knowledge? A. So far as I know, as far back as one metal has been used to precipitate another. The only improvements that I know to have been made were in the direction of getting a still finer state of division than was previously known."

This witness, being questioned in regard to his metallurgical experiences, further testified as follows:

"I have precipitated solutions with metal in a more or less massive state; I have precipitated it with the same metal in a very finely divided form. Common sense tells me that what is true in this case is true in another parallel case. X. Q. 28. I do not quite understand the latter part of your answer. What is true in the one case, that follows in the other? A. I will explain by illustrating. I have precipitated gold from its solution with sheets of copper, but in a very much less time, and much more effectively, by what is called 'cement copper,' being practically copper dust. If I had gold to precipitate with sheet zinc, I should treat it as a 'parallel case,' preferably, with zinc dust. X. Q. 29. You mean, I suppose, that, if the copper dust is more effective in the one case, zinc dust will be more effective in the other? A. The two reactions being so similar in character that I should certainly ex-

pect the zinc dust to be as superior to the zinc sheet as the copper dust was to the copper sheet."

Zinc dust, it is shown, is composed almost entirely of metallic zinc and zinc oxide. Whether the oxide causes the formation of an electric or voltaic couple in the solution, thereby facilitating precipitation, as contended on behalf of the appellant, or retards it, as claimed for the appellee, we regard as unimportant. The fact remains, as is very clearly shown by the foregoing references, and by others appearing in the record, that at the time of, and for many years prior to, Waldstein's alleged discovery, zinc dust was well known, not only as a precipitant of the precious metals from a cyanide solution, but that it was regarded, by some at least, as the best form in which zinc could be used for that purpose. Neither the article itself, nor its precipitating character, could, therefore, have been discovered by Waldstein in 1894. And the record shows that it was just as well known at that time that agitation of the solution during the application of the dust would expedite and facilitate the precipitation of the metals.

In Fresenius' Chemical Analysis, published in 1850, it is said:

"We may generally promote the separation of a precipitate by strongly agitating the menstruum, and also by elevating its temperature."

In Kustel's treatise on Roasting of Gold and Silver Ores, published in 1880, it is said:

"When the solution coming from the leaching vats rises to within eighteen or twenty inches from the rim of the vat, the flow is turned into the next vat, and the precipitation of the first one commences immediately. For this purpose, a bucket full of the sulphide of calcium is poured into the vat, and the silver precipitated. The solution is then stirred violently. * * * The precipitation is performed in a short time, requiring about fifteen minutes for each tank. The stirring must be executed with vigor."

And referring to the precipitation of gold in the chlorination process, the same author says:

"One bucket of this solution, or less, according to the richness of the ore, is poured into the precipitating tub, and the liquid stirred well."

In the Metallurgy of Silver, Gold, and Mercury, published in 1887 by Thomas Eggleston, he refers to the use of a paddle to stir the solution by hand, but says:

"Mechanical agitators should be used to make the mixture perfect; these can be arranged so as to be worked with but little expense."

In an article published in the Industrie-Blätter, at Berlin, Germany, August 23, 1890, we find the following:

"As excellent as the zinc sheets or the combined zinc iron sheets are for the separation of the silver from the silver containing cyanide of potassium solutions, yet it cannot be used for the separation of the gold from the used gold bath solution. In this case the gold precipitates very imperfectly, and then as a closely adhering glossy coating on the zinc. On the other hand, finally [finely] divided zinc,—the so-called 'zinc dust,'—is a preferable means by which to precipitate the gold quantitatively and in a powdered form from its cyanide of potassium solutions. If zinc dust is put into an old used cyanide of potassium gold bath, and from time to time shaken or stirred, then within two or three days all the gold is precipitated. The quantity of zinc necessary for the precipitation is regulated, of course, by the quantity of gold present. * * * Since the precipitation by an excess

of zinc dust proceeds more rapidly, it is well to use, in general, for every 100 liters of old gold bath, $\frac{1}{4}$, at most $\frac{1}{2}$, kilogram zinc dust."

In an article published in the *Berg-Und-Huettenmaenische Zeitung*, at Leipsic, Germany, October 17, 1890, it is said:

"For precipitating gold: Agitate the mixture with zinc dust, taking, for 100 liters of used gold bath, $\frac{1}{4}$ to $\frac{1}{2}$ kilograms of zinc dust; freeing the gold from the zinc by hydrochloric acid, from silver and copper by nitric acid."

In the chemical magazine called "*Chemiker-Zeitung*," published at Cothen, Germany, October 29, 1892, the publisher said:

"According to my experiments, every interested person is easily in a position to recover the gold from cyanide of potassium liquids with the aid of zinc dust. After repeatedly shaking, and eventually allowing the same to remain stationary for a time, the gold is entirely precipitated, so that it cannot be qualitatively detected any more in the mother solution. Zinc in compact form cannot be substituted for the zinc dust. For cyanide of potassium silver solutions, zinc sheets or zinc and iron sheets will answer the purpose."

An English patent, No. 5,152, was issued October 29, 1883, to Astley Paston Price, for "improvements in the extraction of the precious metals from their ores, and from metallurgical compounds or products containing the same," in which his claim was as follows:

"Effecting the precipitation and separation of the precious metals videlicet of gold or of silver, or of gold and silver, from solutions resulting from the treatment substantially as hereinbefore mentioned, or otherwise of ores or of metallurgical products such as, or similar to, those hereinbefore referred to, by the employment, when in a fine state of division, of zinc or of other metal or metals, other than copper, which are capable of precipitating either gold or silver, the same being brought into contact with the solution, and maintained in contact therewith, by means of agitation effected either as hereinbefore mentioned or otherwise."

Within a month thereafter, to wit, November 16, 1883, the United States issued to Price a patent for "improvements in obtaining copper from cupreous solutions," in which the specification states, among other things, that the invention consists "in effecting the precipitation of the copper from its solution or solutions by the employment of zinc when in a state of fine division, such, for example, as that which is known as 'zinc fume' or the 'condensed vapor of zinc.'" In his specification, Price there further said:

"In carrying out my invention, I add, to the solution or solutions containing copper, zinc in a state of fine division, such as zinc fume, which is substantially metallic zinc in a state of fine division, and I cause the cupreous solution or solutions to be intimately mixed with the same either by the injection of steam or of air, or by mechanical agitation, in order that the copper existing in solution may be precipitated therefrom."

It is perfectly plain that the process here described, of using zinc dust or fume with mechanical agitation for the precipitation of copper, is the identical process stated in the first claim of the Waldstein patent for precipitating gold and silver. The latter was nothing more than the application of that old process to analogous matter, producing a result substantially similar in its nature, and was therefore entirely lacking in invention. *Ansonia Brass & Copper Co. v. Electrical Sup-*

ply Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; Manufacturing Co. v. Cary, 147 U. S. 623, 637, 13 Sup. Ct. 472, 37 L. Ed. 307.

It is contended on the part of the appellant that the quantity of such dust to be so used is covered by claims 2 and 3 of the Waldstein patent. Claim 2, as has been seen, is for a definite quantity of zinc dust in a state of agitation, sufficient only in quantity to thoroughly precipitate the contained metals, and claim 3 is for the exact quantity of zinc dust ascertained to be sufficient to precipitate the said metals, agitating the solution and zinc dust until such metals are precipitated and the dust absorbed. Ascertained how? No proportions are given, and, indeed, not a word is said in the patent from which any one desiring to use the process described therein can determine the "definite quantity" referred to in the second, or the "exact quantity" referred to in the third, claim of the patent in question. In the absence of specific information upon the subject, the desired quantity can, in the nature of things, only be determined by experiment.

Section 4888 of the Revised Statutes provides:

"Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the commissioner of patents, and shall file in the patent office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses."

"The object of this," said the supreme court in the case of *In re Incandescent Lamp Patent*, 159 U. S. 465, 474, 16 Sup. Ct. 75, 78, 40 L. Ed. 221, "is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid. *Grant v. Raymond*, 6 Pet. 218, 247, 8 L. Ed. 376. If the description be so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent is void. It was said by Mr. Chief Justice Taney in *Wood v. Underhill*, 5 How. 1, 5, 12 L. Ed. 23, with respect to a patented compound, for the purpose of making brick or tile, which did not give the relative proportions of the different ingredients: 'But when the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident, on the face of the specification, that no one could use the invention without first ascertaining, by experiment, the exact proportion of the different ingredients required to produce the result intended to be obtained. * * * And if, from the nature and character of the ingredients to be used, they are not susceptible of such exact description, the inventor is not entitled to a patent.' So in *Tyler v. Boston*, 7 Wall. 327, 330, 19 L. Ed. 93, wherein the plaintiff professed to have discovered a combination of fusel oil with the mineral and earthy oils, constituting a burning fluid, the patentee stated that the exact quantity of fusel oil which is necessary to produce the most desirable compound must be determined by experiment. And the court observed: 'Where a patent is claimed for such a discovery, it should state the component parts of the new manufacture claimed with clearness

and precision, and not leave a person attempting to use the discovery to find it out "by experiment."'"

See, also, *Mitchell v. Tilghman*, 19 Wall. 287, 394, 22 L. Ed. 125; *Béné v. Jeantet*, 129 U. S. 683, 9 Sup. Ct. 428, 32 L. Ed. 803; *Howard v. Stove Works*, 150 U. S. 164, 167, 14 Sup. Ct. 68, 37 L. Ed. 1039; *Schneider v. Lovell* (C. C.) 10 Fed. 666; *Welling v. Crane* (C. C.) 14 Fed. 571; *Lockwood v. Faber* (C. C.) 27 Fed. 63; *Chemical Rubber Co. v. Raymond Rubber Co.*, 18 C. C. A. 31, 71 Fed. 179.

We are unable to see any invention in anything disclosed by the Waldstein patent, and must therefore affirm the judgment of the court below. The real inventor is undoubtedly to be encouraged, and the courts should always be careful to protect his rights; but it was never the intention of the patent law to give a monopoly to a mere follower of the knowledge and ingenuity of others. The judgment is affirmed.

GILBERT, Circuit Judge, with whom concurred MORROW, Circuit Judge. While concurring with the conclusion that the decree of the circuit court should be affirmed, and agreeing with that part of the opinion which holds that claim 1 of the patent of appellant is for an old process applied to a new use, we are unable to assent to the conclusion that claims 2 and 3 are fatally defective for the reason that no proportions are given, and nothing is said in the patent from which one desiring to use the process can determine the "definite quantity," or the "exact quantity," referred to in those claims. We are not prepared to say that, in a patent for a process such as described in the appellant's claims, the inventor might not be protected in the use of his process if, from the very nature thereof, it would be impossible to state in his claims the precise quantity of material necessary to accomplish the desired result. From the nature of the appellant's process, and the varying conditions under which it must necessarily be applied in practical mining, it is apparent that the appellant, if he were the inventor of a new and useful method of applying zinc dust to a precipitation of precious metals from cyanide solution, could publish no definite formula for his process. The best that he could say would be that his process required the use of such a quantity as, from experiment or analysis of varying ores, would be found in each case to be the requisite amount for complete precipitation. We think, as did the court below, that, to one skilled in the art to which the patent refers, the information afforded by the claims would be sufficient. But we think that the nature of claims 2 and 3 is such as to be incapable of protection by patent. The appellant was not the inventor of the use of zinc dust, by means of agitation, for the purpose described in his claims. That use being already known in the art, his patent is left to rest upon his claim of the use of a definite quantity. This claim, we think, cannot be made the subject of patent. Conceding that the appellee and others had the right to use zinc dust, and to use it by means of agitation, it must follow that they would have the right to use such quantity as would best accomplish the result desired. The appellant cannot take from them that right, or the right to experiment, and adjust the quantity of material, by asserting that he is the first discoverer of the use of a definite quantity, or the exact quantity,

which will precipitate all the mineral in the solution. If all the claims of his patent are good, it follows that others can only avoid infringement by using zinc dust in an unskillful way, by either using too much or too little. The right to use the dust being free to all, we think it follows, necessarily, that all have the right to adjust the quantity of the material to the necessities of each case, and to ascertain by experiment or analysis, if need be, the quantity that may be required to produce the desired end, and that such a use cannot be made the subject of monopoly, there being involved in it no discovery, but only the exercise of ordinary prudence and skill.

THOMSON-HOUSTON ELECTRIC CO. v. LORAIN STEEL CO.

(Circuit Court of Appeals, Second Circuit. May 29, 1902.)

No. 126.

1. PATENTS—VALIDITY—PRIOR PUBLIC USE.

The use of an invention by a subsequent patentee, with the knowledge of the public, more than two years before the filing of his application, renders the patent void for prior public use, unless it is shown by proof that is full, unequivocal, and convincing that such use was experimental for the purpose of perfecting the device; the fact alone that the use was by the inventor himself and without profit does not prevent it from being a bar to a patent.

2. SAME.

The patentee of a commutator brush for use on electric motors, more than two years prior to his application for a patent, used a brush having the essential features of that described in the patent on a motor used to propel a car or carrier with which he was experimenting, and which was run at intervals during several months along a cable stretched over a vacant lot adjoining his factory in a city, and was exhibited to visitors. *Held*, that the fact that the use of the car was experimental did not impart such character to the use of the brush, which was a separate, completed, and successfully operating invention, and that such use was a practical public use, which rendered the patent invalid.

3. SAME—INVENTION—CONTEMPORANEOUS IMPROVEMENT OF DEVICE.

Where a number of workers in the same field, when confronted by an obstacle to the development of a device, naturally, and practically contemporaneously, independently substitute one well-known material for another, and, finding that it successfully overcomes such obstacle, use it publicly and privately without any claim of exclusive right, the presumption is raised that they rightly regard the substitution as a mere improvement or a mere choice of materials, such as would be made by a skilled workman, which does not involve invention.

4. SAME—PRIOR USE—COMMUTATOR BRUSHES.

The Van Depoele patent, No. 390,921, for an improvement in commutator brushes or contacts, the essential feature of which is the use of carbon as the material for such brushes, is void for prior public use, if there was in fact patentable invention involved in the substitution of carbon for the copper brushes previously used.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 110 Fed. 654.

This cause comes here upon an appeal of the complainant in the court below from a decree of the United States circuit court for the Southern dis-

trict of New York, dismissing the bill alleging infringement of the first claim of patent No. 390,921, issued to Charles J. Van Depoele, October 9, 1888, for a carbon contact or commutator brush. The following citations from the patent in suit, and discussion of certain defenses contained in the opinion of the court below, sufficiently and accurately explain the character of the alleged invention:

"The specification states that the 'invention relates to improvements in commutator brushes or contacts for use with dynamo-electric generators and electric-dynamic motors. In the operation of electric motors it is desirable for various reasons to use a thick brush or contact held by suitable mechanism in position tangential to the surface of the commutator; that is, projected endwise against it. [Concededly the word "tangential" is a misuse for "radially," which the context shows was intended.] In these positions the brush may be moved around the commutator to any desired position without in the least affecting their mechanical relation thereto, and it has been usual to use thick bunches of thin copper laminae secured together at their outer ends for this purpose; but I find in practice that the leaves of brushes so constructed will get into the interstices or separations between the sections of the commutator, by the rotation of which the leaves of which the brush is composed will be gradually bent outward and away from each other, and so in a short time rendered useless. This difficulty I have overcome by substituting for the copper contact brushes, heretofore used, brushes or contacts of carbon or other nonhomogenous substance, being porous, will in a short time take up a quantity of copper dust, and form a smooth wearing surface that is extremely durable.' After a reference to the drawings the specification proceeds: 'My improved brushes consist of plates or pieces of carbon shaped to fit loosely within the boxes or holders where they are placed, and then securely held in position against the commutator by the tension of suitable springs, to be referred to. The carbon brushes or contacts, A, may be of any desirable length, or shape according to circumstances, the particular shape and size or proportion herein shown being merely for the sake of illustration. The lower ends of the brushes should be formed or molded to fit the surface of the commutator, the subsequent wear being sufficient to retain the shape originally given.' After setting forth the details of the boxes, or holders with their springs, etc., the specification concludes: 'In order to reduce the resistance of the carbon brush to the minimum, the boxes, CC', are brought down very close to the surface of the commutator, and should the small resistance then remaining be a disadvantage the brushes themselves can be plated with a good conductor, and all objection thus removed. I do not limit myself to the use of carbon alone, as any nonhomogenous or porous hard conducting substance will answer the purpose and come within the scope of my invention.'

"The first claim alleged to be infringed is: '(1) The combination, with a commutator cylinder formed of separated insulated segments, of commutator brushes bearing upon the surface thereof and formed of carbon or other similar unyielding material, and of a width greater than the distances between the commutator segments, substantially as described.' Four other claims, not alleged to be infringed, deal with details of holders, springs, etc. The only one in controversy here is the first or broad claim for the use of 'carbon' as a commutator brush.

"In view of the conclusion which has been reached, it will be necessary merely to allude briefly to some of the arguments which have been advanced on behalf of the defendant. It is contended that the patent should be construed as calling for some peculiar kind of carbon, which will hold copper dust as felt does rouge. This seems to be a very strained construction. Van Depoele, anxious to cover all possible equivalents, announced his invention as covering other unyielding material,—'any nonhomogenous or porous hard conducting substance,'—but apparently he didn't know any of them, other than carbon, nor, so far as the record shows, has any since been found. He found that the hard, brittle carbon of the art would, in operation, 'form a smooth wearing face that is extremely durable.' He had the idea that in some way or other this effect was obtained by copper dust worn off the commutator and taken up by the pores of the carbon. It makes no differ-

ence whether this idea of Van Depoele was correct or not; he has not made it a part of his invention. 'Carbon' is a broad word. It may be used to include a diamond or soot, but, according to all the canons of patent construction, it must be taken here as meaning the carbon known at the time to electricians under that name,—the ordinary carbon of the art, such as was employed for the pencils of arc lamps, for battery plates, for rheostats or artificial resistances, and other similar electrical purposes. It was made up of some variety of coke either from petroleum or bituminous coal, the structure of the material being agglomerate; that is, it is practically numerous particles cemented together, leaving pores between the particles, but not large openings. The improvement of the patent may be obtained by the use of just such carbon pencils or blocks, and, inasmuch as the inventor does not indicate that the functions discharged by the new brush are to be secured by the use of some peculiar variety of carbon not then used in the electrical art, there is no ground for thus confining his patent."

The court reached the conclusion that the patentee made an open and public use, not experimental, of carbon brushes on a motor in what was known as the "telpher" system, for more than two years prior to his application for the patent, and on this ground dismissed the bill.

Thos. B. Kerr and Fredk. P. Fish, for appellant.

Richard Eyre and John R. Bennett, for appellee.

Before WALLACE and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge (after stating the facts). Counsel for complainant has critically analyzed the testimony, and contends that the conclusion of the circuit court is erroneous and contrary to the weight of evidence. This contention has been carefully considered. As the court says of some of the testimony: "It is somewhat unsatisfactory, being individual recollections of long-past dates unchecked by any record evidence." But this is the necessary or natural result of a failure on the part of the complainant to assert its rights under this patent until some 10 years after the occurrence of the events now relied upon to establish validity.

Crot, on whom complainants rely to support the claimed 1885 date of the outside telpher use, contradicts himself as to the date of his employment, at this critical period, to the extent of six months, and asserts in one suit that he had never used carbon brushes before July, 1885, and in the other suit that he had used them between March and May, 1884. On the other hand, five of defendant's witnesses, and two of complainant's witnesses called by defendant, fix the date of installation of the telpher plant in 1883 or 1884. It is clear, upon an examination of the whole evidence, that the date of installation was, as found by the court below, prior to February 5, 1885.

A complicated question is raised by the evidence as to the character of the outside use. Van Depoele conceived the idea that by means of a car suspended on an overhead cable ore might be carried from one mountain top to another, and for the purpose of testing the practicability of this idea he caused such a line to be constructed from the factory of the Van Depoele Company across a lot, and equipped it with ordinary copper brushes, and with a device for reversing the direction of the motor so that the car might make the trip from one street to another and return to the starting point. When it was

first started the reversing apparatus bent the brushes so that they would not work. The next day Van Depoele substituted two ordinary electric light carbons, and thereafter the car was run for four or five weeks, whenever Van Depoele wished to show it to customers or to experiment with it. The system remained there from six months to a year and a half. Van Depoele did not part with his control over the system or receive any pay for running it. The court below found as follows:

"There is no dispute on the proof as to what its use was. As a system for overhead electrical transportation, it was experimental, but as a use of carbon brushes in combination with a segmental commutator on an electric motor it was a substantial public use."

Counsel for complainant contends that no public use can be a bar to a patent unless there is an element of profit involved or unless the inventor allows the invention to go out of his control. The object of evidence on these points is to distinguish between a use by the public, as in *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000, for the purpose of experiment, and a use by any part of the public, as in *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755, which is not experimental. The ultimate question is not whether the public used the invention, but whether the use was directed to a development of the invention or test of its practicability. For the purpose of proving the ultimate fact, evidence as to whether the inventor derived a profit from the use or retained control may be important, but it is not necessarily conclusive. But, where a use known to the public is shown, the proof on the part of a patentee who contends that it is not a bar, "because it was for the purpose of perfecting an incomplete invention by tests and experiments, * * * should be full, unequivocal, and convincing." *Manufacturing Co. v. Sprague*, 123 U. S. 249, 264, 8 Sup. Ct. 122, 31 L. Ed. 141.

The telpherage system as a whole was put up as an experiment, not for practical utility or commercial purposes. But there is no evidence whatever that the use of the carbon brushes was experimental. As already stated, Van Depoele caused the carbons to be put in as soon as he found that the copper brushes failed to work satisfactorily. It does not appear that there was any question as to their operativeness or that they were ever examined or tested.

If there were otherwise any doubt as to whether this was a non-experimental use, it would be resolved in favor of defendant by the testimony of complainant's witnesses. Van Hoogstrate, one of Van Depoele's employes, testifies that Van Depoele understood the adaptability of carbon brushes for electrical motors where a reversal was desirable in 1883, and describes an experimental use at that time. Jannus, Van Depoele's patent solicitor, testifies that in 1883 Van Depoele told him he had ascertained by trial that pieces of carbon would answer very well in such cases, and that Van Depoele then understood that mechanical and electrical questions were involved in the success of such brushes. Long prior to this date Van Depoele had successfully used carbon brushes for various purposes. There was therefore no reason for further experiment.

Furthermore, the testimony as to the inside or shop telpher use

in 1884 is practically uncontradicted. The telpher was a small working model substantially like the outside telpher. It was constructed and operated in 1884, and was publicly exhibited to prospective customers and to large delegations of people. Two witnesses testify that it was equipped with carbon brushes. One witness testifies, "I should think they were copper." Although this successful public use occurred in the Van Depoele factory, no witnesses were produced by complainant to show that the brushes were not of carbon or that their use was experimental. Inasmuch as the burden of proof on the latter point was on complainant, and in view of the confessed use of carbon brushes on the outside telpher, this use in the shop must also be considered as proved to be a public one.

This test of the practicability of the proposed ore-carrier system between mountain tops cannot impart the experimental character of its use to a distinct, completed, successfully operating invention, which is a part of said system. *Manufacturing Co. v. Sprague*, supra.

The other evidence in the case also strongly supports the conclusion of the circuit court. Van Depoele successfully used carbon brushes as early as 1881, and he then said he had used them before. Thereafter he applied for various other patents involving similar devices, but he did not refer to the carbon brush or attempt to patent it till 1887. Meanwhile it had been practically used by him and others in public and private without any claim on the part of any one except Forbes, the English patentee, that such use involved invention. The patent finally issued in 1888, but although carbon brushes were openly and exclusively used by rival manufacturers no right was asserted by Van Depoele during his life nor thereafter by this complainant until 1895, and even then suit was brought both on the Van Depoele and Forbes patents, and it was alleged that Forbes was the original inventor of the devices patented by him, and which cover all that Van Depoele is now claimed to have invented. It was not until this suit was brought, in 1899, that the priority of Van Depoele over Forbes was asserted. As a part of the evidence in support of that assertion the telpher use was shown. As complainant's expert, quoted in the opinion of the court below, says: "It was a practical use of the invention, since the motor was used occasionally to propel the car in connection with the experiments on the cable system, which the apparatus was intended to embody."

In this connection the adverse public uses are material, irrespective of whether such uses occurred more than two years prior to the date of Van Depoele's application. The evidence shows that long prior to his application other workers in this field and in various localities had publicly and successfully used carbon brushes for various purposes, but without claiming any patentable novelty in such use. Randall, in his patent of 1880, had described the use of carbon contacts as interchangeable with metal contacts.

Where, of a number of independent inventors working in the same field, one takes the last step which accomplishes the result sought, a strong presumption of invention is raised in his favor. But where a number of workers in a single field, when confronted by an obstacle

to the development of a device, naturally, and practically contemporaneously, independently substitute one well-known material for another, and, finding that it successfully overcomes such obstacle, use it publicly and privately without any claim of exclusive right, the presumption is raised that such workers rightly regarded the substitution as a mere improvement, a mere choice of material such as would be adopted or selected by the skilled workman, or a double use. Van Depoele's conduct shows that he too considered that he had not made any invention; that he found the tool ready to his hand, requiring no adaptation to fit it for the new use.

It is unnecessary to consider the confessedly great advantages derived from the use of the carbon brush as a result of the experiments in 1888 and thereafter, or the contention that these are due to the comparatively poor conductivity of carbon, which Van Depoele considered an objection and tried to obviate, or whether the doctrine that an inventor is entitled to all the beneficial uses of his invention should be extended to cover a new, original use discovered by others and unknown to him. These questions relate to occurrences long after the period when Van Depoele, familiar with the use of the carbon brush in place of the copper brush, had abandoned it to the public without reservation or claim. Thereafter the public, through him and other users and the Forbes patent, had acquired full knowledge of such use, and had practiced the same, and intervening rights had arisen.

The sole explanation offered by complainant of Van Depoele's long delay in asserting his rights is the usual one that he was experimenting and perfecting his invention; and this is not sustained by the evidence. The carbon brush worked as long as it was needed in 1881; that it would work when reversed Van Depoele had ascertained by trial prior to September, 1883. The evidence of investigations to meet the difficulty experienced with uninsulated segments is argumentative and inferential, and rests largely on the statement in the claim of the patent that the commutators should be "formed of separated insulated segments." But this statement was made in 1887, and the omission of all references to carbon brushes in his patents of 1884 and 1886 are quite as forcibly suggestive of his abandonment of them, especially when coupled with attempts to use the carbons, which had resulted in failure, and the public uses already shown.

That the disclosure of the invention was complete is shown by the statement that a carbon brush would obviate certain objections to the copper brush. Thus, speaking of said 1881 successful use, complainant's witness Verstraete says: "The brush-holder had a large opening that you could slip in a carbon used for electric purpose and rest on the commutator in the same position as the copper brush was before."

From a study of the whole case, the conclusion is irresistible that Van Depoele, during the period prior to February 5, 1885, used, but saw no reason to assert any exclusive right to the use of, carbon brushes in the combination afterwards claimed.

The decree is affirmed.

AMERICAN SALES BOOK CO. et al. v. BULLIVANT.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1902.)

No. 791.

1. PATENTS—ACTION FOR INFRINGEMENT—REVIEW ON WRIT OF ERROR.

An appellate court cannot assume, on a writ of error, where it does not appear from the record, that, in finding against the validity of a patent, the trial court failed to give full force to the presumption of patentable novelty arising from the granting of the patent.

2. SAME—NOVELTY—EVIDENCE OF COMPARATIVE UTILITY.

The question of the novelty of a patented device is one of fact, to be determined as such by the court, where a jury is waived; and, on the issue, evidence of comparative utility, as between such device and others claimed to be anticipations, may properly be considered, where there is doubt as to their practical identity.

3. SAME—EVIDENCE OF COMMERCIAL SUCCESS.

The mere fact that a patented article meets with increasing sales, and is popular, is wholly unimportant where it clearly appears that it was without patentable novelty.

4. APPEAL—REVIEW—FINDINGS OF FACT.

Where an action at law in a circuit court of the United States is, by stipulation, tried to the court without a jury, its findings of fact are not reviewable, on a writ of error, if there was any legal evidence upon which they could have been made.

5. PATENTS—NOVELTY—MANIFOLDING SALES BOOK AND HOLDER.

The Beck patent, No. 647,934, for a manifolding sales book and holder, claims 2 and 3, *held* void for lack of patentable novelty.

In Error to the Circuit Court of the United States for the District of Oregon.

The circuit court in this case found the following findings of fact:

"(1) That the plaintiff American Sales Book Company is a corporation duly organized, existing, and domiciled at Elmira, in the state of New York, and that Warren F. Beck is a citizen of the state of New York, also residing at Elmira, aforesaid, and that the defendant is a citizen of the state of Oregon.

"(2) That on the 24th day of April, 1900, letters patent of the United States were, upon the application of the plaintiff Warren F. Beck, as inventor, duly issued to said Beck, by the United States patent office, under number 647,934, for an improvement in manifolding sales book and holder; and in and by such letters patent there was granted, unto the said Warren F. Beck and his legal representatives, the exclusive right for the term of seventeen years, beginning said 24th day of April, 1900, being the date of said letters patent, to make, use, and sell, and permit others so to do, throughout the United States and territories thereof, manifold sales books embodying the features described in the specification forming a part of said letters patent, and therein claimed as follows: 'The combination, with a manifold-pad of a holder or cover therefor having a carbon or transfer-sheet secured thereto, said transfer-sheet being folded over upon the leaves of the pad at their free ends, and having a portion cut away to expose a portion of the leaves at or near their free ends, for the purpose set forth. The combination, with a manifold-pad, of a carbon or transfer-sheet normally resting upon the top of the pad, and overlying the leaves thereof, said transfer-sheet having a portion cut away to expose a portion of said leaves at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer-sheet.' And that plaintiffs' Exhibit A is a true copy of said letters patent, and plaintiffs' Exhibit B is a manifolding sales book embodying said patent improvement.

"(3) That the said Warren F. Beck is still the owner of said letters patent, and that, by an agreement duly entered into between himself and the plaintiff American Sales Book Company, the former gave the latter the exclusive right to make, use, and sell throughout the United States and its

territories manifold sales books, or pads, embodying the alleged invention described and claimed in said letters patent.

"(4) That the defendant is, and for a long time has been, carrying on a grocery business at Nos. 461-463 Jefferson St., in the city of Portland and district of Oregon.

"(5) That, subsequent to the granting of said letters patent, the defendant, without authority from or consent of the plaintiffs, or either thereof, or their legal representatives, procured from one W. H. Jarrett, doing business under the name of the Ideal Duplicate Order Book Company at Seattle, Washington, a number of sales books of the style of plaintiffs' Exhibit C; and that the defendant used said duplicate sales books in the ordinary course of his business, and continued to so use the same after he had been personally advised of the granting of said alleged letters patent to the said plaintiff Warren F. Beck, and the alleged rights of the plaintiff American Sales Book Company under said alleged letters patent.

"(6) That the manifold sales book procured and used by the defendant as aforesaid embodied the said features and improvements patented to the said Warren F. Beck by said letters patent.

"(7) That prior to the discovery, by said Warren F. Beck, of said alleged patented improvement in manifolding sales book, no manifolding sales books were made, used, or known embodying said particular and patented features or improvements, to wit, comprising a holder, or cover, and a pad on the top of which normally rested a carbon or transfer-sheet, said sheet overlying the free ends of the leaves of the pad, and covering the leaf under it; and said transfer-sheet having a portion cut away to expose a portion of said leaf under it near its free end, and facilitating the withdrawal of the same from under said transfer-sheet, as in said patent described and claimed, and as shown in plaintiffs' Exhibit B. But for many years prior to the application for the issuance of the said letters patent on said alleged invention of Beck, duplicate order books were in general use in the United States, having a carbon sheet, loose or secured in place, for transferring the memorandum of the order written on one sheet to a duplicate sheet, or sheets, arranged below, one illustration of which is defendant's Exhibit A. But in none of such manifolding books did the carbon sheet have a corner cut away, or a thumbhole for the purpose stated by said Beck in his specification of his said invention, forming a part of said letters patent.

"(8) That, prior to the said invention and letters patent, duplicate order books with carbon were also in common use in the United States, in which books certain sheets thereof on which the memorandum was to be written or copied had corners cut away, as shown in illustration on card of Charles E. Crosby & Company, being defendant's Exhibit B, and also as illustrated by defendant's Exhibit C.

"(9) That, for many years prior to said invention of Beck, books, ledgers, and the like have been in common use in the United States, which, for the purpose of facilitating the use of the index with which they were provided, had thumbholes enabling the opening of the book at a certain place.

"(10) That in accordance with said agreement between the plaintiffs, American Sales Book Company and Warren F. Beck, said American Sales Book Company has extensively practiced the said alleged patented invention, and manufactured, advertised, and introduced throughout the United States manifold sales books embodying said alleged patented improvement; and that in the Northwestern states, within the year ending about August, 1901, large quantities of manifold sales books embodying said alleged invention, to wit, about 500,000, have been sold to merchants and others in said Northwestern territory, and are now in use in said territory.

"(11) That the defendant relied on the stipulation as to facts herein, and also as illustrated by defendant's Exhibits A, B, and C, and also upon the use of thumbholes in indexes for books, as proving that the said invention lacks novelty, and is merely a mechanical change of said existing devices.

"(12) That the said alleged patented improvement offers no greater advantages or utility than the form of manifold sales books in use in the United States prior to said alleged patented invention, as shown by the evidence, defendant's exhibits, and stipulation herein.

"And, as a conclusion of law, the court finds: That the patent relied upon by the plaintiffs, being numbered 647,934, and issued to Warren F. Beck by the United States of America under seal of the patent office, and on the 24th day of April, 1900, is void for lack of novelty; that, being void, the defendant, Josephus Bullivant, Jr., by the acts committed has in no way damaged the plaintiffs herein, and that a judgment be entered in favor of the defendant for his costs and disbursements taxed at thirty dollars; and that plaintiffs take nothing by reason of this action."

T. J. Geisler, for plaintiffs in error.

Otto J. Kraemer, for defendant in error.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

HAWLEY, District Judge (after stating the facts as above). This action was brought by the plaintiffs in error to recover damages from defendant for the infringement of letters patent No. 647,934, dated April 24, 1900, issued to Warren F. Beck of Elmira, N. Y., for "certain new and useful improvements in manifold-pads and holders." The following specification is set forth in the letters patent:

"My invention relates to improvements in the pads used by merchants and others in taking manifold copies of orders, etc., and to the holders for such pads, the objects of my improvements being: First, to provide a simple and cheap form of holder wherein a pad and a carbon or transfer-sheet may be placed and replaced independent of one another; and, second, to provide means for manipulating the leaves of the pad without touching the transfer-sheet with the fingers. I accomplish these objects by the construction and arrangement of the parts, as illustrated in the accompanying drawings."

The claims of the patent which are alleged to be infringed read as follows:

"(2) The combination, with a manifold-pad, of a holder or cover therefor having a carbon or transfer-sheet secured thereto, said transfer-sheet being folded over upon the leaves of the pad at their free ends, and having a portion cut away to expose a portion of the leaves at or near their free ends for the purpose set forth.

"(3) The combination, with a manifold-pad, of a carbon or transfer-sheet normally resting upon the top of the pad and overlying the leaves thereof, said transfer-sheet having a portion cut away to expose a portion of said leaves at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer-sheet."

A stipulation was filed by the respective parties waiving a jury, and the case was tried before the court. They also stipulated that certain specified facts should be assumed as duly proven. Upon the evidence in the case and the stipulation as to certain facts, the court found the findings of fact and conclusions of law set forth in the foregoing statement.

The plaintiffs in error have made fourteen specific assignments of error upon which they rely for a reversal. It will not, however, be necessary to specifically notice these assignments; a general reference to the most essential points will be deemed sufficient.

It is argued by plaintiffs in error that the trial court failed to recognize the force of the rule of law that a patent for an invention is prima facie evidence of the existence of all the facts essential to its validity. In support of this argument, plaintiffs in error claim that

the result arrived at by the court below could not have been reached by any possibility had this rule of law been applied, and assert that the court below had a doubt, and, instead of resolving its doubt in favor of the patent, the court below resolved its doubt against the patent. It is unnecessary for the court to include in its findings of fact the principles of law applicable to patent cases, and there is nothing in the record which justifies the statement of the plaintiffs in error that the court had any doubt upon the points referred to, or, if it had any doubt, that it did not resolve it in favor of the patent. The result arrived at did not of itself show, or tend to show, that the court did not apply the force of the rule of law as to the presumptions in favor of the validity of the patent.

This court cannot assume that any facts appeared on the hearing in the court below which are not disclosed by the record. There is no force in counsel's argument on this point.

In *Palmer v. Village of Corning*, 156 U. S. 342, 15 Sup. Ct. 381, 39 L. Ed. 445, the court said:

"There is no doubt that in this, as in all similar cases, the letters patent are *prima facie* evidence that the device was patentable. Still, we are always required, with this presumption in mind, to examine the question of invention *vel non* upon its merits in each particular case."

In *Reckendorfer v. Faber*, 92 U. S. 347, 352, 23 L. Ed. 719, the court held that the decision of the commissioner of patents in the allowance and issue of a patent creates a *prima facie* right only; and, upon all the questions involved therein, the validity of the patent is subject to examination by the courts, and in the course of its opinion said:

"The defense of want of novelty is set up every day in the courts, and is determined by the court or the jury as a question of fact upon the evidence adduced, and not upon the certificate of the commissioner."

The books are full of cases where patents regularly issued by the patent office have been declared void. It is only in cases of doubt upon the point that the presumption arising from the issuance of the patent will have any controlling influence upon the mind of the court.

It is next claimed:

"That utility is suggestive of originality; that the fact that the Beck manifold sales book has gone into general use displacing other books is strong evidence that the patented improvement was a product of an inventive act."

The defendant in error does not controvert the question of the utility of the patent as a basis for a patent, but contends that the evidence as to the comparative utility claimed for it over defendant's Exhibit A was introduced, not for the purpose of proving utility as a basis of a patent, but as evidence of novelty, which was the real fact in issue. The question of novelty is a question of fact for the jury, or, when a jury is waived, is a question of fact to be decided by the court. In addition to the authorities heretofore referred to, see *Westlake v. Cartter*, 6 Fish. Pat. Cas. 519, Fed. Cas. No. 17,451; *Battin v. Taggart*, 17 How. 74, 85, 15 L. Ed. 37.

In 1 Rob. Pat. § 344, the author says:

"The utility of an invention is often properly considered by the courts in their investigation of two different topics with which, otherwise, it has

no connection: First, upon the question whether or not a given art or instrument was produced by the exercise of inventive, as distinguished from mechanical, skill, the actual utility of the invention may become important. * * * Second, upon the question of novelty, where doubt arises concerning the identity of two inventions, and whether the apparent diversities between them are formal or substantial, the superior utility of one may be sufficient to remove the doubt. * * * The relation of these two kinds of utility, the actual and the comparative, to these two questions of novelty and inventive skill, is often much confused through failure to regard the real distinctions which obtain between them. But they are utterly dissimilar in character and in effect, as well as in the principles upon which those relations are established; and their real value in affording a solution of these questions is lost whenever those distinctions are ignored."

It is, among other things, claimed that the court erred "in not giving judgment in favor of the plaintiffs in error on the facts found by the court." It is true that some of the findings mention certain facts tending to support the validity of the patent, but this does not show that the court erred in disposing of the case on the ground of lack of novelty in the patent. There are but few patents issued that do not possess some valuable and essential features of the patent law. This is frequently recognized in the decisions of the courts where it is held that the patent lacks invention or is void for want of novelty.

In *Richards v. Elevator Co.*, 159 U. S. 477, 487, 16 Sup. Ct. 53, 40 L. Ed. 225, the court said:

"The device is undoubtedly a convenient one, and appears to have proven profitable to the patentee; but we are unanimously of opinion that it lacks the necessary quality of invention."

The mere fact that a patented device or article meets with increasing sales and is popular is wholly unimportant when it clearly appears that the invention is without patentable novelty. *Duer v. Lock Co.*, 149 U. S. 216, 223, 13 Sup. Ct. 850, 37 L. Ed. 707; *Printing-Press Co. v. Scott* (C. C.) 103 Fed. 650, 657; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 45 C. C. A. 544, 106 Fed. 693, 707, and authorities there cited.

In *McClain v. Ortmyer*, 141 U. S. 419, 429, 12 Sup. Ct. 76, 35 L. Ed. 800, the court said:

"This court has held in a number of cases * * * that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility; it is not conclusive even of that,—much less of its patentable novelty."

In *Klein v. City of Seattle*, 23 C. C. A. 114, 77 Fed. 200, 204, this court said:

"The fact that a patented device has gone into general use, and has displaced other devices, is evidence of its value and usefulness, and is always of importance in considering the question whether the device or machine is patentable. * * * But the fact that the patented device has gone into general use, while evidence of its utility, is not conclusive evidence of its patentable novelty. * * * A patent must combine utility, novelty, and invention,—it may, in fact, embrace utility and novelty in a high degree,—and still be only the result of mechanical skill, as distinguished from invention."

The court below, in the twelfth finding, against which it is seriously argued there is not sufficient evidence to support it, found on the question of comparative utility, which is a pure question of fact, that Beck's

alleged invention was no better than the combination evidenced by defendant's Exhibit A. Evidence was offered upon this point which tended to sustain this and the other findings of fact, and the question arises whether this court can review such findings. Did the court below err in its conclusions upon the facts that the patent relied upon by plaintiffs "is void for want of novelty"? The plaintiffs in error have argued this case upon the theory that it is the duty of this court to review all the findings of fact found by the court below, and determine whether there is any sufficient evidence to support the findings or justify the conclusion reached by the circuit court. We do not understand such to be the law. The statutes of the United States provide that the trial of issues of fact in actions at common law in the circuit and district courts shall be by jury. Rev. St. §§ 566, 648, 649; 2 Fost. Fed. Prac. § 374; *King v. Smith*, 49 C. C. A. 46, 110 Fed. 95, 54 L. R. A. 708, and authorities there cited. In section 1007, *Rob. Pat.*, it is said that the rules of evidence in actions for infringement of patents "are in their general character identical with those by which the federal courts are guided in other suits at law." The supreme court of Oregon, in which state this case was tried, has held that a finding of fact by a trial court in an action at law will not be disturbed on appeal if there is any evidence to support it. *Bartel v. Mathias*, 19 Or. 483, 490, 24 Pac. 918; *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172. In the national courts it has frequently been held that, where the parties consent that the case be tried before a judge or referee, the only question presented by the writ of error is whether there is any error of law in the judgment upon the facts as found by the judge or referee. The court's findings upon questions of fact are not subject to review in the appellate court if there is any legal evidence upon which such findings could be made. *U. S. v. Dawson*, 101 U. S. 569, 25 L. Ed. 791; *Boogher v. Insurance Co.*, 103 U. S. 90, 95, 26 L. Ed. 310; *Miles v. U. S.*, 103 U. S. 304, 26 L. Ed. 481; *Paine v. Railroad Co.*, 118 U. S. 152, 158, 6 Sup. Ct. 1019, 30 L. Ed. 193; *Stanley v. Board*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Hathaway v. Bank*, 134 U. S. 494, 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; *Rogers v. U. S.*, 141 U. S. 548, 556, 12 Sup. Ct. 91, 35 L. Ed. 853, and authorities there cited; 7 *Enc. Pl. & Prac.* 847, 848. In *Myers v. Brown*, 42 C. C. A. 320, 102 Fed. 250, where it was urged by the plaintiff in error that the verdict of the jury was against the weight of the evidence, the court said: "The conclusive answer to this suggestion is that upon a writ of error the appellate court does not review controverted questions of fact." In *Stanley v. Board*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, the court said:

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it, to its findings of particular facts, and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different."

For the reasons herein stated, the judgment of the circuit court must be affirmed. It is so ordered.

In re LA BOURGOGNE.

(District Court, S. D. New York. March 22, 1902.)

1. SHIPPING—LIMITATION OF LIABILITY—"VOYAGE" DEFINED.

Where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, each trip between the two terminal ports constitutes a "voyage," within the meaning of the statute providing for limitation of liability of owners to their interest in the vessel "and her freight for the voyage" (Rev. St. § 4284); and the owner, in instituting proceedings thereunder for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre, is not required to deposit the freight earned on the preceding trip from Havre to New York.

2. SAME—CONSTRUCTION OF STATUTE.

The construction of the statute as applied to such case cannot be affected by the fact that in a contract for carrying mails, between the ship and the French government, a round trip was designated as a voyage.

3. SAME—PROCEEDING FOR LIMITATION OF LIABILITY—SURRENDER OF PENDING FREIGHT.

By the terms "freight pending" and "freight for the voyage," as used in Rev. St. §§ 4283, 4284, is meant the earnings of the voyage, dependent or contingent on its completion, whether for the carriage of passengers or merchandise; and where the vessel is lost before the voyage is completed, so that she earns neither passage money nor freight, the owner is not required to make any deposit on account thereof in a suit for limitation of liability, although both passage money and freight were paid in advance under contracts which provided that the money should be the property of the carrier whether the vessel were lost or not lost.

4. SAME—RIGHT TO LIMITATION—CARRYING INSUFFICIENT NUMBER OF BOATS.

The owner of a steamship is not debarred from maintaining proceedings for limitation of liability on account of claims arising from her loss at sea on the ground that she was at the time violating Rev. St. § 4488, requiring all steamers to be provided with such number of lifeboats, etc., as will best secure the safety of all persons on board in case of disaster, where, although she did not have sufficient boats to carry all persons on board, she had complied with all of the requirements of the board of inspectors, and received their certificate to that effect, and carried such number of boats as the inspectors determined would best secure the safety of all persons on board, because a greater number would interfere with her management, and create an additional danger.

5. STEAMSHIPS—COLLISION—EXCESSIVE SPEED IN FOG.

Evidence considered, and held to show that the steamship La Bourgogne was in fault for the collision with the British ship Cromartyshire, by which she was sunk off Sable Island in a fog, in failing to reduce her speed to a point of safety after she encountered the fog.

6. SHIPPING—LIMITATION OF LIABILITY—PRIVITY OF OWNERS.

A steamship company, which in good faith makes rules and regulations requiring the officers of all vessels to maintain only a moderate speed during foggy weather, and take all the precautions required by the international rules to prevent collisions, and exercises due diligence and care in the selection of competent officers, is not debarred from the right to a limitation of its liability for damages caused by a collision for which its vessel was in fault by reason of maintaining excessive speed in a fog, even though it had knowledge that such rules were habitually violated in that respect, where it appears to have done all that could practically be done to secure their enforcement.

¶ 1. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

7. ADMIRALTY—JURISDICTION—MARITIME TORTS CAUSING DEATH.

There can be no recovery of damages, under the general maritime law, for negligence resulting in death on the high seas.

In Admiralty. Petition for limitation of liability.

Edward K. Jones, for petitioner.

Benedict & Benedict, William H. Button, A. Gordon Murray, Harold Binney, Hastings & Gleason, Kenneson, Crain, Emley & Rubine, G. J. Wiederhold, Alexander & Colby, Morris Putnam Stevens, Frank L. Eckerson, Townsend & Mann, Judson G. Wells, George Sanders, E. W. Powers, William R. Page, Wilbur & Ludlow, Bullowa & Bullowa, and G. T. Goldthwaite, for claimants.

TOWNSEND, District Judge. On petition for limitation of liability. On July 2, 1898, the steamship *Bourgogne*, of the *Compagnie Generale Transatlantique*, cleared Sandy Hook at 12:45 p. m., bound for Havre, France, with 714 persons on board. At about 5 o'clock on the morning of July 4th she collided off Sable Island with the British ship *Cromartyshire*. A dense fog prevailed at the time, and the collision occurred almost immediately after the vessels sighted each other. The *Cromartyshire* first struck the *Bourgogne's* boat No. 1 with her jibboom, and then struck the *Bourgogne* on the starboard side a little forward amidships, crushing her plating, cutting a deep hole in her side, breaking in four of her compartments, and disabling other boats. La *Bourgogne* at once commenced to list so heavily as to seriously interfere with efforts to lower lifeboats, and, in spite of all efforts made, she sank in about half an hour. Forty-four passengers and 120 of the crew were saved. Various actions having been brought for loss of life and property, La *Compagnie Generale Transatlantique*, on May 15, 1900, filed its petition for limitation of liability, and made a transfer by order of court to a trustee. The claimants herein contest the right of the petitioner to such limitation on the following grounds:

"(1) The petitioner has not complied with the law and the rules of practice in its proceeding, in that it has never delivered to the trustee the freight pending for the voyage in question. The petitioner should be compelled to deliver such freight, with interest thereon from July 4, 1898, to the trustee, before any further proceeding is taken in the case. (2) The petitioner, by reason of its course of conduct in this proceeding, is not entitled to any favorable consideration from the court, and all presumptions should be drawn against it. (3) The steamer *Bourgogne* was in fault for the collision with the *Cromartyshire*, because she was not navigating at a moderate speed in the fog, as required by law. (4) The steamer *Bourgogne* was being navigated by the petitioner without having complied with section 4488 of the Revised Statutes of the United States, in that: (a) She did not have on board such a number of lifeboats and rafts as would best secure the safety of all persons on board.' (b) Her lifeboats were not fitted with boat-disengaging apparatus arranged as required by the above-mentioned section. (5) The said collision did not occur without the privity or knowledge of the petitioner, but the petitioner was itself in fault in the matter, in that: (a) It had not made sufficient regulations to insure that the captains of its steamers should run them at a moderate speed in fog, as required by law. (b) It had knowledge that divers of the captains of its ships ran the ships at an excessive speed in fog, notwithstanding the regulation which it had

¶ 7. See Admiralty, vol. 1, Cent. Dig. § 218.

made; and it took no measures to prevent their continuing so to do, and made no other regulation. (c) If it had no such knowledge, it was negligent, in that it failed to obtain such knowledge, while it had abundant means of obtaining it. (d) It failed to have the Bourgogne furnished and equipped as required by section 4488 of the Revised Statutes."

1. As to the first point,—that the petitioner has not delivered to the trustee the freight pending for the voyage. The statutory provisions bearing on this point are as follows:

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and (owner) (owners) of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

"Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

In admiralty rule 54 the freight to be surrendered in such proceedings is referred to as "freight for the voyage." The petition averred that the pending freight was "a total loss." Claimants contended that petitioner's interest therein amounted to about \$55,000, and applied to the court for an order for the payment thereof to the trustee, but said question appears to have been reserved for further consideration. Said \$55,000, claimed as freight, includes the money collected for carriage of cargo and passengers on the trip from New York to Havre and $\frac{1}{62}$ part of the compensation received from the French government for carrying mails for a year. Claimants insist that the terms "freight pending," in section 4283, and "freight for the voyage," in section 4284, are synonymous, and that the word "voyage" included the round trip from Havre to New York and return. They therefore contend that the petitioner should deliver to the trustee the sum which it received for freight and passage money on the preceding passage from Havre to New York, and on the passage on which the disaster occurred, on the ground that these passages constitute one voyage. In support of this contention claimants quote from the contract between the owners and the French government, and the law under which it was made, as follows:

"The service to be performed includes a weekly line from Havre to New York, or fifty-two voyages, going and returning. The distance to go is 31,300 miles per crossing, and 62,600 miles per voyage, going and returning. * * *

At the end of each annual period comprising the total of fifty-two voyages going and returning, there shall be prepared a summary of the results of each crossing."

They insist that "voyage" and "crossing" should not be given the same signification. It may be true that in litigation based upon the contract of carriage the petitioner would be bound by its interpretation of the term "voyage" in the contract. Thus, in actions on insurance policies containing limitations as to voyages undertaken, the question of the intention of master and owner as to the enterprise entered upon are material as to the voyage. *Paddock v. Insurance Co.*, 11 Pick. 227, 231; *Friend v. Insurance Co.*, 113 Mass. 326. But it is not clear how such interpretation is relevant in the determination of the extent of the limitation of liability under the act. This act was intended to provide a general rule whereby a shipowner might measure his responsibility for loss in certain cases. As the supreme court said in *The Main*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381: "The real object of the act in question was to limit the liability of vessel owners to their interest in the adventure." This liability alone he assumes when he becomes a part owner, and, in the absence of waiver on his part, it should not be extended to include other adventures merely because an agreement entered into between shippers and shipping agents provides that for the purposes of some particular engagement or employment a round trip or a certain number of trips shall be considered a voyage. "'Voyage' is a term of recognized meaning in common parlance, and has received a legal interpretation accordingly." *Valente v. Gibbs*, 28 Law J. C. P. 234. See 1 *Pars. Shipping & Adm.* pp. 307, 308; *In re Moncan*, 8 Sawy. 353, 14 Fed. 44. In proceedings to limit liability it has been repeatedly held that the freight to be surrendered is the freight pending for the particular trip or journey. Thus, in *The Alpena*, 8 Fed. 283, Judge Blodgett says:

"It seems to me that each voyage or trip, each separate journey, which the ship makes from one port to another, must be treated as a separate venture, involving its own particular hazards, losses, and earnings. * * * The owner, freighters, and passengers on any particular voyage may be said to have a common interest for that voyage. They may be compelled to contribute for jettisons made for the common safety under certain circumstances. But there is nothing in common between the freighters and passengers of different voyages."

And he held in this case that each daily trip constituted a voyage, and that they could not be grouped together. In *The Rose Culkin* (D. C.) 52 Fed. 332, Judge Brown cites this case with approval, and, taking the same view, holds that each trip constitutes a voyage. In *The Mary Adelaide Randall* (D. C.) 93 Fed. 222, the writer had occasion to collect some of the definitions of "voyage," and there held that the word in its maritime sense meant the transit at sea from one terminus to another; and the court of appeals, affirming the judgment, speaks of a voyage as signifying in its strict sense the "actual transit of the vessel from port to port." 39 C. C. A. 335, 98 Fed. 895. In *The Giles Loring* (D. C.) 48 Fed. 472, Judge Webb held:

"By the charter party one-half of the freight was earned and payable on right delivery of the outward cargo from Boston to the west coast, and that half was accordingly paid. The other half was freight pending when the voyage terminated, and would be earned only on delivery of the cargo at its destination, before which it was of no value to the owners. The City of Norwich, 118 U. S. 491, 6 Sup. Ct. 1150, 30 L. Ed. 134. As that portion of the freight was never earned, nothing is to be added on its account to the value of the vessel, for the purpose of showing the amount of the owners' liability."

The object of the statute would be defeated if owners were to be held liable for the amount of freight prepaid on previous passages or trips, because, as between shipper and shipowner, the contract had stipulated that the successive trips should be treated as a single voyage. The money paid for the crossing from Havre to New York did not constitute any freight which the petitioner was bound to deposit.

As to the claim that compensation from the French government for the crossing from New York to Havre, during which the vessel was lost, should be included in the freight, there is no evidence that the owners received any compensation for this crossing, or that the mails may not have been carried by some other steamer.

Counsel for claimants contend that, as the freight money and passenger fares had been paid in advance, and as the passage tickets and bills of lading provided that prepaid freight and passage money should be the property of the steamship company whether the vessel were lost or not lost, such money cannot be recovered back, and that, even if such had not been the agreement, the passengers and shippers could only claim their pro rata share in common with other claimants. And they insist that in any event the petitioner should have surrendered the freight and passage money paid for the pending trip from Havre to New York. Counsel for the petitioner, on the other hand, contends that the provisions in the passage tickets and bills of lading that prepaid freight and passage money shall be the property of the steamship company whether the vessel be lost or not lost excludes such money from the category of "pending freight." That the passage money is included under the term "freight" is expressly decided in *The Main*, supra. The question of freight is an interesting one, and, as no precedents have been cited by counsel on either side, it is probably novel, and must be decided as a matter of first impression. What construction is to be given to the term "pending freight" in the statute? The freight money was not actually earned under the ordinary rules of law. The petitioner claims that this prepaid money has in fact been returned to the parties who paid it, or to their representatives. But claimants, with apparent reason, maintain that, if these parties were not legally entitled to receive it, and it is properly included in the statutory term "pending freight," such payment does not operate to relieve petitioner from its obligation to pay such freight into court. The natural meaning of the words "pending freight" is freight dependent or contingent on the completion of the voyage. Until the voyage is completed, it is not earned. That part of the contract which provides that it should not be returned, even in cases of loss, is more nearly like a contract of insur-

ance than of affreightment. Substantially, the passengers and ship-
pers insure the owners against loss to the extent of the money thus
paid, but not earned. But the owners are not obliged to surrender
insurance money in order to limit liability. The City of Norwich, 118
U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. The term "pending
freight" has been generally used in the cases in the sense of freight
to be earned by the carriage of the specific goods or passengers on
board the vessel at the time of the loss. Thus, in The City of Nor-
wich, supra, the supreme court says:

"Pending freight is of no value to the shipowner until it is earned; and
it is not earned, if earned at all, until the conclusion of the voyage. * * *
If, however, by reason of the loss or sinking of the ship, the voyage is never
completed, but is broken up and ended by causes over which the owners
have no control, the value of the ship (if it has any value) at the time of
such breaking up and ending of the voyage must be taken as the measure
of the owners' liability. In most cases of this character no freight will be
earned."

And in The Main, supra, it is said that the property to be assessed
comprises "whatever is on board for the object of the voyage be-
longing to the owners, whether such object be warfare, the convey-
ance of passengers, goods, or the fisheries." The court further says:

"The words 'freight pending,' in section 4283, or 'freight for the voyage,'
in section 4284, were copied from the English statute of George II, which, in
turn, were copied from the Marine Ordinance of 1681, and the prior con-
tinental codes; but in both cases they were evidently intended to represent
the earnings of the voyage, whether from the carriage of passengers or
merchandise. If these words were used instead of the words 'freight for
the voyage,' it would probably more accurately express the intent of the
legislature."

And in The Abbie C. Stubbs (D. C.) 28 Fed., at page 720, Judge
Nelson holds as follows:

"When a shipowner sends his ship to sea, so far as his liability for col-
lisions and other losses happening through the fault of those in charge of
her, and without his privity or knowledge, is concerned, he puts at risk only
his ship, the expense of navigating her, and the freight she may earn on
the voyage. His responsibility is limited to the capital embarked in the
adventure, and the profit he may gain from it in the form of freight, or
its equivalent. If the ship is sunk or destroyed, and no freight earned, his
whole responsibility is at an end. If either or both are saved, in whole or
in part, to that extent his liability remains. The words 'her freight then
pending,' as used in section 4283, must at least include freight earned at the
end of the voyage for cargo on board at the time of the collision, which is
this case."

He holds that certain demurrage on the passage, when the voyage
terminated, is of the character of freight pending, and that such
freight during the voyage or charter in the performance of which
the losses were caused by the master, should be surrendered.

Crump, in his work on Marine Insurance and General Average,
says: "To constitute freight a contributing interest, it must have
been pending at the time of the sacrifice."

It seems most consonant with the tenor of the foregoing decisions
that, unless the freight and passage money are pending in the sense
that they are earned as the result of the maritime adventure, they
do not fall within the terms of the statute. The case of The Main,

supra, cited by counsel for claimants, does not sustain their contention, because in that case the voyage was completed and the freight earned.

2. La Bourgogne had 714 persons on board, while her lifeboat and raft capacity would provide for only 658. Claimants contend that the ship was in actual violation of a statutory rule, and therefore, within the doctrine laid down in *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148, the burden is thrown upon her of showing that such violation could not have been one of the causes of the disaster. Sections 4488 and 4489, Rev. St., provide as follows:

"Sec. 4488. Every steamer navigating the ocean, or any lake, bay, or sound of the United States, shall be provided with such numbers of life-boats, floats, rafts, life preservers, and drags, as will best secure the safety of all persons on board such vessel in case of disaster; and every sea-going vessel carrying passengers, and every such vessel navigating any of the northern or northwestern lakes, shall have the life-boats required by law, provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched while such vessels are under speed or otherwise, and so as to allow such disengaging-apparatus to be operated by one person, disengaging both ends of the boat simultaneously from the tackles by which it may be lowered to the water. And the board of supervising inspectors shall fix and determine, by their rules and regulations, the kind of life-boats, floats, rafts, life-preservers, and drags that shall be used on such vessels, and also the kind and capacity of pumps or other appliances for freeing the steamer from water in case of heavy leakage, the capacity of such pumps or appliances being suited to the navigation in which the steamer is employed.

"Sec. 4489. The owner of any such steamer who neglects or refuses to provide such life-boats, floats, rafts, life-preservers, drags, pumps, or appliances, as are, under the provisions of the preceding section, required by the board of supervising inspectors, and approved by the secretary of the treasury, shall be fined one thousand dollars."

It appears from the testimony of Gen. Dumont, the supervising inspector of steamboats, and of the assistant inspector, that La Bourgogne was duly inspected March 29, 1898, and that she complied with all the requirements imposed by said inspectors, and duly received a certificate to that effect. The "rules and regulations" of the board of inspectors leave the question of what is required in each case largely to the judgment and discretion of said board. It appears from the testimony of Dumont, the supervising inspector, that she was provided with such sufficient number of lifeboats as would best secure the safety of all on board, because she could not carry more boats without interfering with the management of the ship, and thus creating more danger than would result from the lack of boats. And the assistant inspector, Wilmurt, testified that she had all the lifeboats, life-rafts, life-saving appliances, and life-preservers necessary under the law. I understand that it is admitted that section 4493, on which great stress is laid by counsel for the claimants, is not applicable to foreign vessels.

Counsel for the claimants further contend that La Bourgogne was not provided with proper boat-disengaging apparatus. This contention is chiefly supported by the testimony of two witnesses interested in a patent releasing hook. It appeared, however, that this hook had been rejected as impracticable by various boards of steam-

boat inspectors, and that it had not been introduced into general use on other steamers. The supervising inspector of steamboats says that he knows of no device capable of satisfying the requirements of the statute, and that, therefore, the local board of inspectors have made the law practically effective by requiring all such vessels to have detaching hooks, which are absolutely safe, and as good a device as can be used, and that this is the ordinary block and fall and hook, such as was used on La Bourgogne. These contentions of claimants are not proved.

3. The question of speed at the time of the collision has been much discussed and considered. In the English admiralty court it was found that La Bourgogne was in fault for excessive speed, and that the Cromartyshire was not in fault. The French court of appeals and court of cassation held that La Bourgogne was free from fault, and that the collision was caused by the faulty navigation of the Cromartyshire. The evidence tends to prove that the proper officers were on deck, and attentive to their duties, up to the time of the collision; so that there is no imputation of negligence except in the matter of speed. About 4 o'clock in the morning the steamer encountered a dense fog, which prevailed at the time of the collision. The siren was blown regularly from some time after 4 o'clock. A number of witnesses, including Corre, the steersman of La Bourgogne, Laisne, the fourth engineer, Fortin, a fireman, Seol, the second purser, and several of the crew of La Bourgogne, testify that she was slowed down at the time of the collision. These witnesses make various statements of fact in support of their testimony as to the reduction of speed, which would have been of considerable force if the alleged facts had been capable of verification, or had come from disinterested witnesses. The witnesses for the claimants also are interested. Commeau, the steerage passenger, on whose testimony claimants largely rely, made such an unfavorable appearance and told such an extraordinary story on the witness stand that his whole testimony must be discredited. Henderson, the master of the colliding ship, testifies that La Bourgogne was running between 15 and 20 knots an hour at the time of the collision. The testimony on both sides is necessarily unsatisfactory for various reasons. The chief officers of La Bourgogne were drowned. With the exception of Henderson, the persons on board the Cromartyshire were not examined. All the witnesses are interested. The passengers who testify to excessive speed were not experts. In these circumstances this question must be further considered in the side light of such evidence as that the fast steamships of this line, as of ocean lines generally, are apparently run at a dangerous speed in time of fog; that, unless La Bourgogne had been continuously running at approximately full speed, she could not have reached the point where she was at the time of the collision; that no orders to reduce speed are satisfactorily proved; and that when the horn of the Cromartyshire was heard the telegraph was put to "stand by," when, if La Bourgogne had already slowed down, the order would have been to "stop." The testimony of the witnesses for La Bourgogne that orders were given to close the ash-pit doors, and that this was done, shows that the

effect of such action would be at most to slightly diminish the speed of the engine, but not to sufficiently reduce speed; so that, after all allowances made, it would seem that the steamer must have been running at the rate of about 10 knots an hour. This conclusion is supported by the suddenness of the shock, the almost imperceptible interval between the hearing of the signal and the collision, and the severity of the concussion, shown by the disastrous consequences. It must be found that La Bourgogne was in fault for failure to reduce her speed to a point of safety, or to one at which such a collision might have been avoided.

4. In support of the contention that the collision did not occur without the privity or knowledge of the petitioner, it is alleged: First, that the petitioner had not made sufficient regulations to insure that the captains of its steamers should run them at moderate speed in fogs; second, that with knowledge that its captains ran ships at an excessive rate of speed, notwithstanding the existing regulations, it took no further measures for prevention; and, third, that, if it did not know such fact, it was negligent in failing to obtain such knowledge. An order of the company in reference to this matter, passed in 1884, is as follows:

"Our board of directors having seriously in mind the numerous collisions which daily occur at this season in the parts frequented by our steamers, we come to beg you to recall to all our captains individually the recommendations which we have always made to them, to use the greatest prudence in their navigation, and to never hesitate in certain doubtful cases to adopt the most suitable measures to assure the safety of their steamers, even if a loss of time should result from so doing. You will insist upon it with them that in times of fogs the most active watch be kept on board their vessels, and that all the prescriptions indicated in the rule as to collisions be strictly observed as well by day as by night."

And in 1891 the substance of this order was embodied in permanent regulations as follows:

"Art. 393. When the company's vessels are in localities frequented by vessels, especially in foggy weather and during the night, the engineer on watch and the necessary men for maneuvering must be within reach of the apparatus for changing the speed. The order is given by the officer of the watch to the engine room, and mention is made in the ship's log and that of the engineers of the hour at which that order was given and received.

"Art. 394. The company's vessels conform to the international rules for the purpose of preventing collisions. A printed copy of said rule is posted up in a conspicuous place, in order that the officers may take notice of it. The prescriptions of said rule relative to phonic signals to be caused to be heard in foggy weather must be rigorously observed; besides, in said circumstances, a man must be placed aloft on lookout.

"Art. 395. In conformity with the rules of international regulations, having for object the prevention of collisions, all vessels under steam which approach each other so that there may be risk of collision must diminish their speed, or stop and go backwards, if necessary. All vessels under steam must, during foggy weather, preserve a moderate speed. The captain, under these circumstances, must diminish the speed of his engines, and, in agreement with the Agent of Postes, the captain must make known by procès verbal the delays which such maneuvers may have occasioned."

Perhaps the court should take judicial notice of the almost universal practice of running ocean liners at excessive speed in fogs. There is considerable testimony in this case, however, to the effect

that the vessels of the French line did sensibly and materially reduce their speed on such occasions. Two of the captains testified that they always slowed down in a fog, and four passenger witnesses supported this testimony. On the other hand, six witnesses for the petitioner testified to the contrary. But even if it be assumed that the commanders of the steamships were in the habit of violating the foregoing rules, and that the company had knowledge thereof, there is not sufficient evidence to show that the company was negligent in its failure to enforce the rules. The evidence sustains the claim that the company had used due diligence in securing officers of experience and ability. It is not clear that any further precautions than those established by the orders and regulations quoted above would have been practicable. The question of rate of speed in a fog is one which cannot be determined by set rules, but must be left largely to the discretion of the officers of the ship. They are intrusted with the responsibility of the carriage of mails, freight, and passengers at the greatest speed which is consistent with safety. Their own lives, as well as those of the passengers and crew, are at stake. The determination of the question, therefore, as to what is to be done in all the varying stages between a light haze and a dense fog, rests upon a great variety of circumstances and conditions, all looking toward the question of what is a moderate rate of speed in existing conditions. In *Transportation Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585, the supreme court of the United States discusses at length the history of the limitation of the liability of shipowners from the earliest times, and quotes Valin as saying that, with certain exceptions, "it is just that the owner should not be bound for the acts of the master, except to the amount of the ship and freight; otherwise he would run the risk of being ruined by the bad faith or negligence of his captain. * * * It is quite sufficient that he be exposed to the loss of his ship and of the freight to make it his interest, independently of any goods he may have on board, to select a reliable captain." The court then adds:

"The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent. The public interests require the investment of capital in shipbuilding quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent shipowners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In one case, as in the other, their property is in the hands of agents whom they are obliged to employ."

In view of the foregoing conclusions, the question as to liability for loss of life becomes practically an academic one. For the purpose, however, of a formal disposition of this question in the decree, I hold, on the authority of *Rundell v. La Compagnie Generale Transatlantique* (D. C.) 94 Fed. 366, affirmed 40 C. C. A. 625, 100 Fed. 655, 49 L. R. A. 92, that there can be no recovery under the general maritime law for damages for negligence resulting in death on the high seas. Therefore the petitioner is not liable for claims for loss of life.

The testimony and exhibits in this case are very voluminous. Inasmuch as the only time permitted for its disposition has been during the crowded week in which my term of office as district judge expires, it has been impossible to give the full consideration to the complicated questions of fact and law which the importance of the interests involved demand, and would otherwise have received.

The petition is granted.

CHAMPLAIN CONST. CO. v. O'BRIEN et al.*
O'BRIEN et al. v. CHAMPLAIN CONST. CO. et al.

(Circuit Court, D. Vermont. June 11, 1902.)

1. **CONTRACT FOR RAILROAD CONSTRUCTION—DELAY IN COMPLETION OF WORK—LIQUIDATED DAMAGES.**

Liquidated damages stipulated for in a contract for railroad construction for each day's delay in the completion of the work after the time fixed cannot be deducted against the contractor where the delay was caused by the default of both parties, and it is impossible to apportion the damages between them.

2. **SAME—TAKING POSSESSION OF PLANT OF CONTRACTORS—LIABILITY FOR USE.**

Where a railroad construction company took over the working plant of a firm of contractors under the protection of an injunction, claiming the right to do so and to use it in completing the work at the expense of the contractors under the terms of the contract, because of the contractors' default, but it was afterward adjudged not to have such right, it is liable to the contractors for the reasonable value of the use of the plant which it employed in completing the work on its own account.

3. **SAME—STATEMENT OF ACCOUNT.**

Account stated between the parties to a contract for railroad construction.

4. **CONTRACT—VALIDITY—CONSIDERATION.**

The bid of a firm for the construction of a railroad was reduced by their agent without authority, and they refused to execute the contract at the reduced price. To induce them to do so, a third person orally agreed to pay a sum in addition to the contract price for a certain class of the work, in consideration of which they executed the contract and performed the work. *Held*, that such agreement was valid and binding on the promisor.

In Equity.

Alfred A. Hall, Thomas W. Moloney, and Fred M. Butler, for O'Brien & Sheehan.

William H. Button, Frederick H. Button, and William B. C. Stickney, for companies and Clement.

* For settlement of decree, see 117 Fed. 788.

WHEELER, District Judge. These suits grew out of a contract by O'Brien & Sheehan with the Construction Company, guarantied by the Rutland Railroad Company, for building the Rutland-Canadian Railroad along the shore and across islands and waters of Lake Champlain, between Burlington, Vt., and near Rouses Point, N. Y., the parts of which now material are:

"First. That the said contractors, having examined the specifications herein contained, and of this agreement forming a part, for grading, masonry, track-laying, and ballasting on about fifty miles of proposed railway to extend from Burlington, Vermont, to the vicinity of Rouses Point, New York, have agreed, and by these presents do agree, with the said company, for and in consideration of the payments hereinafter mentioned to be made to them by the said company, and under the penalty expressed in a bond for fifty thousand dollars (\$50,000), bearing date even with these presents and made a part hereof, to furnish, at their own expense, all the necessary tools, plant, appliances, labor, and materials, excepting only such as are herein expressly stated to be furnished by the company, and in a good, substantial, and workmanlike manner, and in strict accordance with the said specifications, construct and complete said grading, masonry, track-laying, and ballasting, and the incidental work herein specified, on or before the first day of October, 1899. Time is to be of the essence of this contract. It is mutually agreed between said parties that a bonus shall be paid by the company to the contractors for completion before the first of October, and liquidated damages shall be reserved by the company from the contractors for delay after the said first day of October, both as provided in the said specifications. The contractors also agree to have the masonry for all railroad bridges finished, ready to receive the bridge superstructures, on or before the fifteenth day of June, 1899.

"Second. The said contractors further agree that they will indemnify and save harmless the company from all claims for loss or damage on account of the performance of this work, whether arising from negligence or otherwise. And the said contractors further agree that any part of the moneys at any time due to them under this agreement may be retained by the said company until all suits or claims for damages as aforesaid, and all suits or claims on account of labor or material furnished the contractors for this work, shall have been finally terminated.

"Third. It is further agreed that if at any time the progress of the work, or the character of appliances and materials furnished, is not such as, in the opinion of the company's chief engineer, will secure the completion of this contract within the time stipulated herein, or is not in accordance with the said specifications, then the company may serve written notice on the contractors to increase the progress of the work, or to improve the materials for it so as to conform to the said specifications; and if on the expiration of ten days after the service of such written notice upon the contractors personally, or by leaving the same at their office, No. 253 Broadway, in the city of New York, the contractors shall fail to furnish the company satisfactory evidence of their efforts, ability, and intentions to increase said progress or improve said materials, the company, if it so elect, may thereupon enter and take possession of the said work, or any part thereof, with the tools, materials, plant, and appurtenances thereon, and hold the same as security for any or all damages or liabilities that may arise from the nonfulfillment of this contract within the time herein stipulated, and the company may use and employ said tools and other appurtenances and other proper means to complete the work at the expense of the contractors, and may deduct the cost thereof from any payments then due or that thereafter may become due to the contractors; and in case the contractors shall not complete the work within the time herein specified, and the company shall not have exercised its said election, or, notwithstanding such failure, shall permit the contractors to proceed with and complete the said work (as if such time had not elapsed), then such action shall not be deemed a waiver in any respect by the company of any part of the liquidated damages to be paid by the

contractors on account of delay beyond said first day of October in the completion of the work; nor shall the fact that the company does not enter upon and take over the work from the contractors prevent or estop the company from collecting the amount of liquidated damages herein agreed upon.

"Fourth. It is mutually agreed between the parties hereto that the chief engineer appointed by the company shall in all cases determine the quality and quantity of the several classes of work to be done and paid for under this contract; he shall decide all questions that may arise relative to the fulfillment of this contract on the part of the contractors, and his estimates shall be final and conclusive evidence of the total amount and value of the work performed by the contractors under this agreement; and such estimates and decisions shall be a condition precedent to the right of the contractors to receive any money or compensation for anything done or furnished under this agreement. And it is hereby expressly agreed that the company shall not be precluded or estopped by any return or certificate made or given by any engineer, inspector, or other officer, agent, or appointee of said company, under or in pursuance of anything in this agreement contained, from at any time showing the true and correct amount and character of the work which shall have been done, and materials which shall have been furnished, by the said contractors or by any other person or persons under this agreement. It is hereby further agreed that no claims for extra work shall be allowed unless the work shall have been previously ordered by the chief engineer in writing, except in a case of urgent necessity or emergency, and in the latter case all claims for extra work or otherwise done in any month shall be made to the chief engineer in writing before the third day of the following month; and if, in his opinion, such extra work was not of urgent necessity for an emergency, it shall be disallowed and not paid for by the company.

"Fifth. The company agrees to deliver sufficient scrap rails and ties for one-half mile of track for the contractors' use in construction at each of the three following places, viz.: Allen's Point on south end of South Hero Island, Tromp's Point on north end of said island, and Pelot's Point on north end of North Hero Island, on or before the fifth day of March, 1899, and such further quantities of scrap rails and ties as may thereafter be required for the contractors' use in construction as shall from time to time be certified by said chief engineer to said company to be necessary.

"Sixth. The company agrees to deliver at the several places named in said specifications the new rails, splices, spikes, and ties on or before the first day of July, 1899, or at such later day as the said contractors shall ten days prior to July 1, 1899, in writing, designate to said company, and to have the superstructure of all railroad bridges erected in place on or before the fifteenth day of August, 1899.

"Seventh. It is expressly understood and agreed between the parties hereto that the plans for the three lake crossings on Lake Champlain are subject to the approval of the war department of the United States, and in the event that the plans that are now before the war department are not approved, and changes therein become necessary, the contractors shall have no claim against the company for any profit that they might have made if such crossings had been constructed as shown in said plans, but said contractors shall construct such crossings in the manner required by said war department, and shall be paid therefor according to said specifications. * * *

"The work under this contract is to include grading, masonry, ballasting, and track-laying, and all roadbed and substructures, but not the steel-bridge superstructures nor station buildings. For the work under this contract the contractor is to furnish all labor and all plants and appliances, excepting only construction trains, if he chooses to call upon the company for said trains, as provided hereinafter; and he is to furnish all necessary materials, excepting only ties, rails, splices, ballast pits, and spur track to quarry or quarries or to ballast pits. All excavations shall be classified under the following heads, viz.: 'Earth,' 'Loose Rock,' 'Solid Rock.' Earth shall include sand, loam, gravel, clay, and all other earthy matter, and loose stone or boulders that do not exceed 3 cu. ft. Loose rock shall include all stone and detached rock containing between 3 cu. ft. and 3 cu. yds. Solid rock shall include all sound

rock occurring in masses exceeding 3 cu. yds. The width of roadbed at sub-grade 1 ft. below base of rail will generally be 20 ft. in excavation and 15 ft. in embankments, with side slopes generally $1\frac{1}{2}$ to 1 in earth and $\frac{1}{4}$ to 1 in rock, or of such other widths or slopes as the engineer may in writing direct. The lake crossings will be made with rubble stone embankment, having drawbridge openings where designated. The material for these embankments will be obtained principally from the rock cuts for the roadbed near these crossings and by widening these cuts. The interior portion of these embankments shall be made of stone of such sizes as naturally blast out of these cuts. These rubble stone embankments will be measured in embankment only. None of the material composing it will be measured or paid for as excavation, whether it is obtained from the roadbed, right of way, or from borrow pits or quarries. In measuring the rubble stone embankments, the engineer shall ascertain the settlement, if any, and measure as accurately as possible the entire embankment, including such settlement. The right of way, extra widths for borrow pits, and the ballast pits shall be furnished by the company without cost to the contractor and without delaying his work. All quarry sites outside of the right of way for affording stone for rubble embankment, bridge masonry, or otherwise, shall be furnished by the contractor. But the company shall provide these quarries at points convenient to the work on the contractor's payment to it of the sum of five hundred dollars (\$500.00). In any case the company shall lay spur tracks to quarry sites and ballast pits without cost to the contractor. All grading, excavations for foundations on land or in water, for ditches, berm ditches, culverts, or otherwise, except the material for forming the rubble stone embankments as hereinbefore specified, shall be measured, estimated, and paid for as excavation only, in its proper class as earth, loose rock, or solid rock. If the contractor grade in excess of the directed width in excavation, earth embankment, rubble stone embankment, or otherwise, then such excess shall not be paid for. The price paid for excavation in all the several classes thereof will be understood to cover and pay for the entire expense of its removal by any method whatever, including loading, unloading, transportation, and deposit, in the manner prescribed in these specifications, in the places designated by the engineer: provided, the average haul of the material so transported does not exceed one thousand feet (1,000 ft.), and beyond that distance one-half of one cent per cubic yard per hundred feet (100 ft.) will be allowed and paid for such extra haul. When required by the engineer, the contractor shall riprap the face of embankment or the foot of slopes as protection against action of water. The riprap is to be laid by hand by competent workmen, and be of such thickness and slope and of such ordinary stone as is most convenient. It shall be measured and paid for by the cubic yard. If the contractor abandon any part of the work, or if, in the opinion of the engineer, he do not maintain upon it such rate of progress as would be necessary to complete the work within a reasonable time, the company may take over and enter upon the work and complete it at the contractor's expense. * * *

"The final estimate shall be based on the quantities which shall be deducted by the chief engineer from accurate actual measurements as provided in said specifications, taken together with the following prices, which are to prevail in this contract, to wit: Earth excavation, per cubic yard, eighteen cents (\$0.18); loose rock excavation, per cubic yard, forty cents (\$0.40); solid rock excavation, per cubic yard, forty cents (\$0.40); rubble stone embankment, per cubic yard, 40 cents (\$0.40); track-laying, main and single track, per mile, two hundred and fifty dollars (\$250.00); track-laying, side single track, per mile, two hundred and fifty dollars (\$250.00).

"The Rutland Railroad Company, a corporation created by and existing under the laws of the state of Vermont, and having its principal office at Rutland, in the county of Rutland and state of Vermont, in consideration of one dollar received to its full satisfaction of O'Brien & Sheehan, copartners, having their office and principal place of business at No. 253 Broadway, New York, and in the further consideration of the execution by said O'Brien & Sheehan of a contract with the Champlain Construction Company on the 20th day of February, A. D. 1899, for the construction of the Rutland-Canadian

Railroad, hereby covenants and agrees with the said O'Brien & Sheehan that the said Champlain Construction Company will faithfully perform all the conditions and matters to be performed by it, according to the terms and conditions of said contract, and hereby guaranties that said Champlain Construction Company will faithfully perform all said terms and conditions."

The time of completion was extended to May 20, 1900, and the work and working plant of the contractors were taken over by the Construction Company, protected by an injunction from the state court in the first of these causes, October 12, 1900.

One principal question is as to the right of the Construction Company to take over the work and complete it at the expense of the contractors, with their plant. This question was considered in *Construction Co. v. O'Brien* (C. C.) 104 Fed. 930, on a motion to dissolve the injunction of the state court, after removal to this court. The conclusion was then reached that the case as it then stood did not show any right to take over the plant and use it to complete the work at the contractors' expense. Since then a motion has been made to amend the bill to set up an agreement that this might be done, which was continued to the hearing, with leave to take testimony to support or deny the allegations of the amendment. The testimony does not come up to sustaining these allegations, and the use of an injunction to obtain the possession directly negatives the idea that it was taken under a peaceable arrangement. As the case now stands, the taking over of the work was right, for doing it by the company as its own work, at its own expense, with accountability for the use of the plant belonging to the contractors in doing its work. The rights and liabilities of the parties as to the work done by the contractors up to the time of the taking over, and the use of the plant by the company afterwards, are therefore to be ascertained.

The contract refers all classifications, measurements, computations, and adjustments to the chief engineer. The ascertainment of the quantities of the lake fills was difficult, and as to one a joint measurement by engineers representing the contractors and the company respectively was had, and the results were acquiesced in by all and adopted by the chief engineer as correct. Afterwards suspicion was raised as to the joint measurement, and remeasurement was made by the company through experiments in drilling down through the embankments to ascertain their depth. They made the depths and quantities very much less, and the amount allowable for the work about \$110,000 less. These remeasurements appear to have been made with great care under the difficulties, and by themselves would seem to be sufficiently accurate. But the joint measurement was made with care also by those acting in the interest of their respective sides, and therefore entitled to great weight, and it compares better with the preliminary surveys of the lake bottom. On the whole, it seems to be the safest, and is followed, and the engineer's estimates of the other lake fills are taken to be correct, and followed.

The engineer has computed overhaul at the rates provided for in the contract on excavations for land fills, and not for lake fills. The contractors claim that the method of computing it where allowed is not correct, and that it should be allowed for all fills. The specific pro-

visions of the contract for obtaining material for, construction of, and compensation for the lake fills appear to confine them to these stipulations, and to exclude all other general provisions as to ascertaining compensation for them. The method followed appears to leave some quantities hauled over 1,000 feet not reckoned; and, if the contract had simply provided for overhaul where applicable in excess of 1,000 feet, the result would appear to be clearly too small. But the overhaul provided for is "average" overhaul; and the averaging done by computing from centers of gravity of excavations to those of fills, and allowing for all over 1,000 feet so found, instead of finding the centers of gravity for all quantities moved more than 1,000 feet, seems to be within the terms of the contract in this respect, which were to be carried out by the chief engineer, and his use of it under the contract seems to be final. Some material not within the overhaul clause had to be hauled further than was anticipated, and compensation quantum meruit is claimed; but that seems to be met by the clause in the contract putting such conditions and locations at the risk of the respective parties.

Riprap for rubble embankments, dumped and placed, was to be \$1.75 per cubic yard; 30,867 yards dumped appear to be allowed for at but \$1.25, because not placed. This difference appears to be too great. According to the evidence, 10 cents per yard would be sufficient for the placing, and 40 cents more per yard should be allowed on this number of yards, making \$12,346.80 which should be allowed in addition.

Items amounting to \$2,687.82, as shown by contractors' Exhibit 151, appear by concession to have been deducted twice from estimates, and that amount should be allowed to the contractors to correct that error.

Extra cost of laying old rails and joints instead of new, that by the contract were to be furnished, is admitted to be allowable, and on the evidence is allowed for 44.04 miles at \$125 per mile, amounting to \$5,505.

The company took over the plant materials on hand belonging to the contractors, for which \$10,687.10 is allowed to them.

Use of 55 dump cars, costing \$3,300, appears to have been charged and deducted from estimate to the amount of \$13,981.30. This seems to be too exorbitant to be allowed to stand. One-half their value seems reasonable, leaving \$12,631.30 of the amount deducted to be replaced.

The contractors were dilatory in some respects about proceeding with the work, and the company deducted the \$400 per day for delay for the 11 days of May, 1900, after the expiration of the last extension on the 20th from the estimates of that month. The contractors protested, and the amount was restored. Against the protest of the contractors, deductions were made again for each day after to the taking over of the work October 12th, amounting in all to \$54,200. The contractors insist that this amount should be restored. This deduction was provided for originally, and carried along in extensions always as liquidated damages for delay. If it had been attributable solely to the shortcomings of the contractors, the deductions would have been en-

tirely justifiable, but they would not be proper unless damages as such would be recoverable. That damages are not recoverable by one of another for consequences flowing from both is familiar law of constant application. The line connected at each end with existing railroads, and rights of way for making connections for taking on materials there and for doing the work elsewhere were not acquired, and plans and materials to be furnished by the company were not provided till after the contractors were entitled to them, and these hindrances contributed substantially to the delay for which the deductions were made. If they should be left to stand, the company would recover damages of the contractors for its own neglects. There is no way for summing up the defaults of each and apportioning the damages to them, but the whole must be allowed or none; and, as all cannot be, none must be. These deductions must therefore be restored.

Wider excavations than called for were made for convenience in use of steam shovels, and are claimed for, but that they shall not be allowed for is expressly provided in the contract.

What is called shale was encountered by the contractors in excavations. It appears to have been classified by the chief engineer temporarily as rock, but finally as earth. The classification of materials to be moved is provided for in the contract, and that is to govern according to common language rather than by scientific terms. This is not loose rock mentioned, and must be earth, if not sound rock. It does not seem to be sound rock, however seamy ledges might have to be classified. Rock would not need to be absolutely sound and free from all seams, for classification as such, but only generally sound in layers or masses which would separately be understood to be rock in common speech. There would be none or but little absolutely sound rock excavation on the line, still a great deal of rock moved had been very properly classified as such, but it was sound in rock quantities as contemplated by the contract, and this is not, or not so clearly so as to be without the discretion of the chief engineer, to whom such doubts were by the contract finally referred.

The evidence of the contractors admits, by their Exhibit 69C, items chargeable to them amounting to \$39,387.74, and, by their Exhibit 158, such items not deducted from estimate amounting to \$19,464.22. Those not before deducted should apparently be deducted now. The company admits charges for extra work not credited amounting to \$1,921.26, which apparently should be allowed now.

The riprap was at the agreed price quite profitable to the contractors, and was stopped by the chief engineer on a suggestion from the president before what had been directed was completed. The contractors claim damages for not being allowed to go on with it. But, as the embankments were by the terms of the contract to be ripped only "when required by the engineer," there would be no basis for damages about what should not be so required, whatever his motives might be. There would be no breach of any stipulation for a foundation. They had when stopped done some work toward continuing under the prior direction, for which they seem entitled to fair compensation, that is found to be \$2,000.

The estimates to October 12, 1900, appear to amount to.....	\$870,497 59
Extra for laying old rails.....	5,505 00
Due on riprap done.....	12,346 80
Preparing riprap ordered.....	2,000 00
Materials taken October 12, 1900.....	10,687 10
Admitted extras	1,921 26
	<hr/>
	\$902,957 75
Prima facie payments	\$780,748 16
Supplies not deducted	19,464 22
	<hr/>
	\$800,212 38
Overpaid on dump cars.....	\$12,631 30
Charged twice	2,687 82
	<hr/>
	15,319 12
Net payments	<hr/>
	784,893 26
Due as of October 12, 1900.....	<hr/>
	\$118,064 49

The use of the plant under the accountability required for maintaining the injunction was had in doing the work of the contract, and is to be allowed for at its fair and just value as near as may be under the circumstances, according to the evidence. This is difficult to fix; but on much consideration of its value when taken, of the work actually done with it, of its value when returned, and its whole situation, \$30,000 seems nearest to what is right, and is the amount arrived at. This makes due from the company to the contractors \$148,064.49.

There are many comparably small items in controversy, not mentioned nor mentionable within proper limits in detail, some not proved at all, some not established as required by the contract, some the disposition of which has been acquiesced in, and some which have been abandoned. None are thought to have been overlooked in consideration, but, if any are made to appear to have been, they may be adjusted on settlement of the decree.

The contractors' bid was reduced 2 cents per yard for earth excavation by their agent without their knowledge. When they learned of it they declined to execute the contract. To induce them to go on, the defendant Clement offered to pay 5 cents per yard in addition to the bid of 40 cents for rubble embankment, whereupon they executed the contract at the bid prices. This was done wholly by parol, but thus far there is no fair dispute upon the testimony. The contractors claim that he made this agreement as president for the Rutland Railroad Company; Clement claims that it was to be merely a gratuity of that amount, if the work should be well completed in time, according to the contract. No express authority for making such an agreement in behalf of the railroad company is shown; and, as the work was to be done upon the road of another company, it would not seem to be within the scope of his general authority as president. If he acted without authority he would, of course, bind only himself; and from the testimony it is not found that he assumed to act for any one but himself. The witnesses may have inferred, and from that have understood, that he acted as president from his well-known position as such. The testimony seems to show fairly and sufficiently that the contractors were by him given to rightfully understand that this was to be paid as compensation, and not as a gratuity. The consideration moving

from the contractors was the execution of the contract with the Construction Company, and was ample. Although founded upon, this promise was independent of and not collateral to, the written contract of the company. It never agreed to pay this five cents per yard; that was not and never would be its debt, nor a failure to pay that be its default; and Clement's agreement was not one to answer for the debt or default of the company, but one that created a debt of his own, which seems to be valid. There appear by contractors' Exhibit 69 to have been 1,016,123 yards of this embankment, amounting, at five cents per yard, to \$50,806.15.

The right to the injunction wholly fails, and there is no other relief to which the company is entitled in the first case; but the right of the contractors to compensation for the use of their plant, which was protected by the provision for accountability on continuing the injunction, remains to them by that, as well as according to their rights as owners of the plant, and should not be disturbed.

In the first case let a decree be entered dismissing the bill, without prejudice to accountability for use of plant, and without costs.

In the other case let a decree be entered that the Champlain Construction Company pay to the plaintiffs \$148,064.49 within 20 days, and in default thereof that the Rutland Railroad Company pay the same within 20 days after, with costs, and that defendant Clement pay to the plaintiffs \$50,806.15 within 20 days, without costs.

At the settlement of the decree the amount due as of October 12, 1900, from the construction company was modified to \$112,624.62, and from Clement to \$47,070.15.

THE C. W. ELPHICKE.

(District Court, W. D. New York. June 13, 1902.)

1. SHIPPING—DAMAGE TO CARGO—LIABILITY OF SHIP.

Where cargo was injured after it was received on board a vessel, and before its delivery, the burden of proof rests upon the carrier to show that the vessel was in all respects seaworthy at the commencement of the voyage, before it can invoke the provisions of section 3 of the Harter act, giving exemption from liability for losses arising from dangers of the sea.

2. SAME—SEAWORTHINESS—REQUIREMENT OF HARTER ACT.

A shipowner does not comply with the requirement of section 3 of the Harter act, so as to be entitled to the exemptions therein provided, by merely furnishing proper equipment of the vessel prior to the commencement of the voyage, but he is bound to see that his servants exercise due diligence in its use to make the vessel seaworthy at the time the voyage actually commences.

3. SAME—INSUFFICIENT HATCH COVERINGS.

A steamship carried a cargo of flaxseed from Duluth to Buffalo in November, and on her arrival the seed was found to have been damaged by water, chiefly under the hatches. She encountered a severe storm on the voyage, during which the seas came over her deck, but such storms were to have been expected at the season. Previous to the voyage she had been engaged for a considerable time in carrying ore, and there was

¶ 2. Implied warranty of seaworthiness, see note to *The Carib Prince*, 15 C. C. A. 388.

evidence which justified a finding that her hatch coamings and covers had been injured in loading and unloading, and had not been repaired, and also that the tarpaulins and strong backs were not in good condition. *Held*, that she was not in seaworthy condition at the commencement of the voyage, taking into consideration the cargo carried and the season, and that such fact was a proximate cause of the cargo damage, which rendered her liable therefor.

In Admiralty. Suit to recover for damage to cargo.

Clinton & Thomas (George Clinton, of counsel), for libelants.
Goulder, Holding & Masten, for respondent.

HAZEL, District Judge. The libel in this cause was filed against the steamship C. W. Elphicke for damages to her cargo of flaxseed during a voyage on the Great Lakes from the port of Duluth, Minn., to the port of Buffalo, N. Y. The damages sustained by the Albert Dickinson Company, owners of the cargo, were paid by libelants, marine insurance companies, which thereupon became subrogated to the rights of the cargo owners. The respondent claims that the damage was occasioned solely through perils of the sea. The proofs on the main issue of the Elphicke's seaworthiness at the commencement of the voyage are conflicting. The proofs for libelants tend to show that the Elphicke left Duluth with a cargo of about 89,500 bushels of flaxseed on November 1, 1896, consigned to the Albert Dickinson Company under 12 separate bills of lading. The flaxseed was in good condition at time of shipment. The Elphicke arrived at Buffalo on or about November 7th, with her cargo damaged by water. The grain was chiefly damaged underneath the hatches,—particularly underneath the after hatch. Libelants argue that the accumulation of water underneath the eight hatches of the Elphicke was due to improper and faulty equipment; that her tarpaulins were old, worn, and unsuited to keep water from leaking through the hatch covers; that their seams and eyelets were ripped and torn; that the staples by which the battens were secured were too far apart, in some instances were missing, and therefore the tarpaulins were not firmly placed upon the hatch covers; that the corners of some of the hatches were chamfered from one-half to three-quarters of an inch; that the hatch coamings were defective, and the strong backs out of place. This condition of the ship allowed the water which swashed her deck during a storm encountered on November 5th to leak through crevices and interstices in the hatches or hatch coamings, which the tarpaulins were designed to cover and protect. Libelants' witness Barrett testifies that underneath hatch covers 1 and 2 the flaxseed was set four inches in depth; Nos. 3, 4, and 5, about two feet; while underneath hatches 6 and 7 a worse condition appeared. The respondent's proofs tend to show that the steamship Elphicke had received in the fall of 1895 the highest insurance classification; that when the Elphicke left Duluth with her cargo of flaxseed she was well fitted and seaworthy; that she possessed and used two sets of tarpaulins, one of which was comparatively new, and entirely suitable for covering hatches and to protect them from leakage. The other was old and worn, but in good condition. Both were used in the usual and cus-

tomary manner,—the old employed as an inner, and the new as an outer, covering. The captain of the Elphicke, as well as others of the crew, testified to the seaworthiness of the vessel at the time of commencing the voyage. None of the defects in hatch coamings and tarpaulins, as testified to by the witness for libelants, when the vessel arrived at Buffalo, were observed by them.

It is strenuously insisted that the stress of weather caused the vessel to strain and twist. This resulted in the damage complained of, and therefore respondent claims the leakage may be properly ascribed to perils of navigation. The issue is, I think, confined to that question alone. On the argument it was stated for respondent that, assuming the tarpaulins were serviceable, the captain of the vessel having under his management and supervision men competent to repair hatch coamings, hatch covers, and seams, and the necessary tools wherewith to make such repairs, the inquiry was pertinent whether the provisions of the third section of the Harter act, under such circumstances, are not properly invoked. If such were the facts, the vessel would not be exempt when the defects existed at the commencement of the voyage. The supreme court has recently passed upon this question in *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830. At page 225, 181 U. S., and page 593, 21 Sup. Ct., 45 L. Ed. 830, the court says:

"We do not think that a shipowner exercises due diligence, within the meaning of the act, by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship in all respects seaworthy; and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage, and until it is actually commenced."

Assuming the facts as proved by witnesses for libelants to be established, the vessel was not in all respects seaworthy. It was not reasonably equipped and supplied at the beginning of the voyage, and therefore the loss caused was not one incident to the perils of the sea. The burden of proof is on the vessel to show that she was in all respects seaworthy at the time she cleared. The rule is thus stated by Justice Wallace, speaking for the court, in *The Frey*, 45 C. C. A. 309, 106 Fed. 319:

"When goods in the custody of a common carrier are damaged after their receipt and before their delivery, there is a prima facie presumption that the carrier was at fault."

The Elphicke encountered a gale on Lake Erie abreast of Middle Ground, between Point Pelee and Pelee Island. Its velocity is in dispute. Some witnesses put it as high as 60 miles per hour. It was not an extraordinary gale for that season of the year on the Great Lakes, although its severity tested the seaworthiness of the Elphicke. The wind varied from south to southwest; the course of the ship being east by north half north; the wind and the sea bearing on the starboard quarter. The captain testifies that it was about 10 o'clock in the forenoon of November 5th when the seas came over the ship forward of the boiler house. The bulwarks were 18 inches high, solidly built, with scuppers. The scuppers failed to free the ship of the water. She reversed her course and sheltered under Pele

Island. The severity of the wind caused a breakage of the window in the pilot house 20 feet above the surface of the water, and washed in the forward bulwarks. The second after-hatch cover was twisted. The water stood on her deck almost continually between the bulwarks for the space of five hours. On the next day, while the ship was sheltered at Pelee Island, the captain observed that the butts around the hatch coamings and water ways had started. The oakum had started, and, it seems, had the appearance of having been started during the storm. The captain further testifies that the leakage was attributable to the strain from the pitching of the vessel. In this he is corroborated by others of the crew. A careful examination of the testimony, however, satisfies me that the damage to the cargo was not proximately due to this cause. I do not think she suffered a strain so unusual as to result in the opening of seams to the extent of damaging 6,000 bushels of flaxseed. I incline to the belief that the *Elphicke*, starting on her voyage at that season in the manner in which she was laden, was not in a condition that can be regarded as reasonably safe, under all the conditions in the case. The evidence of the libelants justifies the finding that the strong backs, hatch coamings, and hatch covers were insufficient and defective. Failure to adequately protect cargo during the storm was a consequence. The trip was made at a time when navigators on the Great Lakes and owners of vessels are required to use great care against the inclemency of weather bordering on the close of the navigable season. Such severity of weather in that season of the year on the Great Lakes is presumed to be well known to mariners. The *Elphicke* is 272 feet keel, 42 beam, and was loaded to a depth of 16 feet, with a capacity for 17½ feet. During the previous season she was engaged in transporting iron ore, and it may reasonably be presumed from the evidence that while so engaged her hatch coamings and covers suffered from usage in loading and unloading. This the owners thereafter failed to repair. The tarpaulins alone, assuming them to be sufficient, failed to offset this injury and defect, by reason of their improper battening. She was calked and overhauled in 1895, immediately prior to engaging in the ore trade. Witness Watterson, for respondent, testifies that after unloading at Buffalo she was examined by him at Cleveland, and in his opinion the oakum and butts had started, due to the storm which she encountered on her trip to Buffalo from Duluth. Doubtless this is true, but, as we have seen, the damage to the cargo was most apparent immediately under the respective hatches. It must therefore be found that the chief contributory cause of the damages sustained was the lack of sufficient protection to the cargo, in the construction of the hatches of the vessel. I am well satisfied by the evidence that she was not reasonably fit at the commencement of the voyage, laden as she was, to encounter gales of wind and storms that are known to prevail at that period of the navigable season. *Hughes*, Adm. p. 57; *The Aggi* (D. C.) 93 Fed. 484; *The Queen* (D. C.) 78 Fed. 155; *International Nav. Co. v. Farr & Bailey Mfg. Co.*, supra. The owner should have exercised great diligence to ascertain her condition, and to have guarded against the occurrence of damage to those who intrusted their property for

safe transportation to the vessel. Had such diligence been exercised, the security of the cargo, in my opinion, would not have been impaired.

The evidence shows that the amount of damaged grain was 6,126 bushels; that its market value at Buffalo at the time of loss was 79½ cents per bushel. This amount is based upon the average of the prices shown by the evidence to be the current market price at Chicago, with freight charges, etc., added to fix its reasonable value at Buffalo. This fixes its total valuation at \$4,877.82. It appears that the damaged grain was sold for \$1,546.81. These proceeds will be regarded as held by the shipbrokers, Brown & Co., as agents for libelants, and the libelants may recover the balance, \$3,331.01, with interest from January 9, 1897, together with costs. Let a decree be entered accordingly.

DAVIDSON S. S. CO. v. 119,254 BUSHELS OF FLAXSEED.

(District Court, W. D. New York. June 13, 1902.)

1. SHIPPING—DAMAGE TO CARGO—SEA PERILS.

Damage to a cargo of flaxseed on a voyage from Duluth to Buffalo, caused by water, *held* not to have been due to unseaworthiness of the vessel at the commencement of the voyage, but to dangers of the sea, against which the carrier was protected from liability by the conditions of the bills of lading; it being clearly shown that the vessel, which was new, had been recently overhauled, and was in every respect in the best condition and properly equipped, having the highest rating, and it being further shown that on the voyage she encountered unusually severe gales and heavy seas, which caused her seams to start, from the strain.

2. SAME—LIEN FOR FREIGHT—DELIVERY OF CARGO IN WAREHOUSE.

A vessel, by delivering her cargo of flaxseed in a warehouse at the end of the voyage, and taking a receipt therefor, which was retained until a libel was filed, did not thereby lose her lien on the cargo for freight.

In Admiralty. Suit to enforce lien on cargo for freight.

George Clinton, for libellant.

Harvey L. Brown, for claimant and respondent.

HAZEL, District Judge. A libel was filed in this proceeding against 119,254 bushels of flaxseed, cargo of the steamer Orinoco, by the Davidson Steamship Company, a Minnesota corporation, to recover the sum of \$1,646.87 freight. The cargo was consigned to Spencer Kellogg, of Buffalo, N. Y. It was taken on board the Orinoco pursuant to bill of lading at the port of Duluth, Minn., on or about November 6, 1900. The Orinoco had in tow the Abyssinia, a lake barge having a capacity of 25,000 bushels of wheat. The respondent, owner of the flaxseed, claims that 513 bushels of the cargo, valued at \$1.88 per bushel, were damaged when the carrying vessel arrived at her port of destination, by reason of her unseaworthiness when she commenced her voyage. He seeks to recoup in this action

¶ 1. Loss by perils of the sea, see note to *The Dunbritten*, 19 C. C. A. 465.

the sum of \$759.25. I have carefully examined the proofs, and have become satisfied that the vessel was reasonably seaworthy and fit to carry the cargo which she undertook to transport, and therefore the libellant is entitled to recover freight on the entire cargo delivered by it to the respondent at Buffalo, N. Y. I am well convinced that the libellant, owner of the ship, has maintained the burden which the law imposes,—to prove that the damage was sustained by causes over which the owner of the ship had no control, and for which, therefore, it cannot be held responsible. The question presented is whether, in view of the terms of the bill of lading, which provide for the delivery of the cargo in good order, "the dangers of the sea only excepted," the damage sustained to the cargo is attributable to such dangers, or to unseaworthiness of the ship at the inception of the voyage. The Orinoco was a first-class wooden vessel, built in Bay City, Mich., in 1898. She sustained damage in September, 1900, in consequence of a fire, and was immediately thereafter overhauled, examined, calked, and placed in good condition. She was rated A1 star,—the highest class that can be given an inland vessel,—and was so rated at the time she was laden with cargo consigned to the respondent. It is admitted by respondent that she was in all respects strong, staunch, and well fitted for carrying large quantities of iron ore or coal on the Great Lakes. The theory upon which respondent predicates unseaworthiness at the time of the commencement of the voyage is that she was not fitted for carrying flaxseed, by reason of defects of construction, which resulted in quantities of water leaking on the cargo through the hatch covers, and other places hereinafter more particularly specified, during gales encountered on Lakes Superior and Erie. The captain of the Orinoco testifies substantially that before leaving Duluth, on or about November 6, 1900, he made the usual and customary examination of the vessel to ascertain her condition. He says he gave special attention to the hatches. They were covered by extra-heavy No. 2 tarpaulins, which were bought and put in use after the fire in the preceding September. The mate secured the hatches before leaving, and he gives evidence on the trial corroborative of Capt. Starkey, and tending to show that the hatches and tarpaulins were in good condition. The efficiency of the tarpaulins which were designed to protect the cargo from leakage is not seriously disputed. In this respect, therefore, the duty of the vessel was properly performed. On the night of November 7th, when the ship and her consort were off Eagle Harbor, Lake Superior, 191 miles from Duluth, in consequence of the turbulency of the lake, produced by a gale, the Abyssinia broke the steel cable by which she was being towed. She anchored near the beach. She was taken off the succeeding morning by the Orinoco, assisted by a tug. The gale lasted 24 hours. Some witnesses put its length at 40 hours. The Orinoco pitched, tossed, and rolled from side to side. The velocity of the wind was 40 miles per hour. The witnesses for the libellant say that the gale was a very severe one, and the strength of the vessel was sharply tried. The seas came over her bow and flooded her deck at intervals while the storm lasted. When the vessel arrived at Sault Ste. Marie, a delay of four days ensued, by reason

of needed repairs to the Abyssinia's rudder, injured by the stress of the gale. The Orinoco suffered no harm. Two small pine plugs under the collar of the hawse pipe dropped out, which resulted in water reaching the chain locker. There was no appreciable damage to the cargo, however, from this cause, at any stage of the voyage. The Orinoco and consort left Sault Ste. Marie on or about the 16th of November, and reached Lake Erie uneventfully on the morning of the 21st, and passed the dummy light at the mouth of Detroit river with a 10-mile southwest wind, which increased in velocity. The vessel began to steer badly about 10 o'clock in the morning. The seas were running high. The Abyssinia again broke her cable. The evidence shows this gale to have been of great force and unusual severity. It was a hurricane. The Orinoco plunged and rolled both before and after the Abyssinia broke her cable. Much water came over her deck. She pitched and strained in her joints. The captains and others of the crew testified that in their opinion the velocity of the wind was 65 to 75 miles per hour, beginning at 2 p. m., to 8 p. m. The wind was from the west. The mate and the engineer, both of whom have had many years' experience on the lakes, say that the gale was the worst in their experience. The official forecaster of the signal service stationed at Buffalo testified that the storm was general, and placed the maximum velocity per hour at 80 miles. Its average velocity per hour, beginning at 2 p. m., was 69 miles; being 68 miles at 3 p. m., and over 60 miles thereafter until 8 p. m. The minimum velocity was 38 miles at 11 a. m. As a result of the straining of the Orinoco's joints, her oakum started in and around the hatches. When the vessel arrived at Buffalo it was ascertained that her cargo was damaged underneath the hatches, the boiler house, chain locker, and around the foremast. Her appearance indicated that her seams had opened in parts and places. Evidence was offered by the respondent which tends to show that bolts in the battens were too far apart; that this condition in the hatch covers made it possible for water to make its way over the coamings underneath the battens and tarpaulins. The battens were fastened 33 inches apart. I do not regard that it was essential to the seaworthiness of the ship that they should have been closer. The testimony justifies the assumption that the coamings, tarpaulins, and hatch covers were proper and adequate, and that the manner of fastening the battens was sufficient to keep the tarpaulins snug and tight. Surveyors were appointed by the claimant on the arrival of the vessel at Buffalo to ascertain the extent of the damage and the cause thereof. Their testimony tends to show, further, that a contributory cause was the faulty construction of the chain locker; that no proper provision was adopted to carry off, or prevent from entering the cargo, water which might penetrate the compartment. Much testimony was given by both sides on this point. It does not clearly appear that the water reached the cargo from the chain pipes by way of the chain locker. The libellant contends that it came through the hawse pipe during the Lake Superior gale which caused displacement of plugs in the hawse-pipe collar. Some of the water came from that source. It was prevented from getting into the cargo by temporarily stopping the flow.

No liability attaches from this alleged defect. It is shown with singular clearness that the master of the vessel performed his full duty in this regard. The displaced plugs were due to stress of weather. The gale on Lake Erie was extraordinarily severe. Indeed, it would have been astonishing if every conceivable part of the ship had proved impenetrable to the water which rolled over her. The claim of defect in the mast in the forward and starboard side, and that improper air or ventilator pipes aft contributed to the damage, does not persuade me. No decay extended over enough surface or was of such depth or character as to cause a leak in an ordinary storm. The mast was properly wedged. If water penetrated the cargo at that point, it is evident that it was produced by the straining and twisting of the vessel. Judge Wallace says in *The Sandfield*, 34 C. C. A. 612, 92 Fed. 664, that the test of seaworthiness is to be determined whether the vessel was reasonably fit for the contemplated voyage. He cites as authority *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. It is not claimed here that there was error in the management of the vessel through negligent omission or commission in the use of the vessel's equipment. The respondent rests his contention on the claim of unseaworthiness at the time of the commencement of the voyage. The proof, however, is abundant and satisfactory that the *Orinoco* at the time when she contracted to transport the cargo in question, and when she left the port of Duluth for the port of Buffalo, was reasonably equipped and fit to carry out her assumed obligations as common carrier. She was staunch, strong, and well equipped to withstand the ordeals of the weather prevailing at that season. I think that due diligence was exercised by her owner to make her in all respects seaworthy. Her officers and crew performed their full duty in her management. The case comes within the rule laid down by the supreme court of the United States in *The Silvia*, supra, as illustrated and explained in *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830. After the September fire already alluded to, the burned material was removed and replaced by new decks, beams, coamings, and ceilings. The decks were calked, seams repitched, the boiler, which was of steel, properly secured and riveted, and other extensive repairs made. This must be regarded as strong evidence persuasive of her seaworthiness. I find no analogy to the case of *The C. W. Elphicke* (tried before this court at the same term) 117 Fed. 279. In that case there was a manifest defect in the hatches at the commencement of the voyage, and the tarpaulins, necessary equipment of a seaworthy vessel, afforded no adequate protection.

No claim is made that the lien for freight cannot be held because of the conditional delivery of the cargo. Witness Farrell testified on this point that it is customary to elevate grain immediately on its arrival, and then a ticket is issued to the vessel agent, who indorses it on the issuance of the warehouse receipt, which is delivered to the consignee upon payment of the freight. The warehouse receipt was not delivered to the consignee because of his refusal to pay freight charges. The libel was filed immediately, and the marshal delivered possession of the cargo to the consignee on filing a stipulation. On the facts proved, the lien for freight had never been waived or abandoned. Costello

v. 734,700 Lathes (D. C.) 44 Fed. 105; The Giulio (D. C.) 34 Fed. 909.

A decree may be entered for the full amount of freight, \$1,648.80, with interest from November 24, 1900, besides costs.

MAY et al. v. KEYSTONE YELLOW PINE CO.

(District Court, E. D. Pennsylvania. June 27, 1902.)

No. 72.

1. SHIPPING—GENERAL AVERAGE—LOSSES SUBJECTS OF COMPENSATION.

Where the rudder of a ship was partly torn loose in a gale at sea, and it became necessary to cut it away to prevent its beating a hole in the ship during the storm, its value in its damaged condition before it was cut away is a proper subject for allowance in general average.

2. SAME—WAGES AND PROVISIONS OF CREW.

The wages and provisions of a crew during the time they were engaged at sea in constructing a jury rudder after it became necessary to cut away the broken rudder to save the ship in a storm are proper items for allowance in general average.

In Admiralty. Suit on general average bond.

Horace L. Cheyney and John F. Lewis, for libellant.

Theo. M. Etting, for respondent.

J. B. McPHERSON, District Judge. This controversy concerns two items of the general average adjustment that was made in consequence of certain losses sustained by the bark Guy C. Goss during a voyage from the port of Vancouver to the port of Philadelphia. Not long after the ship had rounded Cape Horn, she encountered severe weather, and during the course of the gale, and in consequence thereof, her rudder was torn partly loose, and could no longer be used for steering the ship. For 15 or 16 hours efforts were made to repair the injury, but, owing to the strength of the wind, and to the heavy sea that was running, it was found impossible to make the damage good, and, as the loosened rudder threatened to beat violently against the rudder post, and thereby to cause the ship to spring a leak, the captain decided to cut the rudder away. This was accordingly done, and of course rendered the vessel helpless. All hands were immediately set to work to construct a jury rudder, and meanwhile sails were set to steady the ship. In this condition she drifted about for seven days, while the temporary rudder was being made. This being finally accomplished, the ship proceeded upon her voyage, and arrived safely at the port of Philadelphia. Here the customary protest was made, and the respondent, who was the consignee of the cargo, gave a general average bond, upon which the present action has been brought. The adjuster allowed two items with which the present dispute is concerned—First, the estimated value of the rudder in its damaged condition just before it was cut away; and, second,

¶ 1. General average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357.

the cost of the wages and provisions of the crew during the seven days while the jury rudder was being constructed.

With regard to the first item, the respondent contends that the rudder had ceased to have any value whatever at the time it was cut away, and, therefore, that no allowance of any amount should be made. I agree with this conclusion if the fact were as supposed, but I am unable to assent to this view of the testimony. I think it appears with sufficient clearness that, if it had not been for the storm to which the vessel was exposed at the time the rudder was sacrificed, it could easily have been restored to its former condition; in other words, it had some value at the time it was cut away, and this is sufficient to justify an allowance in general average for such value. Judge Butler decided the point expressly in this district in *The Margarethe Blanca* (D. C.) 12 Fed. 723 (I refer to his opinion for a satisfactory discussion of the question), and his decision was affirmed on appeal: *Id.* (C. C.) 14 Fed. 59. See, also, *The Star of Hope*, 9 Wall. 228, 229, 19 L. Ed. 638, and *Gourl. Gen. Av.* 174 et seq. I do not understand that any objection is made to the amount estimated by the adjusters on this account, if any allowance at all is to be made therefor. The argument of the respondent is addressed solely to the question whether the cargo is liable to contribute anything whatever for the loss of the rudder.

I think, also, that the second item was properly allowed by the adjusters. Undoubtedly, if the ship had been able to proceed, and had borne away to a port of refuge in order to repair the damage caused by the storm, the wages and provisions of the crew during the period of her deviation to the port of refuge and her return to her course would be a proper subject for allowance in general average (*Hobson v. Lord*, 92 U. S. 397, 23 L. Ed. 613; 14 Am. & Eng. Enc. Law, 980); and I am unable to see any sufficient reason why a similar allowance should not be made for the period during which the vessel was delayed at sea, making the same repairs by the aid of her own crew. In the present case, the cost is much less than if she had gone to Buenos Ayres, which was the nearest port, even if she had been able to proceed in her rudderless condition. It seems to me that the cost of wages and provisions during this period is an extraordinary expense incurred by the ship upon behalf of the common enterprise. It was a necessary expenditure, while the ship was being put into condition to prosecute the voyage, and, upon the principles that govern this branch of the law of general average, I think the allowance was unquestionably correct.

A decree may be prepared in favor of the libellant.

GERMAN INS. CO. et al. v. HEARNE.

(Circuit Court of Appeals, Third Circuit. July 11, 1902.)

Nos. 24-32.

1. INSURANCE—CONSTRUCTION OF CONDITIONS IN POLICY—WORKING OF MECHANICS.

A clause of a fire insurance policy providing that it shall be void "if mechanics be employed in building, altering, or repairing the within described premises for more than 15 days at any one time," unless otherwise provided by agreement, is reasonable and valid, and must be given effect as limiting by agreement the alterations or repairs which may be made without special agreement with the insurer, and without avoiding the policy, to such as can be completed within 15 days, even though the work done is reasonably necessary for the ordinary repair and preservation of the property.

2. SAME—REPAIRING—AVOIDANCE OF POLICY.

Under such a clause, work done on an insured building in rubbing and polishing the woodwork, regliding light fixtures, reburnishing, plumbing, and repairing defects in the plastering and spouting, is "repairing," and its continuance for 24 days without notice to the insured, prior to the destruction of the building by fire, during which time 351 days work had been done, rendered the policy void.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

George B. Gordon and Walter C. Rodman, for plaintiffs in error.

Willis F. McCook, for defendant in error.

Before GRAY, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

J. B. McPHERSON, District Judge. Each of these writs of error raises the same question, and they may therefore be disposed of together. The evidence upon which the question arises was not disputed, and may be summarized as follows:

In December, 1900, Frank I. Hearne, the plaintiff below, bought a large and handsome residence in the city of Pittsburgh. At the time he was living in a hotel in that city, and before he moved into the house that he had purchased, he desired to put it in thorough order, and to make some minor improvements therein. No structural change was contemplated, and none was made. A firm of contractors undertook to do whatever Mr. Hearne directed, and upon February 4, 1901, the work was begun. The kind and quantity of labor and material that was done and used does not seem to have been questioned at the trial. The total amount of the various bills was \$2,712.04, and in this sum is included payment for 351 days of labor. The following quotation from the brief of counsel for the plaintiffs in error is no doubt substantially correct, and will indicate the kind and amount of work and material:

"The plasterers' bill for material and 164 days' labor amounted to \$790; the carpenters' bill for material and 85 days' labor amounted to \$474.79; the plumbing bill for material and 21½ days' labor amounted to \$276.23; the

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 744, 745.

electricians' bill for material and 8 days' labor amounted to \$45.48; the tinnerns' bill for material and 3 days' labor amounted to \$37.30; the steam fitters' bill for material and 10 days' labor amounted to \$98.57; the bricklayers' bill for 1 day's labor amounted to \$5.55; the tile man's bill for material and 10 days' labor amounted to \$95.50; the weather strip man's bill for material and 17½ days' labor amounted to \$225,—and, in addition to this, there were about thirty days' wages of calciminers, and five painters for a part of a day, which went into the decorators' bill of \$500 for materials and labor up to the time of the fire."

Early in the morning of February 28th, a fire broke out, and destroyed the house. It was insured for \$50,000 in the companies that are now plaintiffs in error, and suits were brought upon the policies to recover for a total loss. Each policy contains the following provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if mechanics be employed in building, altering, or repairing the within described premises, for more than fifteen days at any one time."

No such agreement was otherwise made or waived, and the company defended under this provision, and, among other requests, asked the court to charge the jury as follows:

"(1) Under all the evidence and the pleadings, the verdict should be for the defendant.

"(2) The policy sued on in this case provides that if mechanics be employed in building, altering, or repairing the insured premises for more than fifteen days at any one time, the policy shall be void, unless otherwise provided by agreement indorsed or added to the policy. As it is the undisputed evidence in this case that there was no such agreement indorsed on the policy, and as it is further the undisputed evidence that mechanics were employed in altering or repairing the insured premises for more than fifteen days at one time, at and immediately prior to the fire, the verdict should be in favor of the defendant."

"(6) If the jury find from the evidence that mechanics were employed in altering or repairing the insured premises for more than fifteen successive working days at any time between the date of the policy and the date of the fire, there being no such agreement indorsed on or added to the policy, their verdict shall be in favor of the defendant."

The court refused these points, referring the jury to certain instructions contained in the general charge. The portion of the charge referred to by the learned trial judge is as follows:

"I am asked to charge you, as matter of law, that the work done by the mechanics and other persons employed in this building amounted to such altering or repairing of the building as violated the condition of the contract, and prevents recovery by the plaintiff. I decline so to instruct you under the evidence in the case. That evidence I submit to you, with the following instructions:

"The particular clause here relied on is not to be construed as preventing the owner of the premises insured from renovating the usual and ordinary effects of use and wear, and if the renovation is such as is customary and proper in a house of the kind and quality insured to preserve it, and keep it in fit condition for use, such work is not prohibited by the policy; in other words, the clause in question cannot be supposed to be intended to interdict the insured from the maintenance of his dwelling house in the condition in which it was when the policy was issued, and the preservation of it in such condition.

"If, then, what was done in the plaintiff's dwelling house did not involve any building or rebuilding, or any alteration of any part of the structure or

body of the house, and did not go beyond what was incidental to the ordinary repairing necessary for its preservation, there was no violation of that condition of the policy relied upon as avoiding it. It will be for you to determine from the evidence whether what was done in this instance went beyond such ordinary repairs for the preservation of the premises. If you find from the evidence that what was done did go beyond what I have just indicated, that would be a breach of the condition of the policy, and there can be no recovery. But if what was done did not go beyond what was required for the ordinary repair and preservation of the house, the plaintiff may recover. The question of fact, as to the character and extent of the work, is for the jury, under all the evidence."

The refusal of the points and these instructions are complained of by proper assignments of error, and present the question that is now to be considered.

The foregoing portion of the charge of the learned judge would no doubt have been correct in a suit brought upon an earlier form of the fire policy, which contained the unqualified provision that the contract should be void if mechanics were employed about the house in making alterations or repairs. When this provision made its appearance in policies of fire insurance, and suits were brought that required the courts to determine the scope of this language, serious objections were urged against construing it without qualification, and it was generally—perhaps everywhere—held that a reasonable construction must be put upon the clause,—a construction that would not be repugnant to the nature and purpose of the contract, or inconsistent with the proper protection that the policy was intended to afford. In one of the early cases upon this subject (*James v. Insurance Co.*, 4 Cliff. 272, Fed. Cas. No. 7,182), Mr. Justice Clifford, in the course of an elaborate discussion, stated the reason for such a construction in the following language:

"Small repairs, such as taking out a broken slate and putting in a new one, or replacing a broken pane of glass, or stopping a leak in a chandelier or other gas fixture, or mending a leaky cistern, or repairing a defective chimney, stovepipe, or furnace, it is properly conceded, may be made; but the effect of that concession is to admit that the condition in question is subject to a reasonable construction, not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property. Necessary repairs of the house, whether small or great, could not be made by the working of mechanics in the premises without avoiding the policy if it be held that the condition under consideration applies in such cases, as the language of the condition, if taken literally, would forbid everything of the kind; but we are of the opinion that the condition, if construed to exclude all rights of making such repairs, would be void, as repugnant to the nature and purpose of the contract as expressed both in the written and printed words of the policy. Stipulations of the kind, however, in a policy of insurance, may be held valid, if, by a reasonable construction, the objection to the literal operation of the instrument may be avoided, even though, if taken literally, they would be invalid. Authorities to support that proposition do not appear to be necessary, as the rule is well established that courts of justice, in the construction of all written instruments, will seek to uphold the instrument, if it can be done by a reasonable construction. *Harper v. Insurance Co.*, 17 N. Y. 198.

"Apply that rule to the present case, and it follows, in the opinion of the court, that the condition in question does not prohibit the insured from remedying defects in the premises or machinery insured which arose subsequently to the granting of the policy without his fault, or which were wholly unknown to him at that time, provided such defects were of a character to

endanger the safety of the property insured, or to render the same untenable and unsafe, and unfit to be occupied for the purposes and uses described in the policy, unless it appears that the repairs made were unreasonable, and increased the risk, or that the fire was in some respect attributable to the repairs, or to the work done in making the repairs."

Other courts took the same view, and, so far as we are advised, this construction prevailed with little or no dissent. The following statement concerning the reason for inserting the provision in the policy, and for the restriction placed upon it by the courts, from May, Ins. (4th Ed.) § 240, is amply supported by the cases quoted in the note:

"Working of Carpenters—Repairs. Upon the same general principles, when, from the character of the building insured, and the use made of it, it is necessary to have workmen constantly engaged in repairing, in order to keep it in proper condition for the business done therein, the employment of such workmen is not a breach of the condition that 'working of carpenters,' &c., altering or repairing, will vitiate the policy. Such condition has for its object to prohibit such hazardous use as is generally denominated a 'builder's risk,' which arises from placing the building in the possession or under the control of workmen for alteration or repairs, but does not refer to such indispensable repairs as are necessary to the proper conduct of the business to which the building is appropriated."

It will be observed that the learned trial judge construed the clause contained in the policies now being considered as if it were identical with the clause construed by the foregoing cases, and it is this construction that is complained of as error. After careful examination, it seems to us that the complaint is well founded. In our opinion, the clause now before the court differs materially from the clause construed in the cases by which the charge of the trial judge was evidently directed, and requires a different construction to be placed upon it. The qualification imposed upon the earlier provision by Mr. Justice Clifford and by other judges resulted in this situation: Since reasonable repair was to be permitted,—such repair as was necessary properly to preserve the building in such condition as the policy found it, or to allow it to be used and enjoyed in a due and customary manner,—it was clear that in nearly every instance the question must be submitted to a jury whether what had been done to the building was reasonably necessary for the purposes mentioned, or whether it had exceeded that limit. As an inevitable consequence, disputes continually arose, and it became plain that the provision forbidding all repairs, thus construed to mean only repairs unreasonable in extent, was of little value in preventing controversies upon this branch of the contract. Accordingly, the clause now under consideration was substituted, with the evident purpose of getting rid of a fruitful source of friction and litigation. In effect, the companies said to the insured:

In order that there may be no room for question in the future concerning the character and extent of the work that may be done upon the insured premises, we agree that you may do whatever you please to the building, whether the change would be accurately described as building, or as altering, or as repairing, without asking our consent, and without being obliged to consider whether or not the risk is thereby increased; and you may do this for fifteen days. But if the work you do is so extensive that it requires more than fifteen days to finish it, then we require you to give us notice, in order that we may take

such steps as we may then see fit. We shall then have knowledge of what you are doing, and we can decide whether it may go on, or whether it is so dangerous as to require us to cancel the policy altogether, or to demand that the increase of hazard shall be compensated by an increase of premium.

This, we think, is the true meaning of the clause in question. It substitutes the much more certainly applied test of time for the test of reasonableness, and is a change in the contract that seems to us to be commendable, and worthy of support. There can rarely be room for a serious dispute concerning the length of time employed in doing a given work, while it is every day's experience and observation that there are frequently at least two conflicting standards of reasonableness. It seems to us, therefore, that the learned judge fell into error in supposing that the policies in question required him to ask the jury to determine whether the work done by the defendant in error was merely such work as was necessary for the ordinary repair and preservation of the property, or whether it exceeded this limit. To our minds, the meaning of the provision already quoted is plain and clear, as we have endeavored to explain; and it only remains to add that the work done by the mechanics employed for Mr. Hearne was certainly "repairing," even if it were neither "building" or "altering." The scope of the last two words need not now be determined. The character and extent of the changes are thus described in the brief of the counsel for the defendant in error, who may be trusted not to exaggerate the description:

"Not a brick, a stone, or a timber was added to or taken from the building. Neither the roof, walls, floors, partitions, or foundations were altered in any manner or added to. Nothing of the structure or frame of the building was disturbed, excepting that a small end of a board in one floor, provided for that purpose, was lifted by a plumber, to examine a pipe beneath it. The principal work done by the insured was the rubbing and polishing of the hardwood floors, stairway, wainscoting, and woodwork throughout, preparatory to renewing or freshening the finish. Cracks had appeared in a number of the walls and ceilings, which required to be filled up or cut out, and a ceiling was so badly cracked that it was deemed inadvisable to attempt to repair it, and it was replaced. This, of course, required the redecoration of those walls and ceilings, which work was contemplated, and the decorators had come to work with their materials, but had not commenced their work beyond some calcimining in the servants' quarter in the third floor. A bowl in one of the bathrooms was cracked, and replaced by a new one, and the exposed parts of the plumbing were being reburnished and renickedled, so as to freshen it, but no change was made in the plumbing system. The electric and gas chandeliers were tested, insulation renewed where required, and the chandeliers were reburnished, but no change was made in the electric wiring of the house, except to change the position of two small electric light brackets on the wall. The only alteration or addition made to the entire building was so insignificant as to be immaterial, namely, a small chair board, about 8 inches high, was put in the servants' rooms, the board being made and shaped outside of the building, and was simply put in its place in the room. A tinner examined the gutters and spouting of the building, and found leaks in some of the spouting, which was renewed with new spouting."

The charge of the court also contains an excellent summary of the changes, but it need not be quoted. It seems to us impossible to say that "repairing" does not accurately describe work of this character and extent, and indeed we do not understand the learned trial judge to

differ from us upon this point. He also held that this was "repairing," but believed it might be of such a character as to be permitted by the policy, even after the expiration of 15 days.

The clause under consideration is of comparatively recent date, and only a few cases have been found in which it has been examined by the courts of last resort. None of them decides the precise point raised by this writ of error, although we think that the reasoning of *Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475, justifies us in citing that case as affording support to the conclusion we have reached.

The other question raised by the record need not be considered. For the reasons given, we think the undisputed evidence would have justified the circuit court in affirming the first point of the defendants below, by which binding instructions in their favor were asked, and it is therefore ordered that the judgment in each of these cases be reversed, without a new venire.

In re SEARS et al.

(Circuit Court of Appeals, Second Circuit. July 10, 1902.)

No. 146.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—AMENDMENT OF PETITION.

General orders in bankruptcy No. 6 by implication limits the power to allow amendments to a petition in involuntary bankruptcy to the single case in which an earlier act of bankruptcy than the one charged is sought to be incorporated.

Petition to Review an Order of the District Court of the United States for the Western District of New York.

In bankruptcy. This is a petition to review an order of the United States district court for the Western district of New York in bankruptcy, granting the petitioning creditors leave to amend their petition for the adjudication of Sears, Humbert & Co., as bankrupts, by inserting an additional act of bankruptcy. The petition for adjudication was filed October 10, 1901, and October 23, 1901, another petition for adjudication was filed by other creditors in the district court for the Southern district of New York. Subsequently the creditors in the first petition moved for leave to set up in their petition the act of bankruptcy alleged by the creditors in the second petition. See 112 Fed. 58.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The order allowing an amendment of the petition by the insertion of a further act of bankruptcy was erroneous, because it clearly appeared that such act of bankruptcy was not an earlier act than that first alleged, but was later. The case is controlled by the terms of general order No. 6, and, as that makes explicit provision for it, an amendment not within its terms is unwarranted. Except for that provision, such an amendment would have been permissible, and its allowance a reasonable exercise of judicial discretion; but the provision, by implication, limits the power of amendment to the single

case in which an earlier act of bankruptcy is sought to be incorporated into the petition.

We notice that the application to amend was founded upon an averment which was untrue, viz., that the new act of bankruptcy was an earlier act than the one which had been set up originally. The court below was probably misled by this misstatement, and the expenses of this petition of review thereby imposed upon the opposing creditors. It may be that facts existed in justification of the averment that do not appear in the application. We suggest to the court below that action should be taken to ascertain whether this misstatement was a bald falsehood, and, if found to be without any basis of fact, to discipline the attorney who prepared the application, and who advised or permitted his clients to verify the averment, unless he can exonerate himself from culpability.

The order is reversed, with costs to be paid by the respondents.

WEST COAST SAFETY FAUCET CO. v. JACKSON BREWING CO.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1902.)

No. 717.

1. PATENTS—ANTICIPATION—FAUCET AND BUSHING FOR BARRELS.

The Anthony & Savage patent, No. 468,144, claim 4, for a faucet-bushing and valve for barrels, is void for anticipation; the device being a combination of old elements, resulting merely in the aggregation of their respective functions, and producing no new result, and no such improvement in the method of operation as to amount to invention.

Appeal from the Circuit Court of the United States for the Northern District of California.

This is a suit in equity for the infringement of claim 4 of letters patent of the United States No. 468,144, granted to Mark Anthony and William C. Savage on February 2, 1892, for an improvement in thimbles and bushing for barrels. The appellant, as assignee of the right, title, and interest of the patentees in and to said letters patent for the Pacific Coast territory, charges the appellee with using and operating within such territory bushings and thimbles for barrels, containing, embracing, and embodying the invention and improvement patented in and by said letters patent No. 468,144; that such use constitutes an infringement of the appellant's rights and results in large damages to appellant, wherefore an injunction restraining the use of such bushings and thimbles by the appellee is prayed for, and a decree for such damages as have already accrued to the appellant through such use by the appellee. The appellee sets up the general defenses of anticipation, want of invention, and noninfringement. In the court below, judgment was entered for the appellee (respondent therein), and a decree made dismissing the complainant's bill, upon the ground that the patent in suit was anticipated. This action of the trial court is assigned as error by the appellant.

N. A. Acker, for appellant.

Frank J. Kierce and William F. Booth, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

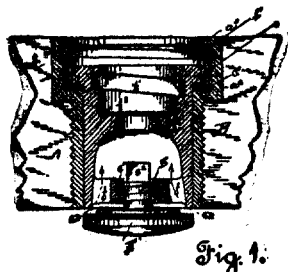
MORROW, Circuit Judge (after stating the facts as above). The claim of the patent in issue in this suit is as follows:

"(4) The combination, with a barrel, of the faucet-bushing, said bushing having the inner screw-threaded end, and the valve provided with the screw-threaded stem, as and for the purpose set forth."

The invention sought to be patented relates to certain improvements in thimbles and bushings for beer barrels or other liquid-containing receptacles, and is stated in the specification to consist mainly in providing a thimble for attachment within the tap-hole of barrels free of internal screw-threads throughout, thereby presenting smooth, free inner walls, thus allowing for the bushing fitting freely therein, and obviating liability of the former becoming clogged with dirt, pitch, or the like. It is stated that heretofore it has been customary in some cases to screw the bushing within the thimble, for which purpose it became necessary to screw-thread the bushing and internal walls, which not only prevented the liability of clogging, but also had a tendency to break or damage the threads, consequently making it difficult to insert the bushing without recutting the screw-threads. And further the invention is said to consist in providing a simpler, less complicated, less expensive, easier, and more effective valve for the bushings than any heretofore known. It appears that it was formerly the practice, after a beer barrel had become empty, to pitch or char the interior of the barrel before refilling it, to prevent the souring thereof; that the pitch was used in a heated condition, and the surplus remaining after the surface was entirely covered was allowed to run out of the bung or tap-hole; that for this purpose the bushing carrying the valve was required to be removed from the barrel, and the screw-threads in the wood were thus exposed and became filled with pitch, making it a very difficult matter to re-insert the bushing, with its valve, into the tap-hole of the barrel. The use of the thimble in the patent in suit, to which the bushing was attached, instead of directly to the walls of the barrel, is stated to have provided against the clogging from the pitch. But since the date of this patent other methods of treating the interior of barrels have been introduced, omitting the use of pitch, and the usefulness of the thimble has thereby become greatly lessened. It is contended by the patentees, however, that the value of their improvement in the bushing and valve is in no degree affected by the use or nonuse of the thimble; that the thimble may serve an additional function as an outer screw-threaded wall, or as a convenient means for attaching the bushing and valve to the barrel, but it in no way aids the bushing and valve in the operation of drawing beer from the barrel. Their claim of infringement is therefore entirely confined to the improvement in the bushing and valve, described and illustrated as follows:

"In Fig. 1 we have shown a bridge, E, in the lower end of the bushing-stem, which is provided with the central screw-threaded opening e', and within which works the screw-threaded stem, e², of valve E'. Within the bridge-wall we form the exit-ports, f, through which the liquid flows when the valve is opened. The upper portion of the bushing is provided with the raised annular projection, f³, and inclined grooves, f', through which passes and works the faucet set forth and described in letters patent No. 339,252.

granted Mark Anthony on the 6th day of April, 1886. As set forth in said patent, the lower end of the faucet-key is formed triangular, and fits upon the triangular valve-stem. As the faucet is screwed downward within the bushing, the valve is opened by turning inward, while the same is closed by screwing the faucet upward in order to remove the same from within the bushing. When the valve is opened, the liquid flows between the inner or upper face thereof and the end of the bushing through the passageways or ports, f, and through the faucet-openings. Inasmuch as the faucet or key used is the same as that set forth in the aforesaid letters patent, we have not shown the same herein."



The patentees claim to have been the first to produce a faucet-bushing having a vertically-moving valve secured to its lower end; the upper end of the bushing having inclined grooves therein, and an annular seat intermediate the grooved end of the bushing and the valve end thereof; the whole so arranged that the faucet joint is made the moment the valve joint is destroyed. It is contended that this improvement is of great value, as, the first device having a vertically-moving valve in connection with the described bushing, that could be utilized without leakage of the liquid occurring. Giving to the patent in suit, then, all the virtue that is claimed for it, we have a faucet device which makes and breaks its bushing seat simultaneously with the opening and closing of the valve, thereby preventing leakage when in operation. Has this device been anticipated in its result and method of operation? The valve with a screw-stem is an old device, found in many prior patents. The faucet engagement with the bushing, then, is the only thing left to be considered. The particular advantage here claimed by the appellant is the quick action of the device, by which by a quarter-turn of the faucet a quick faucet-joint results, and the consequent avoidance of leakage. This is accomplished by inclined grooves in the outer end of the bushing, an annular intermediate seat, and the faucet-stem with lugs thereon. The seating of the faucet on its seat within the bushing appears to be the important feature. The more quickly it is done, the more effective is its operation. In the model introduced, claimed to have been constructed from the patent in suit, the valve is opened and the faucet-stem seated in the bushing by a quarter-turn of the faucet. This operation is accomplished by the pitch of the threads of the screw-valve in combination with the thickness of the rubber washer interposed between the faucet and its seat. If the threads of the screw-valve are steep, the revolution of the valve is correspondingly short and the operation quick; and, if the washer between the faucet and its seat is thick, the distance for the screw-

valve to travel is short, and the operation is correspondingly quick. Hence it follows that the pitch of the threads of the screw-valve and the thickness of the washer between the faucet and its seat determine the turn of the faucet, and the length of time required for the performance of the operation. Neither of these elements is new, and no invention was required to bring them into play in the combination. The faucet and bushing engagement by means of inclined grooves and lugs appears in two prior patents issued to Anthony, one of the patentees of the device in controversy, and in both of those patents is also found an intermediate annular faucet seat or projection. These patents contained a rotary disc-valve instead of the vertically-moving screw-valve of the patent in controversy. It would appear that each of the elements of the device covered by this patent has been used in prior patents, though not in the same combination with each other. The result obtained by the combination of these elements selected from old devices is a mere aggregation of their respective functions,—the carrying forward of an old idea to a greater degree of perfection, perhaps, than had theretofore been attained in the art, but not rising to the dignity of invention, according to the requirements of the patent law. *Wright v. Yuengling*, 155 U. S. 47, 54, 15 Sup. Ct. 1, 39 L. Ed. 64. "To sustain a patent on a combination of old devices, it is well settled that a new result must be obtained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Double Pointed Tack Co. v. Two Rivers Mfg. Co.*, 9 Biss. 258; *Wringing Machine Co. v. Young*, 14 Blatchf. 46, Fed. Cas. No. 9,508." *Brinkerhoff v. Aloe*, 146 U. S. 515, 13 Sup. Ct. 221, 36 L. Ed. 1068. The only patentable distinction possible in the device in question is the quick seating of the faucet, and that is really a question of degree, dependent upon the pitch given to the threads of the screw-valve, to open and close the liquid passage, and the thickness of the washer between the faucet and its seat. This idea is contained in prior patents, and its adaptation to the combination in question requires merely the knowledge of a skilled mechanic, and not the exercise of the inventive faculty.

The decree of the circuit court is therefore affirmed.

SCHLICHT HEAT, LIGHT & POWER CO. v. ÆOLIPYLE CO.*

(Circuit Court, S. D. New York. August 4, 1902.)

1. PATENTS—VALIDITY AND INFRINGEMENT—METHOD AND APPARATUS FOR PRODUCING COMBUSTION.

The Schlicht patents, Nos. 556,280, 556,282, 556,283, and 556,285, all relating to an improved method of producing combustion, and apparatus therefor, as to the method shown and the apparatus in general were not anticipated, and are valid, although many of the claims are mere repetitions of others, with no distinction between them in a patentable sense. Claims 5, 6, and 13 of No. 556,280, which is the primary patent, claim 2 of No. 556,282, and claim 1 of No. 556,283, are for that reason invalid. Claims 3, 4, 8, 10, 12, 14, and 22 of No. 556,280, and claim 1 of No. 556,282, *held* infringed by the device of defendant, when located in use at a substantial distance from the combustion chamber. Claims 1 and 2 of No. 556,285, as limited by the prior patents, *held* not infringed.

In Equity. Suit for infringement of letters patent Nos. 556,280, 556,282, 556,283, and 556,285, all relating to a method of producing combustion, and apparatus therefor, granted to Paul J. Schlicht. On final hearing.

Robert N. Kenyon and Pennington Halsted, for complainant.

Frederic H. Betts, James R. Sheffield, and James J. Cosgrove, for defendant.

COXE, Circuit Judge. This is an action to restrain the infringement of four letters patent, numbered, respectively, 556,280, 556,282, 556,283, and 556,285, granted to Edmund Francis Eldredge, as assignee of Paul J. Schlicht, for improvements in the art of producing combustion and apparatus therefor.

No. 556,280 is the primary patent. It relates to an improved method of producing the greatest amount of heat or light from a given quantity of fuel and to means for making it practically effective without altering materially existing apparatus for producing combustion. Schlicht says that his method consists in causing air to flow to a combustion chamber in contact with a current of the hot products of combustion escaping therefrom and flowing in an opposite direction, whereby the air is heated and its rate of flow retarded before it reaches the combustion chamber, the quantity of air fed to the combustion chamber being regulated according to its needs. This result is accomplished by means of a deflector placed in a chimney or flue whereby the air is introduced and given an initial flow towards the combustion chamber. The invention in all its details is based upon the discovery "that a current of air and a current of combustion products will flow in contact without any substantial intermingling, and that if a current of air is properly introduced into a chimney or flue through which hot products of combustion are escaping the current of air will flow to the place of combustion in a direction opposite to that of the current of products." The specification describes and the drawings illustrate various devices for causing the downward or inward flow of air. Different forms of deflectors are described but they are always located at or near the top of a tall chimney or stack so that the air

* For opinion on motion to modify, see 117 Fed. 1003.

current when once established will maintain itself and during its extended passage will absorb heat from the escaping products of combustion until it reaches the fire chamber in a heated state.

The specification says:

"In practice the air will usually be admitted at or near the top of the flue; but its admission is not necessarily limited to this position. The advantage of introducing the air at the top of the flue is that the current of air is subjected to the action of hot gases throughout its entire length, and thus its temperature is raised much higher than would be possible if it were introduced at a lower point."

The essence of the invention is the continuous flow in contact, through a chimney or flue, of the oppositely moving currents for a considerable distance, sufficient, at least, to maintain each current in a substantially distinct condition during its journey to and from the combustion chamber. It is clear, therefore, that the introduction of the air at a point where it passes directly to the combustion chamber or at a point where it enters a short and tortuous passage in which the maintenance of separate currents is doubtful, if not impossible, will not be an infringement of the Schlicht method.

The claims alleged to be infringed are numbered 3, 4, 5, 6, 8, 10, 12, 13, 14, and 22.

The third claim is as follows:

"The improvement in the art of producing combustion which consists in causing a supporter of combustion to flow to a place of combustion in contact with a current of products of combustion flowing in a direction opposite to that in which the supporter of combustion is moving, said contact continuing throughout a substantial part of the length of said current of products of combustion, substantially as set forth."

The claim uses the indefinite article in referring to the fire chamber, intending to cover a structure where the air is carried to a different fire chamber from the one that furnishes the hot products of combustion; in this respect the claim differs from the fourth claim which is intended to cover an apparatus where the air current is carried to the same chamber from which the products of combustion are escaping.

The other claims, with slight verbal differences, are repetitions of the third claim, the design apparently being to cover every shade and shadow of distinction based upon the kind of fuel used, the character of the supporter of combustion, whether air or some other fluid, the manner of feeding it to the fire chamber by gravity or otherwise and various other unimportant details. The specification contains 4,300 words of description and 22 claims. When it is remembered that it relates to a process which is carried out by the simple expedient to placing a deflector or damper in a flue in such a manner that the entering air is given an initial push towards the fire pot, the court may, especially in the month of August, be pardoned for suggesting that the inventor might, perhaps, have omitted a word or two here and there, and still have made clear his contribution to the art.

Patent No. 556,282 relates to an apparatus for carrying out the method of producing combustion described in the fundamental patent. This apparatus, so far as it is now in controversy, consists of a jacket so arranged as to heat the air before it enters the chimney proper.

After the air is heated by passing between the jacket and the outer wall of the chimney it reaches the deflector and is directed down the chimney to the combustion chamber.

Claims 1 and 2 are involved.

Claim 1 is as follows:

"The combination with a chimney or stack of means for causing a current of air to move downward within said chimney or stack in contact with the products of combustion, and an air-heating device adapted to receive heat from the combustion products within the chimney or stack and to deliver heated air to said means, substantially as set forth."

Claim 2 differs from claim 1 by the substitution of the words "means for initiating a downwardly moving current of air" for the words "means for causing a current of air to move downward."

Patent No. 556,283, relates to another form of apparatus for carrying out the Schlicht method and consists of an air inlet pipe, which is sufficiently described in the only claim involved, which is as follows:

"The combination with a chimney or stack of an air-inlet pipe extending into the chimney or stack and adapted to introduce a current of air and direct it towards the place of combustion, substantially as set forth."

Patent No. 556,285, so far as the same is in controversy, is intended to cover the Schlicht device in every variety of size and shape as "a new article of manufacture."

Claims 1 and 2 are involved; they are substantially similar.

Claim 1 is as follows:

"As a new article of manufacture, a chimney attachment provided with means for causing a current of air to flow downward within a chimney or flue, substantially as set forth."

The title of the complainant to these patents and its right to sue is sufficiently established.

The defenses are noninfringement and invalidity of the patents by reason of anticipation, lack of patentability and the inoperative character of the apparatus described and shown. So far as the record discloses the prior art, Schlicht was the first to discover that a current of air can be introduced at or near the top of a furnace chimney and made to flow downward to the combustion chamber, in direct contact with a current of the hot products of combustion flowing in an opposite direction, and delivered, as a supporter of combustion, in a heated condition above, instead of below, the fire bed. Schlicht states that he was the first to apply this process to lamp chimneys, but in this he is in error, for the proof shows that several years prior to his invention an experiment was made which demonstrated the success of the method when limited to lamps. The court cannot, however, regard this as an anticipation of the invention as applied to stoves and furnaces for producing heat and power. Assuming the information contained in the "Elementary Lessons" to be substantially that of the patent as applied to lamps, it by no means follows that the patent is invalid in its application to furnaces. It required the exercise of the inventive faculty to adapt the knowledge imparted by "Experiment 61" of the book in question, to produce the important and paramount results referred to in the specification of the Schlicht patent. If the patentee,

in his anxiety to expand his patent to cover not only the entire field but adjacent fields, has attempted to seize more than he is entitled to it is no reason why he should be evicted from premises which are clearly his own. The simple experiment referred to would not have suggested to a mechanic the application of the principle thus demonstrated to furnaces, and even if it had done so he would not have known how to apply it. To construct a comprehensive and successful system of heating from a rudimentary apparatus consisting of a candle, lamp glass, cigar and piece of cardboard, requires an exercise of inventive skill. The best reference of the defendant is the patent granted to Howard, in 1887, for a "smoke and gas consuming attachment for stoves and furnaces." The device is placed at or near the smoke collar of the stove or furnace and is designed to aid combustion and consume smoke and gas by the introduction of atmospheric air to the fire chamber. The air is drawn into the smoke pipe through an opening at the bottom of the pipe and, being cold and heavier than the gases generated by combustion, it passes along below the gases until it is heated to the proper degree, "when the oxygen of the atmospheric air will mix and unite with the heated gases, making them highly combustible and causing them to burst into flame." "In this manner," says the specification, "no gases or smoke can leave the fuel chamber and pass the pending partition or diaphragm F without utilizing fully their combustible qualities, and the carbon gases, that by condensation form soot on the walls of the pipe and chimney, are entirely consumed, and therefore a great saving of fuel is the result of my device and arrangement." This device does not anticipate, but it certainly prevents a very broad construction of the claims of the Schlicht patents.

It is urged that the Howard apparatus is inoperative, an argument frequently resorted to and maintained with great ingenuity and learning, when a prior patent encroaches dangerously upon the invention under consideration. The court is convinced, however, that the Howard apparatus will operate to a certain extent in a more limited field than the Schlicht method, but upon a somewhat different principle. There is always a presumption that a patented device is operative. The long-continued flow of separate, oppositely moving, parallel currents in contact, and the gradual heating of the downwardly flowing air cannot be accomplished by the Howard structure. The air is delivered too near the combustion chamber of the stove, or the labyrinthian radiator of the furnace, to permit the accomplishment of the essential results achieved by the Schlicht method. As stated in complainant's brief:

"It is the very essence of the Schlicht invention, that the contact between the outflowing products of combustion and the inflowing air should be for a substantial distance, otherwise the inflowing air would not be heated, and none of the objects or advantages of the Schlicht invention would be realized. This idea is particularly emphasized in the patents."

This is a clear and correct statement of the distinguishing feature of the invention and it seems quite plain that the Howard patent does not disclose it.

It is unnecessary to examine the other patents and publications, as none of them describes the Schlicht method and apparatus as above

explained and limited. That the Schlicht devices will operate has been established practically and experimentally. That the defendant has infringed some of the claims cannot be doubted. This is proved by the direct admissions in the circulars issued by the defendant, by the use of the "æolipyle" of the defendant upon the pipe of the stove in the office of Ray, Daisley & Co., and by the experiments of Dr. Morton, Prof. Hutton and Mr. Kennedy with the apparatus illustrated by complainant's "Exhibits 34, 25 and 38." In these instances the "æolipyle" was placed several feet from the combustion chamber and the observed phenomena indicated that the Schlicht method was employed. The defendant's experiments on the other hand seem to establish, at least, the proposition that when the device is placed in close proximity to the combustion chamber a downward current cannot be established and that the entering air is caught and whirled upward and backward by the opposing current of the products of combustion.

The admissions of the defendant through its circulars and otherwise cannot be ignored. Such admissions may be insufficient to establish the validity of a patent, but upon the question of infringement they are exceedingly persuasive. These circulars state that with the use of the "æolipyle" the maintenance of a good fire does not depend upon air through the grate, the holes in the side of the "æolipyle" supplying all the draft necessary for the fire at all times, the heated air being supplied to the gases of the combustion chamber causing them to burn and produce increased heat. In short, most of the statements of these circulars are as applicable to the complainant's apparatus as to that of the defendant.

There is little difficulty in finding infringement when the defendant's device is placed at a substantial distance from the fire chamber, but the court is equally clear in the conviction that when placed in close proximity thereto there is no infringement. It was admitted at the argument that an "æolipyle" placed on the smoke collar of a stove would not infringe, but it is argued that if placed on the smoke collar of a furnace it will infringe. This contention is based upon the theory that as the air after being introduced has to traverse a maze of complicated apertures and channels, known as the radiator, the currents of the Schlicht method can there be established. The court is unable to accept this view. It is practically impossible to use the "æolipyle" inside the radiator or even inside the furnace casing. The smoke collar is the nearest point where it can be applied and, if the complainant's contention be correct, it will not only prohibit the use, in connection with furnaces, of the defendant's device, but of all other devices for the introduction of air into the pipe in the direction of the fire chamber, even though the device be placed as near the fire pot as it is possible to locate it.

If there be any clear testimony that the contact between the two distinct currents moving in opposite directions for a substantial distance, which is "the very essence of the Schlicht invention," can be initiated and maintained in the radiator of a furnace, the court has failed to discover it. If it be possible for such a condition to exist it was the

duty of the complainant to establish it. That such testimony can be adduced is doubtful. It would seem that a furnace radiator, with its channels, chambers and vents; with its currents, cross-currents and eddies, mingling and whirling in every direction and all adapted to mix, tangle and vex an entering current of fresh air, would be the last place selected to segregate the air and conduct it in a separate stream to the fire bed. For these reasons the court is convinced that the defendant's device when placed at the smoke collar of a furnace or stove, or within six inches therefrom, is not an infringement.

It remains to consider the various claims in issue, as it is asserted, even conceding the validity of some of the claims, that several others are invalid and that others still are not infringed. That there is a needless multiplication of claims has already been intimated.

Claim 5 of No. 556,280 is not distinguishable in a patentable sense from claim 4. "Igneous fuel" means fuel having the nature of fire, or fuel on fire or in a state of combustion. To cause air to flow to "igneous fuel" is, therefore, to cause it to flow to a place of combustion. The two are identical. Various other synonyms for "place of combustion" might be suggested, but patents are not granted for ingenuity in the discovery of words.

Claim 6 is open to the same criticism; it substitutes the word "air" for "supporter of combustion," but in view of the statements of the specification and of the record there is nothing patentable in the change.

The complainant's expert says:

"Claim 13, as I understand it, only differs from claim 12 in so far as it emphasizes the employment of gravity as a means for feeding in the air."

As there is no hint in the patent of the employment of any other force and as the employment of gravity is sufficiently "emphasized" in claim 8 there is no necessity for claim 13. Gravity, and every means shown in the patent for feeding by gravity, are clearly covered by other claims.

The other claims of this patent are, perhaps, open to similar objections, but, when confined to the devices shown, or their equivalents, it is thought that they may be sustained.

It is thought that patent No. 556,282 may be upheld for the peculiar preheating devices shown and that the "æolipyle" if located at a substantial distance from the combustion chamber, infringes the claims involved which, however, are substantially alike.

The first claim of patent No. 556,283 is invalid because the identical device is covered by the primary patent and particularly by claims 14 and 19 thereof.

Claims 1 and 2 of patent No. 556,285, unless strictly limited to the devices described and shown as separate attachable structures are void, as the same apparatus, substantially, is protected by the claims of patent No. 556,280. If so limited they are not infringed.

The evident purpose of the patentee was to cover his various devices as separate articles of manufacture so that they could not be sold in the market without infringing. A purchaser could, however, go to a licensed dealer, select the desired deflector and attach it to his

chimney in the manner described. The "æolipyle" is not a chimney attachment in this sense.

It follows that the complainant is entitled to a decree, in accordance with the views thus expressed, for an injunction and an accounting, but without costs.

DOIG v. MORGAN MACH. CO.

(Circuit Court, W. D. New York. April 28, 1902.)

1. PATENTS—INFRINGEMENT—BOX-NAILING MACHINE.

The Smith & Doig patent, No. 342,268, for a box-nailing machine, was not anticipated and is valid, but is so limited in scope by the prior art, as disclosed by the Swan patent, No. 180,503, and others, that the doctrine of equivalents cannot be invoked in its support as against the device of a patent subsequently granted, and therefore presumptively different. Claims 5 and 6, as so limited, construed, and held not infringed.

In Equity. Suit for infringement of letters patent No. 342,268, issued May 18, 1886, to Thomas L. Smith and William S. Doig, for a box-nailing machine. On final hearing.

For former opinion, see 89 Fed. 489.

Charles G. Coe, for complainant.

Frederick F. Church, for defendant.

HAZEL, District Judge. The patent in suit, No. 342,268, dated May 18, 1886, issued to complainant and one Thomas L. Smith, relates to improvements in box-nailing machines. It has special reference to receiving and distributing the nails, as well as to the nail conducting and driving mechanism described and shown in a prior patent issued to the inventors. Claims 5 and 6 of the patent are alone involved in this proceeding. They are as follows:

"(5) The combination, in a nail-feeding mechanism, of a frame or support provided with a series of way plates, with a second frame or support, also provided with a series of way plates, the way plates of the said frames or supports being arranged to act in pairs to form nail ways,—one series being adjustable in relation to the other laterally,—substantially as and for the purpose set forth.

"(6) The combination, with the nail-feeding mechanism, of a pair of way plates, supporting the frames, adjustable laterally one in relation to the other, and the frame-adjusting screws, substantially as shown and described."

An examination of the involved claims shows that this suit is concerned chiefly with a series of nail ways or channels formed by parallel plates attached flatwise to an adjustable frame called a "feeder." These plates are so adjusted laterally that the width of all of the nail ways may be simultaneously and uniformly established. In further explanation, it may be said that the nails prior to reaching the nail ways in the feeder are contained in a nail pan or hopper pivoted at the rear of the main frame of the machine. The nail hopper at its outlet has a slotted bottom, thereby forming nail channels which permit the nails to hang by their heads. They are carried along through the interstices by force of the oscillation of the nail hopper. The nail hopper is attached to the machine close to the feeder, and

inclined at an angle of 30°. The suspended nails rush downward through the interstices in the nail hopper, and thence along the interstices in the nail feeder, which joins the nail hopper and is set at the same angle. The nails are thence discharged into perpendicular chutes, their course being regulated by a cut-off device at the discharge end of the feeder. From the chutes they pass into nail boxes, and while held there in a vertical position are driven by nail punches into the boxes in process of construction. The prior art, as will hereinafter appear, discloses devices showing equivalent arrangements of track plates used as nail ways. These are regulated by screws at the ends to adjust the width of the nail channels, and thus facilitate the passing or sliding of the nails suspended by their heads along these tracks. The patentee claims that the track plates of the prior art required an individual regulation. That is to say, each track or plate was regulated by separate screws. The improvement of a simultaneous adjustment of the nail plates eliminated the former result of improper and irregular alignment, which produced loss of time and annoyance. The improvement claimed by the patentee is a means of securing an alignment of the plates by momentary action. The defense is noninfringement and noninvention. The limits of the prior art are quite extensive. They are not urged, however, by defendant in anticipation of the involved claims, but only to narrow and restrict claims 5 and 6 of the patent to their actual construction and application. Among the patents shown by the defendant, illustrative of the prior art, is the Swan patent, No. 180,503. This was considered by Judge Townsend in *Doig v. Sutherland* (C. C.) 87 Fed. 991, and held by him not to be anticipatory. He declared it to be a mere paper patent, incapable of successful and practical operation. He assigned as a reason for his conclusion, among others, the failure of the specifications and drawings of the Swan patent either to correspond to the model in evidence or to the patent-office model. Judge Townsend pointed out structural differences between it and the Doig patent then before him, and now here under consideration. The court then observed that the Swan device disclosed no rigid frame; that its screws worked separately, and therefore no means were provided for simultaneous adjustment of the plates. I agree with Judge Townsend as to the differentiating features of the Swan device. It embodies a frame or support provided with way plates or tracks adjusted laterally so as to permit different sizes of nails to move longitudinally along the way plates or tracks toward the nailing device. The nail plates are attached to frames, and are so arranged as to form a narrow track, down which the nails move, hanging by their heads. One of the tracks or way plates is fixed rigidly to the supporting frame, and the other is movable longitudinally. This movement of the plates is caused by the rotation of a cam shaft at the rear end of the frame and nail tracks, which forces the hanging nails to slide toward the nailing device. The plates are adjusted by the manipulation of screws and nuts at both ends of the supporting frame or bars. Separate loosening and adjusting of the screws and nuts are necessary to effect the width of the nail ways, so as to insure an alignment of the plates or tracks

suitable to the size of the nails used. It is clear that the Swan device could supply the nail at the nailing point after a fashion, but clogging of nails in the nail way impeded their course, the manner of adjusting the frames interfered with the nailing, and at each change of nails a readjustment of the plates was necessary. By complainant's device two sets of way plates are so arranged in relation to each other as to form a series of nail ways permitting a lateral adjustment, by which the width of the plates in series is simultaneously adjusted to conform to the size and kind of nail used. No mechanical arrangement of the device requires a separate or individual adjustment. Two screws are attached laterally, and may be manipulated by the operator simultaneously,—one for moving movable way plates of the nail receptacle or feeder in one direction, and the other for moving them in the other direction, thus increasing or decreasing the interstices through which the nails are hung. I think that the complainant's device was a step forward in box-nailing machines over the Swan patent, increased the capacity of the machines, and in other ways enhanced their utility. It must, nevertheless, in view of the practical use shown in this case, be considered as restricting the scope of complainant's claims. No evidence of the operative-ness of the Swan machine was before Judge Townsend. He accordingly found that the Swan patent was not practicable. The proofs now show quite satisfactorily that the Swan machine was successfully operated on different kinds and sizes of boxes at the mechanics' fair held at San Francisco in October, 1875, and afterwards at the factory of the Union Box Company. It further appears by defendant's proofs that subsequently Swan constructed another nailing machine similar to the first, and sold the same in 1877, an accurate model of which was filed with his application for patent. The Swan machine was in practical use during the years 1875, 1876, and 1877. The complainant attempts to show that the specifications and drawings of the Swan patent do not show an operative machine, and that Swan admitted the specifications and drawings to be defective in various particulars. Nevertheless he testified that the Swan model in evidence disclosed the nailing machine, and that, in his judgment, the specifications of the patent are ample to enable a skilled mechanic to make and use the invention. Other proofs show that the patent is sufficiently specific to permit a practical mechanic skilled in the art to construct therefrom an exact model.

I now come to consider the Howard patent, No. 219,863, and other patents which in my opinion must have an important bearing in limiting the scope of claims 5 and 6 of the patent in suit. An improvement is shown upon a former Howard patent, No. 196,456, for nail assorters or nail separators. It consists of a cylindrical screen, having an inner and outer set of bars, the opposing faces of which are flat or fitted close to each other. This construction forms what may be considered as analogous to the nail bars or plates. These bars or series of plates are connected for simultaneous adjustment in relation to each other, and permit the desired opening or closing of the interstices. The inner bars or plates are V-shaped, but present a flat surface, and are even with the main or wider bars. All are sup-

ported by rings having a device and means for simultaneous adjustment of the cylinders in relation to each other. This adjustment governs at the same time the width of the slits. These devices may be cylindrical or flat. By the action of the adjusting screws the frames may be moved simultaneously one way or the other. I think that the analogy between the later Howard device and the device of the complainant is not remote. When the adjusting screw is turned, the interstices are reduced by moving the outer plates. Were this device worked out on a plane surface, the adjusting screws would be lateral. It is stoutly insisted that, as the device is cylindrical, it would not work as a nail feeder. Doubtless some alteration would be required, but none that would not readily occur to a skilled mechanic familiar with box-nailing machines. In the Chess patent, No. 145,720, for improvement in nail-separating devices, an adjustable screw is used laterally to narrow or widen longitudinal grooves. The Bumbaugh United States patent, No. 171,213 (improvement in nail separators), consists of a revolving cylinder, permitting nails to drop through V-shaped grooves, which are adjustable by means of plates or screws attached to the frames. This device shows that perfect nails pass along the V-shaped grooves, and are deposited at the end of the separator, in a suitable receptacle. The Chess United States patent, No. 185,894 (improvement in machines for assorting nails), embraces an exact adjustment of the size of the openings while the separator is in motion. The slots are adjusted by longitudinal movement of the outer ring with a series of blades either from or toward the inner or main ring, C. By the adjustment of the slots, their width is reduced simultaneously as desired. The Smith & Doig patent, No. 276,639 (improved feeder for nailing machines), speaks of the arrangement of the track plates so that they may be readily adjusted to suit nails or tacks of different sizes. These references were not in evidence in the Sutherland Case, and therefore not considered by Judge Townsend. In view of the state of the art, complainant must be precluded from invoking the doctrine of equivalents as applied to the defendant's device, which was subsequently patented, and therefore raises a presumption that there is substantial difference between them. *Illinois Steel Co. v. Kilmer Mfg. Co.* (C. C.) 70 Fed. 1012; *Wellman v. Midland Steel Co.* (C. C.) 106 Fed. 226. The defendant's device shows a mechanism by which the nails are fed down the track plates by gravity alone. It has neither of the frames described in claims 5 or 6. One set of these way plates is rigidly fixed to the main frame of the machine. The second frame or support in complainant's device, and by which the movements of the plates attached thereto are regulated, is not found in defendant's device. The way plates are moved and guided in defendant's device by an overlying bar with a screw adjustment, stretching through the middle from one end of the device to the other. This bar, with screw attached, regulates the way plates, and really performs the function of the frames or support, with lateral adjustment of complainant's device. The complainant, however, was not a pioneer, and therefore cannot insist upon a broad construction of his claims. Neither way plates forming nail ways nor adjust-

able way plates were new. As has been pointed out, the feature of simultaneous adjustment by arrangement of the plates in series is disclosed by analogous invention.

The claims of complainant's patent involved in this proceeding are therefore not infringed by defendant's device, and a decree dismissing the bill may be entered accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. STANLEY ELECTRIC
MFG. CO.

(Circuit Court, D. Massachusetts. July 1, 1902.)

No. 1,582.

1. PATENTS—CONSTRUCTION OF CLAIMS—ELECTRICAL DISTRIBUTION.

The Stanley patent, No. 469,809, for a system of electrical distribution, as construed in *Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Light Co.* (C. C. A.) 113 Fed. 884, is for a transformer in which the so-called Stanley rule for ascertaining the proper length of primary coil inheres as an essential feature of the invention, and must be read into the claims, and such construction is conclusive upon the parties to such suit and their privies.

2. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for infringement of a patent, the first thing to determine is the scope of the invention; and the second, whether the alleged infringing device comes within the invention as thus defined; and this rule applies on the hearing of a motion for a preliminary injunction, although the patent had been construed and its validity sustained in a prior suit between the same parties, where there is a dispute as to such construction.

3. SAME—INFRINGEMENT—ELECTRICAL DISTRIBUTION.

The Stanley patent, No. 469,809, for a system of electrical distribution, claims 1 and 3, as previously construed and limited in a suit between the same parties, *held* not infringed, on a motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 469,809, issued to William Stanley March 1, 1892, for a system of electrical distribution. On motion for preliminary injunction.

Gifford & Bull, F. P. Fish, and Edgar Bull, for complainant.

Mitchell, Bartlett & Brownell, C. E. Mitchell, and M. B. Philipp, for defendant.

COLT, Circuit Judge. This motion for a preliminary injunction is based upon the decision of the circuit court of appeals for the Second circuit in the case of this complainant against the Saranac Lake Electric Light Co., 113 Fed. 884; *Id.* (C. C.) 108 Fed. 221. It is not denied that the present defendant was the real defendant in that suit. That case, therefore, is *res judicata* as to both these litigating parties. So far as the decision in that case was favorable to the complainant, it is binding on this defendant; and, so far as it was favorable to the defendant, it is equally binding on this complainant. It is the law which governs this case as to both parties. In that case the court held the Stanley patent, No. 469,809, now in issue, to be valid, and not anticipated by prior patents, or by articles printed in various

foreign publications prior to the date of Stanley's invention. In his specification Stanley described a method known as the "Stanley rule." The two claims in issue were broad, and did not in terms include this rule. The court says in its opinion that the defendant contended that the prior art showed anticipation of these claims, because "this so-called Stanley rule is no part of the invention claimed," and "there is nothing in the claims requiring the rule to be considered as a part of the invention thereby covered"; and the court then proceeds to discuss the Stanley rule, and its bearing upon the invention and claims. It is conceded in the case at bar that the defendant's apparatus is not made by the Stanley rule. If, therefore, the Stanley invention, as construed by the court in the former suit, is limited to the employment of the Stanley rule, the defendant's apparatus falls outside of the monopoly of the patent. It becomes necessary, then, to determine whether the court, in its opinion, imposed the limitation of the Stanley rule upon the first and third claims of the patent. The complainant maintains, apparently with great confidence, and certainly with great positiveness of statement, that the court imposed no such limitation upon the Stanley invention; that the court held that the invention was for a transformer, "which is automatically self-regulating as to a secondary pressure," and "not for a rule," or for "a transformer having such a length of wire on its primary coils as would make it self-regulating," or for "a transformer having in its primary coils substantially such a length of wire as was described in the specification, and which would effect the result sought, irrespective of the means or methods employed in arriving at the result," or for a transformer which has "in its primary coils the proper length of wire to make it self-regulating," all of which means that the Stanley patent was held to cover the transformer described, irrespective of the Stanley rule by which the length of wire is obtained, although it was incumbent upon Stanley to point out one method by which the proper length of wire was determined. On the other hand, the contention of the defendant is that it is perfectly plain from the decision of the court that the Stanley rule is inherent in the Stanley invention, and that this limitation is imposed upon the claims. Does the language of the opinion sustain the complainant's position or the defendant's position? Is the Stanley patent, as construed by the court in the New York case, for a transformer, a product, in which the Stanley method does not of necessity inhere, or is it for a transformer, a product, in which the Stanley method does inhere as an all-essential feature, and the most important part of the invention? The opinion on this point is as follows:

"As stated before, after the Kennedy improvement a difficulty still existed, in that the candle power went up or down as lamps on any particular transformer were turned on or off. Stanley suggested that the difficulty was due to an improper length of wire on the primary; and, among much else, he states precisely, specifically, and exactly what that length should be. The amount of wire for a given character of current-supply cannot be stated in feet and inches, because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and the way the coils are applied. The Stanley patent, recognizing these variable elements, gives a rule applicable to all conditions. It says you may determine the proper length of the primary coil by connecting the transformer in circuit with the dynamo with

which it is to be used, and then winding on wire until the loss indicated by the formula C^2R , with the secondary circuit open, equals a certain loss of energy. The field of invention lies in that obscure and difficult art, which is so hard to be understood by those who have not constant practical experience with its phenomena, its laws, and its nomenclature, and deals with a branch of that art which is still evidently in dispute between those who have carefully studied it. It is fortunate, therefore, that we find the concession in defendant's brief that the rule above set forth for determining just what shall be the length of primary coil is not found in any prior patents or publications, for, with this concession, it is easy to determine from the record that there is no anticipation shown. It is contended, however, by the defendant that this so-called Stanley rule is no part of the invention claimed; that there is nothing in the claims requiring the rule to be considered as a part of the invention thereby covered; that it is merely in the nature of a recommendation, the patentee saying, 'In practice I use the following method,' being the so-called rule. The first claim (and in that respect the third claim uses similar language) prescribes for the primary coil 'such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used,' under certain conditions, certain results will follow. Concededly the man skilled in the art would not have found in that art anything which would have told him precisely what that length of wire should be. The claim does not give any formula for determining what it should be, and, if the specification were equally silent, there might be some question as to whether Stanley had really contributed anything of importance to the art. Certainly it would yet remain for others to inform the art just how to find out a length which would operate as indicated in the claim. But when the patentee in his claim enumerates as one element of his combination a wire of a length which will accomplish the result sought to be achieved, and his patent discloses a method for determining that length with mathematical exactness, his claim may fairly be sustained for the length thus shown, although it might be that some other length covered by the language of the claim, but not of the rule, would fall outside the claim. The 'length of wire exposed,' etc., 'operated by,' etc., * * * substantially as set forth,' is the length of wire that the specification shows as the result of a given formula. The so-called Stanley rule is therefore a part of the invention disclosed and claimed in the patent,—indeed, it would seem to be the main part of that invention; and with the patent thus construed the citations from the prior art show neither anticipation nor lack of invention. The whole argument of defendants on that branch of the case is so interwoven with the postulate that the Stanley rule is to be eliminated from the patent that when the postulate is not granted the argument becomes wholly unpersuasive."

Upon the most careful consideration of this opinion in connection with the record and briefs of counsel, its meaning seems to me free from doubt. The court states that after the Kennedy improvement a difficulty still existed, and that Stanley suggested the difficulty was due to an improper length of wire on the primary; that he states precisely, specifically, and exactly what the length should be; that the amount of wire for a given current supply was subject to variable elements; that "the Stanley patent, recognizing these variable elements, gives a rule applicable to all conditions." The rule is then set forth. After declaring that the field of invention lies in an obscure and difficult art, the opinion proceeds to state that it is fortunate the defendants have conceded that the Stanley rule "for determining just what shall be the length of primary coil is not found in any prior patents or publications," and that, "with this concession, it is easy to determine from the record that there is no anticipation shown." It is manifest that the defense of anticipation was decided in Stanley's favor from the fact

that Stanley had stated a rule for determining exactly the length of wire. As the claims of the patent do not expressly cover the Stanley rule, the court then considers the defendant's contention on this point. The opinion proceeds:

"It is contended, however, by the defendant that this so-called Stanley rule is no part of the invention claimed; that there is nothing in the claims requiring the rule to be considered as a part of the invention thereby covered; that it is merely in the nature of a recommendation, the patentee saying, 'In practice I use the following method,' being the so-called rule."

The court then refers to the claims:

"The first claim (and in that respect the third claim uses similar language) prescribes for the primary coil 'such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used,' under certain conditions, certain results will follow. Concededly the man skilled in the art would not have found in that art anything which would have told him precisely what that length of wire should be. The claim does not give any formula for determining what it should be, and, if the specification were equally silent, there might be some question as to whether Stanley had really contributed anything of importance to the art. Certainly it would yet remain for others to inform the art just how to find out a length which would operate as indicated in the claim."

Here the court says, in substance, that a person skilled in the art would not have found anything in the art which would tell him precisely what the length of wire should be, that the claims do not give any rule or formula for determining what the length should be, and that, if the specification were equally silent, there might be some question as to whether Stanley had really contributed anything of importance to the art. The court then goes on to say, however, that:

"When the patentee in his claim enumerates as one element of his combination a wire of a length which will accomplish the result sought to be achieved, and his patent discloses a method for determining that length with mathematical exactness, his claim may fairly be sustained for the length thus shown, although it might be that some other length covered by the language of the claim, but not of the rule, would fall outside the claim. The 'length of wire exposed,' etc., 'operated by,' etc., * * * substantially as set forth,' is the length of wire that the specification shows as the result of a given formula."

By this language the court plainly imports into the claims the Stanley rule set forth in the specification, and sustains the claims on this ground. This is made clear from what follows:

"The so-called Stanley rule is therefore a part of the invention disclosed and claimed in the patent.—Indeed, it would seem to be the main part of that invention; and with the patent thus construed the citations from the prior art show neither anticipation nor lack of invention. The whole argument of defendants on that branch of the case is so interwoven with the postulate that the Stanley rule is to be eliminated from the patent that when the postulate is not granted the argument becomes wholly unpersuasive."

If we are to interpret language according to its natural meaning, I can discover no doubt or ambiguity in this opinion. When the court declares that the Stanley rule is "a part of the invention disclosed and claimed in the patent," and that "it would seem to be the main part of that invention," I must take the court to mean what it says.

Further, on the petition for a rehearing, the defendants contended that they did not make the concession as to the Stanley rule referred to in the opinion. In denying the motion the court said:

"It was supposed that upon the argument defendant's counsel practically conceded that the Stanley rule, as stated by the court, was not found in any prior patents or publications. If this supposition be incorrect, nevertheless we find in the record no prior patent or publication which states that one 'may determine the proper length of the primary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C^2R , with the secondary circuit open, equals a certain loss of energy.'"

I cannot construe this whole opinion otherwise than as holding that the Stanley rule inheres in the Stanley invention, that this rule must be imported into the claims, that this rule is the main contribution which Stanley made to the art, and that it constitutes the principal and most essential part of the invention covered by his patent. I do not agree with the complainant's counsel that the court in the former case found the Stanley invention to reside in "a certain length of primary winding," and their argument on this point seems to me plainly in conflict with the invention as defined by the court. Where do we find in the opinion that it was Stanley's discovery of the proper length of wire in the primary which constitutes his invention, or that the invention is for a transformer having a proper length of wire, or that the Stanley rule is no part of the invention claimed, but only one method of determining the proper length of wire? I can find nothing in the opinion to warrant these contentions. On the contrary, the court expressly declares that the Stanley rule is the main part of the invention disclosed and claimed.

In a suit for infringement of a patent, the first thing to determine is the scope of the invention. The monopoly must be first defined, in order to tell whether the alleged infringing device is within it. In the present case, however, we are asked by complainant's counsel to decide first the question of infringement. Their contention is that, the Saranac transformer having been enjoined by the court in the New York case, it is the duty of this court to enjoin the defendant, unless it is shown that the transformer now in suit differs essentially from the Saranac transformer. It does not seem to me that this position is well taken. In my opinion, it is the duty of this complainant, under its present bill charging infringement, to show—First what the Stanley patent covers, as defined by the court in the other case; and, second, to show that the transformer now manufactured by this defendant comes within the Stanley invention as thus defined.

It is further maintained that the Saranac transformer did not embody the Stanley rule, and that consequently the transformer now alleged to infringe comes within the decision in the other case; but, in view of the opinion of the court as I interpret it, it must be presumed that the Saranac transformer contained the Stanley rule. Otherwise it leads to this conclusion: On the question of validity the Stanley patent is limited by the Stanley rule, while on the question of infringement there is no such limitation; in other words, a transformer may be outside the monopoly secured by the patent, and still infringe the patent. There is nothing in the language of the opinions of the circuit court of appeals, or of the circuit court, of the New York case, which would justify this court in holding that any such illogical and inconsistent conclusion was reached. Neither of those courts seems

to have regarded infringement as a question seriously disputed. This much at least can be said: After the appellate court in the other case had determined that the Stanley invention for the most part resided in the Stanley rule, and that the rule must be imported into the claims, and after the court said on the petition for rehearing that, "as to infringement," it "did not deem it necessary to add anything to the opinion below," it is manifest that the court did not understand from the opinion of the court below that the Stanley rule was eliminated from the Saranac transformer. For these reasons, the motion for a preliminary injunction must be denied.

Motion denied.

ELECTRIC STORAGE BATTERY CO. v. BUFFALO ELECTRIC CARRIAGE CO.

(Circuit Court, W. D. New York. June 4, 1902.)

No. 163.

1. PATENTS—CONSTRUCTION—SECONDARY BATTERIES.

The Brush patent, No. 337,299, is the generic patent covering the Brush invention of secondary or storage batteries, and has uniformly been sustained by the courts, and given a broad construction. The patents previously issued to the patentee, but subsequent to the date of the original invention, were for improvements merely, and their expiration did not affect the validity of the basic patent.

2. SAME—DELAY IN ISSUANCE—INTERFERENCE PROCEEDINGS.

The fact that delay in the issuance of a patent after the filing of the application will result in giving the patentee a monopoly for a longer period of time than 17 years, cannot shorten the term of the patent, where such delay resulted from interference proceedings, and was not attributable to the patentee.

3. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the validity of a patent has been frequently sustained by undoubted authority, and infringement is clear, a court should not exercise its discretion to deprive the patentee of the monopoly the law gives him for the full term of his patent by refusing him a preliminary injunction either because the patent will soon expire, or because the defendant offers to give a bond for the payment of all damages recovered.

In Equity. Suit for infringement of letters patent No. 337,299, granted to Charles F. Brush March 2, 1886, for a secondary battery. On motion for preliminary injunction.

John R. Bennett, for complainant.

Banning & Banning (Randall, Hurley & Porter, of counsel), for defendant.

HAZEL, District Judge. The patent in suit, No. 337,299, dated March 2, 1886, application filed June 13, 1881, is the Charles F. Brush generic patent for secondary or storage batteries, and is an improvement on the method applied by Gaston Plante prior to 1877. This patent, although many times vigorously assailed, has always been sustained. Judge Coxe, in the introduction to his opinion upon a motion for preliminary injunction in *Battery Co. v. Belknap* (C. C.) 112 Fed. 538, summarizes all the cases in which this patent has been at-

tacked. They show conclusively, upon examination, that the claims of the patent in suit have always been accorded a broad construction by the circuit courts and the circuit courts of appeals, and that the patents subsequently issued to Brush were in the nature of improvements upon his basic invention. None of them appear to include the invention claimed by the patent in suit, and only refer to it as may be necessary to describe the subsidiary invention. It was contended for the defendant on the hearing that Brush patents Nos. 260,654, granted July 4, 1882; 267,756, September 5, 1882; 266,090, October 17, 1882; 275,985, April 17, 1883,—had expired, and the patent in suit issued to the same patentee was therefore invalid, and not infringed by defendant. This contention is untenable, for it is quite well settled that patents of prior date issued to the patentee, if in the nature of improvements on the original invention, are subordinate to the broad scope of the first conception. In *Electrical Accumulator Co. v. Julien Electric Co.* (C. C.) 38 Fed. 117, it was decided that the patent in suit was conceived and reduced to practice by Brush in 1879 and 1880. It was not issued by the patent office, on account of interference, until March 2, 1886. Application for a patent appears to have been seasonably made, and therefore the inventor is protected in his invention from the time when it was conceived and adapted to practice. *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; *U. S. v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144. The affidavits read on the hearing, together with the cases construing the patent in suit and those claimed to improve it, satisfy me that the patents issued to Mr. Brush subsequent to the invention described by the generic patent were improvements merely. The specifications of the various patents which have expired and the patent in suit do not disclose that the improvements in any manner increased within its scope the efficiency of the prior invention. Many improvement patents were issued to Mr. Brush, but none of them are independent of the generic invention. The claims of various subsidiary patents analogous to those under consideration have been limited and defined by former adjudications. It would seem unnecessary to again construe their scope. It is argued, however, for defendant, that giving full effect to the broad construction of the patent in suit tends to prolong the monopoly beyond the terms for which an exclusive use is given by the patent law. The doctrine annunciated in *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121, is invoked. The doctrine of that case does not seem to have application to the case at bar as explained in the *Horseheads Case*, 69 Fed. 257, and other cases. It may be that the delay resulting from interference proceedings in the patent office and the issuance of subsidiary patents will enable the patentee to enjoy a monopoly for a longer period of time than 17 years, but, as the delay entailed by the interference is not attributable to the patentee, the benefit, if there be such, inures to him alone. The construction given to *Miller v. Manufacturing Co.*, *supra*, in *Thomson-Houston Electric Co. v. Elmira & H. R. Co.*, 18 C. C. A. 145, 71 Fed. 397, and *Same v. Winchester Ave. R. Co.* (C. C.) 71 Fed. 193, may with propriety be applied to the case at bar. The patent in suit will soon expire, but that fact does not sanction the refusal of an injunction

pendente lite, where its validity has been adjudged by an appellate court, and where it appears, as here, that the expired patents are improvements on the unexpired generic patent. Counsel for defendant argue that no preliminary injunction should be granted, inasmuch as defendant is responsible and willing to give a bond conditioned to pay all damages which complainant may incur because of the alleged infringement. The cases cited on this point have application to cases where doubt exists as to complainant's rights under his patent. In the case at bar no such doubt exists. The validity of the patent has so frequently been established, and the improvement patents of Brush so often considered, by the circuit courts and the circuit courts of appeals, that the conclusions reached by said courts are strongly persuasive, if not controlling, of the rights involved on this application. The complainant, owner of the patent in suit, is entitled to the monopoly for the full term allowed by law. At its election it may proceed against the user or the manufacturer of the infringing batteries. Were it otherwise, the law affording protection which congress intends should inure to one who by his skill has discovered something new and useful. *New York Filter Mfg. Co. v. Niagara Falls Water Co.* (C. C.) 77 Fed. 906; *Munson v. City of New York* (C. C.) 19 Fed. 313; *Battery Co. v. Belknap*, supra. It is true that applications for preliminary injunction are addressed to the discretion of the court, but when a patent has frequently been sustained by undoubted authority, and when infringement is clear, such discretion should not be exercised to the detriment of the patentee. In the case of *Campbell Printing Press & Mfg. Co. v. Manhattan Ry. Co.* (C. C.) 49 Fed. 931, where it was insisted that the responsibility of the alleged infringer was a guaranty of protection to the owner of the patent, Judge Lacombe at great length reviews the question of judicial discretion, and in conclusion orders the injunction to issue. In his opinion he states: "The contention of the defendant that, because it is willing to pay nominal damages for past infringement, an injunction to restrain future infringement should not issue, is unsound." I am constrained, therefore, to allow the preliminary injunction sought.

An order may be entered restraining the defendant from using and preparing the process disclosed by claims 1, 2, 3, 6, 7, and 12 of the patent in suit.

HUMANE BIT CO. v. BARNET.

(Circuit Court, D. New Jersey. May 28, 1902.)

1. EQUITY—COMMENCEMENT OF SUIT.

A suit in equity in a court of the United States is commenced by the filing of the bill.

2. PATENTS—SUIT FOR INFRINGEMENT—EVIDENCE.

A suit for infringement of a patent cannot be sustained by proof of acts of infringement committed after the bill was filed.

In Equity. Suit for infringement of patent. On motion to dismiss.

George G. Frelinghuysen, for complainant.
Edwin H. Brown, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this cause was filed on the 3d day of October, 1894, and in it the complainant sets out that the defendant has, in this district and elsewhere, made, used, or sold bridle bits made, arranged, constructed, and combined according to the construction and arrangement set forth in the claims of his letters patent, without its license or permission. Wherefore it prays that the defendant may be perpetually enjoined from said infringement, and that its damages may be assessed as provided by statute, and that it may have a writ of subpoena directing the defendant to appear in court and answer the said bill. In accordance with the prayer of such bill, process was issued on the same day, and made returnable within the time prescribed by law. In taking its proofs to sustain the charges made in its bill, the complainant called but one witness, William J. Bahrs, who testified as follows:

Q. Did you on or about the 5th day of October, 1894, purchase from the defendant, David H. Barnet, any bits? A. I did purchase a bit from David H. Barnet about that time, and also purchased other bits. Q. Please produce the bit that you purchased from David H. Barnet. A. (Witness examining bit.) I purchased this bit from the Barnet company. (The bit referred to is offered in evidence, and marked, "Complainant's Ex. E, the Barnet Bit.") Q. At that time did you purchase any part of a bit other than that marked, "Complainant's Ex. E, the Barnet Bit"? A. I also purchased part of a bit from the Barnet Company. (Witness examines cheek-piece and chin strap.) And I identify this as that bit. (The same is offered in evidence, and marked "Complainant's Ex. F, Cheek-Piece and Chin Strap.")

It thus appears that the only act of the defendant complained of consisted of a sale by him of an article which is claimed to be an infringement of the complainant's device, on the 5th day of October, 1894, which was two days subsequent to the filing of the bill. Motion is now made to dismiss the bill on the ground that the act claimed to be an infringement was not committed until after the filing of the bill. The case of *Slessinger v. Buckingham* (C. C.) 17 Fed. 454, is exactly in point. In that case Judge Sawyer said:

"There are two points made by the defendants, both of which, I think, are well taken. One is that, if it is conceded that the articles charged to have been made are an infringement of the patent, it does not appear that those articles were sold or made prior to the filing of the bill."

And he dismisses the bill on the ground, as he distinctly states, that the complainant has failed to show an infringement before the filing of the bill.

If the complainant relies upon an infringement in order to sustain its action, such infringement must have been committed prior to the commencement of the suit. The complainant therefore insists that, because by the sixteenth equity rule promulgated by the supreme court it is provided that "upon the return of the subpoena as served and executed upon the defendant the clerk shall enter the suit upon his docket as pending in the court and shall state the time of the entry thereof," the suit has not been begun until such entry is made.

But I cannot concur in this view. The direction to the clerk to enter the suit as pending is merely directory, and does not indicate that it may not before that time have been commenced. In England suits in equity have always been instituted by preferring a bill in the style of a petition, directed to the lord chancellor or other proper person, and it is provided by statute that no process shall issue until after the suit has been so begun. Following this practice, the United States supreme court, by equity rule 9, provides that no process shall issue out of a court of equity until after the bill has been filed with the clerk. The filing of the bill is the commencement of the suit. *Madd. Ch. Prac.* 164. And in *Daniell, Ch. Pl. & Prac.* p. 401, it is said, "A suit in equity is commenced, it seems, when the bill is filed," citing *McLin v. McNamara*, 22 N. C. 82, and *Aston v. Galloway*, 38 N. C. 126. To the same effect, *Story, Eq. Pl.* (4th Ed.) § 7. In the case of *Farmers' Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, the question arose whether the state or federal court had first acquired jurisdiction of a suit for the foreclosure of a mortgage. The contention was, as stated by the court, that the jurisdiction of the state court attached, because, although the bill therein was not filed until after the filing of the bill in the federal court, the summons issued by the state court was served before the service of the writ of subpoena in the federal court. The court held, on this state of facts, that the federal court had first acquired jurisdiction, because the suit therein had been first begun; that the filing of the bill was the commencement of the suit; and that it was only when applying the doctrine of *lis pendens* to the case of a third person, who is a bona fide purchaser, that notice is held to begin from date of service of subpoena, and not from the filing of the bill.

I am of opinion that the proofs in this case do not sustain the allegations of the bill in respect to the injuries that had been committed prior to the commencement of the suit, and for that reason I am reluctantly compelled to defer any examination into the merits of the controversy, and dismiss the bill.

UPSON NUT CO. v. H. CHAPIN SONS CO.

(Circuit Court, D. Connecticut. June 27, 1902.)

No. 1,038.

1. PATENTS—VALIDITY—RIVETING MACHINE.

The Frisbie patent, No. 501,681, for a riveting machine, is void because the patentee was not the inventor of the machine therein shown.

In Equity. Suit for infringement of letters patent No. 501,681, for a riveting machine, granted to Samuel Frisbie July 18, 1893. On final hearing.

George D. Seymour, for complainant.

Wm. E. Simonds, for defendant.

PLATT, District Judge. This case is now before me on its merits, on pleadings and proofs. Complainant owns letters patent No. 501,681, granted July 18, 1893, to Samuel Frisbie for a riveting machine. The claims are as follows:

"(1) In a riveting machine, the combination with one or more reciprocating hammers, and an anvil arranged in opposition thereto, of step-by-step mechanism for regularly and intermittently reducing the distance between the hammer or hammers and the anvil, the said mechanism being constructed and arranged to operate between the successive blows of the hammer or hammers, substantially as set forth, and whereby the rivets are operated upon progressively, or little by little, instead of all at once.

"(2) In a riveting machine, the combination with one or more reciprocating hammers, and an anvil arranged in opposition thereto, of step-by-step mechanism for imparting a regular, intermittent movement to the anvil toward the hammer or hammers, the said mechanism being constructed and arranged to operate between the successive blows of the hammer or hammers, substantially as described, and whereby the rivets are operated upon progressively, or little by little, instead of all at once.

"(3) In a riveting machine, the combination with one or more reciprocating hammers, and an anvil arranged in opposition thereto, and having its lower face longitudinally inclined, of a bed located below the anvil, and having a corresponding opposite inclination, and step-by-step mechanism for imparting a regular, intermittent movement to the anvil upon its bed, to move it progressively toward the hammer or hammers, the said mechanism being constructed and arranged to operate between the successive blows of the hammer or hammers, substantially as set forth, and whereby the rivets are operated upon progressively, or little by little, instead of all at once.

"(4) In a riveting machine, the combination of a reciprocating slide, carrying one or more hammers, corresponding in number to the rivets to be operated upon, an anvil below said hammers, and adapted to support the work, the anvil inclined upon its under side from one end toward the other, a bed below the anvil, upon which the said inclined surface of the anvil rests, the anvil constructed with an arm projecting from one end, a slide arranged to move in a path at right angles to said arm, the said slide carrying a cam, and the arm carrying a stud against which said cam is adapted to operate, mechanism substantially such as described for imparting to said slide a step-by-step or intermittent movement, which movement will be communicated to the anvil by said cam, and cause the anvil to ride up the inclined surface on which it rests, mechanism substantially such as described to release the said anvil from the action of said slide, and a spring to return the anvil after such release, substantially as and for the purpose described."

Respondents admit that their machine comes within the first three claims of the patent in suit, but contend that they do not infringe upon the fourth claim. As to the fourth claim, they say that it calls for "one or more hammers, corresponding in number to the rivets to be operated upon," but that their machine has only a single hammer, which is so constructed as to operate upon four or five rivets at the same time.

As to the first three claims, they say that they are anticipated in patent to Charles Nobs, No. 383,142, dated May 22, 1888, and they also contend that Samuel Frisbie was not the inventor of the machine described and claimed in the patent in suit. The discussion as to anticipation under the Nobs patent of claims 1, 2, and 3, and noninfringement of claim 4, is an exceedingly interesting one, and I listened to it with much pleasure and profit when the oral arguments were made; but I was then struck with the force of the claim that Mr. Frisbie was not the inventor, and my final conclusions upon that point have relieved me from presenting here an exhaustive analysis of the

other contentions. Let me state, as briefly as I can, my reasons for feeling forced to find that Mr. Frisbie did not invent the machine. Mr. Frisbie sleeps in his final resting place. I knew him well for many years, and ever held him in the highest respect. He was a worthy man and a good citizen. He was, however, a busy man, and it is fair to believe that under all the circumstances, although he obtained the basic idea from Hogarty, and the mechanical adjustment from Campbell via Lamb, he might very easily at a later date have argued himself into the belief that he really did originate ideas which in fact sprang from the brains of others. The basic mechanical idea, i. e., a method of raising the work gradually, "a step-by-step movement," so far as Frisbie is concerned, came from Edward Hogarty, who by placing first one piece of cardboard, then another, and another, under an anvil, showed how step by step the anvil could be raised. Frisbie had the mathematical calculations made, and with them went to the Farrell foundry in Waterbury, and found Mr. Lamb. He there explained that he wanted Hogarty's idea worked out into a practical result. A machine to which the idea could be applied stood there ready, and Frisbie, without explaining how, and in fact without knowing how, the desired result could be reached, left an order to have the machine prepared. This request was delivered by Mr. Lamb to Andrew C. Campbell, and if any inventing was ever done, Mr. Campbell confessedly did that inventing. The mechanism for producing intermittent motion is plainly shown in Campbell's working drawings, and Frisbie in no way contributed to its production. In view of the state of the prior art, it is, at least, very doubtful whether anybody connected with the matter invented anything; but one thing seems to be settled, far beyond reasonable doubt, and that is that look at the case as one may please, and from whatever point of view one wishes, there is no trace of Mr. Frisbie's inventive skill to be found. At best, he could fare no better than a joint inventor with Hogarty and Campbell, and his share in the invention would trench perilously upon the infinitesimal.

From every standpoint, the bill ought to be dismissed, and it is so ordered.

HOCKE et al. v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court, S. D. New York. May 19, 1902.)

1. PATENTS—INVENTION—MEANS FOR PREVENTING LOSS OF FREIGHT IN SHIPMENT.

The Mockridge patent, No. 493,595, for means for securing railroads and shippers against loss of freight by means of a system of numbering applied to the cars and packages, the duplicating of the numbers on checks and the shipping receipts, and a temporary receptacle on the car for holding the checks in loading, is void on its face for lack of patentable invention.

In Equity. Suit for infringement of letters patent No. 493,595, for a means for securing railroads and shippers against loss of freight, issued to Joseph B. Mockridge March 14, 1893. On demurrer to bill.

Arthur v. Briesen, for plaintiffs.

Robert J. Fisher, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 493,595, dated March 14, 1893, and granted to Joseph Babbitt Mockridge for "means for securing railroads and shippers against loss of freight." They consist in numbering the cars for each train temporarily and consecutively; numbering the packages consecutively and by letters, serially; designating the same car for packages to the same place; printing the serial numbers, a description of the packages, and the temporary number of the car on a shipping receipt for the office; and the numbers on a check to load the car by to be left in a box on the car, and returned to the office for comparison,—whereby mistakes in loading will be prevented, or discovered and corrected, before the cars leave, and the freight can be readily traced after the cars leave.

The claims are for:

"(1) The means for securing against loss of freight, consisting of a receipt or other like document, containing characters indicating the car designed to receive the merchandise, a separate independent check or ticket, containing duplicate characters of the ones on the said receipt, so that the check and receipt control each other, and a receptacle held temporarily on the car, and adapted to receive the ticket bearing the number of the car on which the receptacle is held; the ticket being deposited in the said receptacle at the time the merchandise indicated on the ticket is loaded in the car, substantially as shown and described.

"(2) The means for securing against loss of freight, consisting of a shipping receipt, waybill, or other like document, containing characters indicating serial numbers and the number of the transporting medium, a separate independent ticket or check, containing duplicate characters of the ones on the said receipt, so that check and receipt control each other, and a receptacle placed temporarily on the numbered transporting medium, to receive the correspondingly numbered checks or tickets at the time the merchandise indicated by the serial number on this ticket is placed in the corresponding transporting medium, substantially as shown and described.

"(3) The means for securing against loss of freight, consisting of a receipt or other like document, containing characters indicating the car designed to receive the merchandise, and characters to designate the merchandise to be shipped, and a separate independent ticket or check, containing sets of characters which are a duplicate of the characters on the said receipt or document, substantially as shown and described."

The bill alleges the grant of the patent; ownership by the plaintiffs; respect to it by the public generally; that the invention has gone into extensive use; and that the defendant infringes.

The bill is demurred to for invalidity of the patent apparent on its face. Of course, upon the question so raised, every intendment must be made in favor of the validity of the patent, as allowed by the patent office; and all defenses arising from prior knowledge or use, or other facts, must be left for answer and proofs. But after this there remains the question, which may be raised in this way, whether the patent on its face, as it stands, covers any invention that can be patented. The claims do not go so far as the specification in covering the details of the means employed, but the substance of what is either set forth or claimed seems to be the numbering of the cars, the serial numbering of the packages, the duplicating of the numbers on the shipping receipt and the check, and the temporary receptacle on the car for holding the checks in loading. The numbering of cars or packages or other things, for identifying them, seems to be a mere

ordinary use of numerical language for an ordinary purpose; and the duplication of the numbers on the checks is only a more extended use of such language in the ordinary way, for comparison in safe-keeping or tracing,—like that of duplicate checks for baggage, of stubs for checks, or of double entries in account books. The temporary receptacle is a merely convenient place to keep the checks in by stevedores while loading, that involves no ingenuity. The whole seems to be just a good plan for carefully using ordinary things. It is a painstaking—which is always a useful—method, without ingenious novelty, which does not in any view seem to be patentable.

Demurrer sustained.

REED MFG. CO. v. SMITH & WINCHESTER CO. et al.

(Circuit Court, D. Connecticut. June 27, 1902.)

No. 1,040.

1. PATENTS—INFRINGEMENT—COLLAR-IRONING MACHINE.

The Shaw patent, No. 608,720, for a collar turning and ironing machine, was not anticipated, and is valid and entitled to a broad construction, as covering a pioneer invention. Claim 1, as so construed, held infringed by a machine made in accordance with the Asher patent, No. 627,889.

In Equity. Suit for infringement of letters patent No. 608,720, granted to W. C. Shaw, August 9, 1898, for a collar turning and ironing machine. On final hearing.

H. C. Lord and James D. Dewell, Jr., for complainant.
Wm. E. Simonds, for respondents.

PLATT, District Judge. This case now comes before me on its merits on pleadings and proofs. Complainant is the owner of patent No. 608,720, granted August 9, 1898, to W. C. Shaw. One of the defendants is the manufacturer, and the other the selling agent, of the machine claimed to be manufactured under patent No. 627,889, granted June 27, 1899, to the defendant Asher. The question hinges entirely upon the first claim of the patent in suit, which is as follows:

"(1) In a collar turning and ironing machine, the combination of a curved, flange-shaped former, over which the collar is folded and curved into proper shape for wear, a grooved iron arranged opposite the former, and means for moving the grooved iron into engagement with the former and for moving one of said parts upon the other, substantially as set forth."

This claim was an evolution resulting from interference proceedings in the patent office. Basing his action upon the decision of the patent office in those proceedings, Judge Townsend granted a preliminary injunction. (C. C.) 103 Fed. 796. This order was appealed from, and reversed by the circuit court of appeals. 46 C. C. A. 601, 107 Fed. 719. The court says, on page 720, 107 Fed., and page 603, 46 C. C. A.:

"It is quite manifest that there is presented a substantial question as to infringement, which can be settled only upon construction of the patent, and

that requires a presentation of the state of the art and a history of the invention in the patent office."

Judge Townsend intimates, in his memorandum filed at the time of ordering the preliminary injunction, that the patent in suit was a pioneer patent. I can find nothing in the final proofs to lead my mind to any different conclusion. It is not apparent that the respondents, in their effort to establish anticipation, have been able to add anything of value to the specifications and claims embodied in patent to Martin H. Ryder for hat-curling machine, No. 287,865, dated November 6, 1883, and in the German patent to Rudolph Mindt, No. 24,731. Evidently they chose to use at the outset their best ammunition. These patents, as well as a fair résumé of the interference at the patent office, were before Judge Townsend at the early hearing, and he was of the opinion that the evidence was "insufficient to support the respondents' contentions of noninfringement and invalidity." If the history of the proceedings in the patent office interference has been given in greater detail, the contention of the complainant has been strengthened rather than weakened thereby. To quote again from Judge Townsend, "The essence of Shaw's invention is to provide a machine whereby collars can be laundered in a circular shape, fitted to the neck of the wearer, without breaking the edge of the collar," by which he means without injuring the fabric of the collar. It is quite clear that if a turnover collar was first starched and ironed flat, and then dampened upon the fold line, and placed upon the former to be ironed and polished ready for wear, it was, in the prior art, impossible to avoid either wetting the collar too much or not wetting it enough. If too much moisture was applied, the polish of the edge was lost. If too little was applied, the fabric was injured and the collar cracked. Shaw saw the situation, met the problem, and solved it. His machine, therefore, is novel and of great utility. The generic idea belongs to him, and, when two machines which accomplish that purpose are before us, it is idle to carp and criticise and stick in the bark as to methods and manner. Whether there are three or four elements in the claims; whether the word "opposite" refers to a portion of the imaginary circle which would be formed by an extension of the former, where the sadiron will remain when at rest, or whether it is used to describe the position of the sadiron when in use, as being above that portion of a circle which the former occupies; whether the means, considering the last portion of the combination as expressing a single function, or the assimilation of two functions, consists of the vertical and horizontal action of the levers at the pivotal point when they are attached, or the addition of the power which the hand, when applied to the levers, furnishes; whether "moving" and "guiding" are synonymous terms,—all these and other contentions seem to me to be extremely narrow and provocative of useless discussions. I agree with the complainant that it would be a queer freak of justice if he, after fighting out manfully in the patent office the question of priority in the conception of this novel and meritorious claim, should now be compelled to abandon to a contestant the fruits of his victory. It is beyond cavil that the broadest permissible construction shall be given to the language of a pioneer patent, to protect, if possible, the

patentee in the enjoyment of the invention to which he has given the first tangible expression.

A decree may be entered for an injunction and accounting upon the first claim of the patent in suit.

PENNSYLVANIA GLOBE GASLIGHT CO. v. AMERICAN LIGHTING CO., Limited.

(Circuit Court, D. Delaware. July 21, 1902.)

No. 233.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement of a patent comparatively recent, and which has not been adjudicated, will not be granted where the proofs are conflicting, and it appears that a full hearing is necessary to determine the questions in issue.

In Equity. Suit for infringement of letters patent No. 31,745, granted October 31, 1899, to Arthur E. Shaw and Edward S. Sanderson for a design for a street lamp. On motion for a preliminary injunction.

A. C. Gray and John R. Bennett, for complainant.

W. Saulsbury, Hervey S. Knight, and Wm. B. Greeley, for defendant.

BRADFORD, District Judge. The bill in this case charges infringement of letters patent of the United States No. 31,745, dated October 31, 1899, granted to Arthur E. Shaw and Edward S. Sanderson, assignors to the complainant, for a design for a street lamp, and prays for an injunction and damages. The case is now before the court on a motion for a preliminary injunction. The affidavits on each side are numerous, and it is admitted that there has been no adjudication of the validity of the patent. On careful consideration of all the affidavits and exhibits produced, and in view of the course and practice of the courts in this and other circuits on applications for preliminary injunctions in patent causes, I am satisfied that it would be premature and improper at this stage of the case to express any opinion upon its merits, and that the same should be determined only after plenary proofs shall have been adduced. The application for a preliminary injunction must, therefore, be denied, the costs to abide the event of the cause.

LOOMIS-MANNING FILTER CO. v. MANHATTAN FILTER CO. et al.

(Circuit Court, S. D. New York. May 10, 1902.)

1. PATENTS—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICERS.

A suit for infringement cannot be maintained against an individual who is not alleged to have infringed, except in his official capacity as an officer of a corporation charged to have committed the infringement, and not shown to be insolvent, unless some other special reason appears.

In Equity. Suit for infringement of patent. On demurrer to bill.

Ivins, Kidder & Melcher (Ernest Hopkinson, of counsel), for complainant.

Dyer, Edmonds & Dyer (S. O. Edmonds, of counsel), for defendants.

HAZEL, District Judge. The essence of the bill discloses a similar state of facts as shown in *Mergenthaler Linotype Co. v. Ridder* (C. C.) 65 Fed. 853. By paragraph 12 of the bill in suit, it appears that the infringement complained of is that of the defendant corporation. The individual defendants are officers thereof, and as such participated in the acts of infringement. In the absence of some special reason for joining the officers of the alleged infringing corporation as defendants,—such as insolvency of the company, or the use of the name of the corporation to conceal a fraud or conspiracy, or as a protection against liability of others,—I am not inclined to hold differently than was held by Judge Townsend in the *Mergenthaler Case*, and by Judge Coxe in *Bowers v. Atlantic, G. & P. Co.* (C. C.) 104 Fed. 892. These cases are analogous, and the decisions are followed by me.

The demurrer is therefore sustained, with costs. Complainant has leave to amend within 30 days.

SOUTHERN BUILDING & LOAN ASS'N v. CAREY et ux.

(Circuit Court, W. D. Tennessee. July 19, 1902.)

1. APPEAL—RIGHT—DECREE ENTERED ON MANDATE.

A circuit court has no power to refuse to allow an appeal on the ground that the decree sought to be appealed from was entered on a mandate from the circuit court of appeals.

2. SAME—GROUNDS FOR DENIAL.

A circuit court cannot deny an appeal from its decree on the ground that it is frivolous and sought for delay only; that being a matter which can only be considered by the appellate court.

3. SAME—EFFECT—APPEAL FROM DECREE ENTERED ON MANDATE.

The power of a circuit court to enforce a decree entered by it on a mandate of an appellate court, notwithstanding an appeal therefrom and the tender of a proper supersedeas bond, is doubtful, and, if it exists, should be rarely exercised.

4. BILL OF EXCEPTIONS ON APPEAL—BRINGING REJECTED DOCUMENTS INTO RECORD—FEDERAL PRACTICE IN EQUITY CASES.

The practice of bringing into the record, by bill of exceptions, pleadings or papers which the court has refused to allow a party to file, is

not known to the federal courts in equity cases; but, inasmuch as a consideration of such documents may be necessary to enable the appellate court to determine whether or not they were properly rejected, it would seem that, in the absence of any statute or rule regulating the practice in that regard, the trial court may properly, by an order, direct the clerk to certify the pleading or other document rejected to the appellate court for that purpose.

In Equity. On motion for allowance of appeal.

Thomas M. Scruggs, for plaintiff.

Thomas W. Brown, for defendants.

HAMMOND, J. This is an application for an appeal from an order entered upon the mandate of the circuit court of appeals in the case of Association v. Carey, 114 Fed. 288. Before that appeal was taken there had been an accounting by the receiver before the master, leaving a balance of about \$400 in his hands, which was ordered to be paid to the defendant Mrs. Carey, which was the judgment affirmed. When the mandate was filed in this court the plaintiff company asked leave to file a petition praying that this sum of \$400 should not be paid to Mrs. Carey until certain delinquent taxes due upon the property foreclosed should be paid. It is stated in the petition that in accounting with the master the receiver had omitted to pay these delinquent taxes, and that they had since been paid by the plaintiff company, after its purchase of the property under the foreclosure decree. The petition also asked that certain costs claimed to have been reserved by the original decree should now be decreed against Mrs. Carey, and paid out of the fund in the hands of the receiver. The court refused to entertain this petition or to allow it to be filed, and directed a decree upon the mandate paying the fund to Mrs. Carey, and decreeing costs against the plaintiff company. From this an appeal is prayed, and the application is resisted upon the ground that it is a frivolous appeal for delay, and does not lie, because the decree from which the appeal is sought is in strict conformity to the mandate of the circuit court of appeals, and is only in execution thereof. This may be true, and yet the application cannot be denied. Rule 33 of the rules of the supreme court (3 Sup. Ct. xvii) and rule 30 of the circuit courts of appeals (31 C. C. A. clxviii, 90 Fed. clxviii) furnish the only remedy known to the law against frivolous appeals for delay, by imposing damages not exceeding 10 per cent. for the delay at the discretion of the appellate court. It is said by the supreme court in the case of *The Douro*, 3 Wall. 564, 18 L. Ed. 168, that:

"An appeal is a matter of right, and, if prayed, must be allowed, but should never be prayed without some expectation of reversal. We impose penalties when writs of error are sued out merely for delay in cases of judgments at law for damages; and, if the rule were applicable to the case before us, we should apply it."

See, also, *Prentice v. Pickersgill*, 6 Wall. 511, 18 L. Ed. 790.

The rules above mentioned at first were applicable only to writs of error at law, but they were subsequently extended to cases of appeal in equity and in admiralty, covering the very situation mentioned by the court in the above quotation. These rules apply as well to cases of a second appeal from an order upon the mandate as to original

appeals. In any case the court, justice, or judge granting the appeal is but little more than a ministerial officer carrying into effect the statutes in that behalf. Whether the appeal is one that ought or ought not to be taken, that may or may not be entertained on its merits, or should be redressed by damages for the delay occasioned in taking it, is a question solely for determination by the appellate court. The court or judge passing upon an application for an appeal can only refuse it in those cases where no appeal at all is allowed, and where the judgment of the original court is absolutely final, which can never be said of such decrees as this.

Cases of appeal or writ of error from judgments entered upon the mandates of the appellate court are almost innumerable. *Ex parte Union Steamboat Co.*, 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 84, where the cases are numerous cited. It is there said that "the inferior court is justified in considering and deciding any question left open by the mandate and the opinion of this court, and its decision upon such matters can only be reviewed upon a new appeal to the proper court." In this case the plaintiff contends that final judgment for costs was not decreed by the court of appeals, and should not now be adjudged against it; also that the taxes delinquent and not paid at the time of its purchase under the foreclosure decree should be paid by the receiver, and that its omission to pay them before the sale should not affect that right; and that these matters were not adjudicated in the court of appeals. The court here is of the opinion that the decree of the court of appeals is effective as to all these matters, and that inasmuch as it settles that Mrs. Carey was not liable beyond her undertaking to mortgage the corpus of her estate, and that the fund in the hands of the receiver represents rents or profits which were not mortgaged by her, it is a necessary inference from the mandate that there should be no decree against her for either costs or taxes in exoneration of the plaintiff company. Therefore the petition presented was refused, and not allowed to be filed. But it now seems to the court quite certain that this application for appeal from that construction of the mandate falls within the category mentioned by Mr. Justice Brown in the quotation above made from the case of *Ex parte Union Steamboat Co.*, supra.

If there were nothing involved but the question as to the costs, it is possible that this court might refuse this application for appeal, upon the ground that no appeal lies from a mere decree for costs. But the application further involves the question made as to the liability of Mrs. Carey to pay the delinquent taxes, which is sufficient to give the appellate court jurisdiction over both questions, as was ruled in *Bank v. Hunter*, 152 U. S. 512, 14 Sup. Ct. 675, 38 L. Ed. 534. This court is further of the opinion that this matter ought to have been settled prior to the former decree which was appealed and confirmed. The plaintiff ought to have diligently ascertained the taxes delinquent before any sale was had under the foreclosure decree, or at least before its purchase of the property, and have had the same paid out of the fund, if it were liable therefor; but, not having done this, it was the plaintiff's own fault that the matter was not so litigated, and the question is therefore *res judicata* by the decree of the appellate court.

Mackall v. Richards, 116 U. S. 45, 6 Sup. Ct. 234, 29 L. Ed. 558. It was said in that case that the appellate court will not entertain a second appeal from a decree upon its own mandate where that decree conforms to the mandate; but obviously this is a question for that court to decide, and not this court upon the application for the appeal. The case of Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1044, shows that the proper remedy against such appeals as that applied for here is by a motion to dismiss the appeal made in the appellate court, and upon that motion the court will examine the decree made upon the mandate, and if it be in conformity to that mandate the appeal will be dismissed, but, if not, the error will be corrected. And this and many subsequent cases show that, where a second appeal does not lie for the correction of any alleged errors in entering a decree upon the mandate, a mandamus in aid of the mandate is the proper remedy. The dissenting judge in that case thought that the remedy of dismissing the appeal was not a proper one, but that the appeal should be entertained and heard notwithstanding that it was taken only for delay, for which delay he said that the only remedy was the damages allowed under rule 33, *supra*. But I have searched in vain for any case authorizing or intimating that the court or judge below could refuse to grant such an appeal, even when it was apparent that it was taken only for delay. That is a question which it seems to me the court below cannot decide.

The cases are numerous, and it is unnecessary to cite them further, which establish the foregoing practice upon this subject. As I understand them, the court below has no discretion in any way to alter or amend the decree of the appellate court, and has no further duty than to enter the decree of enforcement according to the mandate. But if disputes arise as to the interpretation of the mandate, and as to what does or does not conform thereto, a second appeal is open to the parties to settle those disputes. Or if subsequent proceedings are taken, or are offered and refused, as in this case, a second appeal is open to the parties, to review the action of the court in allowing or disallowing such subsequent proceedings. And in cases where for any reason a second appeal is not allowable, mandamus is the remedy for the correction of such alleged errors occurring after the mandate has arrived, as if the plaintiff company here should be put to a mandamus to compel us to entertain and file its petition; but always a second appeal, if that be possible, seems to be the preferable remedy. *Hinckley v. Morton*, 103 U. S. 765, 26 L. Ed. 607; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Cook v. Burnley*, 11 Wall. 677, 20 L. Ed. 84; *Ex parte Washington & G. R. Co.*, 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339; *Gaines v. Rugg*, 148 U. S. 228, 242, 13 Sup. Ct. 611, 37 L. Ed. 432.

It is intimated, if not decided, in *Perkins v. Fourniquet*, 14 How. 328, 330, 14 L. Ed. 435, that the court below may go on and execute the decree of the appellate court notwithstanding an appeal taken after the mandate has been entered and decreed, but it is not suggested that the court below may refuse the second appeal. Nor are we told under what circumstances the court should proceed with the execution of the mandate notwithstanding the appeal, and no subsequent case has been found where such a course was taken. It

seems to me a doubtful power, at best, since by exercising it the court below would practically preclude all review of its judgment in the matter, and would, in effect, finally decide the very question which the appeal has carried to the appellate court for its determination. It would also seem that the statutes providing under what circumstances a writ of error or appeal shall operate as a supersedeas of the decree would control this matter, and that the court below should exercise the power intimated in *Perkins v. Fourniquet* very rarely, if at all, and perhaps never if the decree be for the payment of money, and the proposed appellant offers a bond, conditioned as required by law, to effectuate the supersedeas provided by the statute. Rev. St. §§ 1000, 1007; Sup. Ct. Rule 29 (3 Sup. Ct. xvi); Cir. Ct. App. Rule 13 (31 C. C. A. clii, 90 Fed. clii); *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810; *Fost. Fed. Prac.* § 402.

If the power exists in the court below to grant the appeal, but to refuse the supersedeas pending the hearing of it, or if, having signed a bond, conditioned as required by law, to effectuate a supersedeas, as in ordinary cases, the court below may notwithstanding disregard the supersedeas because it is a second appeal, and from a decree believed by the court below to be in conformity to the mandate, then that power is so extraordinary that it is not surprising that no case has been found or cited by counsel where it was exercised.

On the whole, notwithstanding a strong belief that this appeal must fail and be dismissed in the court of appeals, and notwithstanding the contention of the defendants' counsel that it is obviously only for delay, I do not feel authorized to refuse it, nor to decline to accept a bond which, under the statute, will operate as a supersedeas pending the appeal. If I am wrong about this, the remedy of the defendant who is entitled to the money is an application to the court of appeals for a mandamus directing the enforcement of its decree in spite of the appeal that has been taken. Of course, the court or judge should do without mandamus that which he would be so directed to do, but, where the power to act is doubtful, judicial wisdom requires that he should await the judgment of the appellate court where the question involved concerns that jurisdiction. The appeal will be allowed.

The plaintiff tenders a bill of exceptions designed to make the petition offered by it a part of the record, but I must decline to sign it because bills of exception are unknown to the practice of the court. It is a familiar and well-established practice in the state chancery courts to make all papers or documents of any kind which have been rejected by the court, and have not been allowed to be filed, a part of the record by a bill of exceptions, after the manner of the practice at law. This is especially so in Tennessee practice. *Spurlock v. Fulks*, 1 Swan, 289; *Perry v. Pearson*, 1 Humph. 431, 439; *Kelly v. Fletcher*, 94 Tenn. 1, 5, 28 S. W. 1099; *Aymett v. Butler*, 8 Lea, 453; *Wynne v. Edwards*, 7 Humph. 418; *Hill v. Bowers*, 4 Heisk. 272; *Weakley v. Pearce*, 5 Heisk. 401, 415; *Jones v. Stockton*, 6 Lea, 133; *Hays v. Crawford*, 1 Heisk. 86; *State v. Hawkins*, 91 Tenn. 140, 18 S. W. 114; *Ingram v. Smith*, 1 Head, 414, 418; *Anderson v. Railroad*, 91 Tenn. 44, 54, 17 S. W. 803; *Steele v. Frierson*, 85 Tenn. 431, 438, 3 S. W. 649; 1 *Webb*, Dig. pp. 448, 451, 452; *Id.* p. 351. Convenient as this prac-

tice is, it is unknown to, and is not permitted by, the federal practice in equity cases. *Ex parte Story*, 12 Pet. 339, 343, 9 L. Ed. 1108; *Johnson v. Harmon*, 94 U. S. 372, 24 L. Ed. 271; *Watt v. Starke*, 101 U. S. 247, 250, 252, 255, 25 L. Ed. 826; *Wilson v. Riddle*, 123 U. S. 608, 615, 8 Sup. Ct. 255, 31 L. Ed. 280; *Brockett v. Brockett*, 3 How. 631, 11 L. Ed. 786; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C.)* 99 Fed. 177; *Brinkley v. Railroad Co. (C. C.)* 95 Fed. 345, 351; *Brown v. Coal Co.*, 13 C. C. A. 66, 65 Fed. 636, 638; 3 *Enc. Pl. & Prac.* 381; *Id.* 401; 2 *Daniell, Ch. Prac. (1st Ed.)* 746; *Id.* (5th Ed.) 1119, note 6.

The bill of exceptions being refused, the plaintiff asks to modify the former order denying it leave to file the rejected petition "by allowing it to be filed for the purpose of making it a part of the record." This is almost the same alternative order that was asked in *Ex parte Story*, *supra*, and refused. There the rejected answer was sought to be placed at large upon the order book. Here it is asked to file the paper as a part of the record. Substantially, these two processes are the same, and their effect identical. The supreme court refused a mandamus in the *Story Case* to compel the court below to make the rejected document a part of the record upon the distinct ground that that court might properly refuse to suffer any notice to be taken on the record of the proposition to file the supplemental paper. How, then, is a rejected pleading to be made a part of the record in equity cases for the purpose of a review in an appellate court of the action of the circuit court in refusing to allow it to be filed? This point is very obscure in that practice to which equity rule 90 binds us, and I have not found any very satisfactory answer to it.

The *Case of Story*, *supra*, is frequently cited by the works on federal practice and by subsequent cases to the point that the court of original cognizance is not bound to reopen the merits of the main controversy after a mandate on appeal has come down; but of the other question involved in that case—the very one we have here—but little, if any, notice has been taken. That case does not explain how the rejected paper is to be made a part of the record for the purposes of appeal, nor do I know of any other case that does. The books are full of cases at law where a bill of exceptions is available for that purpose, and in state equity practice, as in Tennessee, there is rarely any difficulty about it. But how it is to be done in a federal court of equity is not at all clear, nor is it explained by any reading of the books on federal practice, so far as I am advised. Possibly it can only be done by mandamus compelling the court to receive and file the paper. There would be no difficulty in the English practice, but our American practice on appeal with relation to the record and the papers that go up with it is so radically different that the former scarcely furnishes an analogy. They have in England, strictly, no transcript of the record; interlocutory appeals are allowed from almost any order as well as from the final decree; and there is a petition for every appeal, which is largely used as a vehicle to convey to the appellate court the particular matter to be reviewed upon that petition, and the documents relating thereto, of every kind, used at the original hearing thereof. The appellate court uses the identical record of the original court or office

copies, and there is, in the sense of our practice, no transcript whatever for carrying the case into the appellate tribunal. In the house of lords either side prints its "case," and with it prints an appendix of the documents to be used; the expense being mitigated by agreement for a joint use of the appendixes. Technically, the original documents constituting the record are at the bar of the house for any reference that is needed. On appeal to the lord chancellor or another judge, and now on appeal to the chancery court of appeals, as I understand it, the petition for appeal, by mere reference to the documents relating to the matter to be reviewed, brings the originals for examination on review by the appellate court; and likewise there is no transcript of the record sent up, as in our practice. 3 Daniell, Ch. Prac. (1st Ed.) 149; 2 Daniell, Ch. Prac. (5th Ed.) 1499; Id. 1471, 1473; Id. 1487, note 7; Id. 1477, note 9; Id. 1484, note 5; Id. 1491; Id. 1504, note 10; Id. 1488; and particularly Id. 1003, note 3; also Id. (1st Ed.) 654.

The rule as to filing bills and pleadings before they could become a part of the record was in the English practice very strict. 1 Daniell, Ch. Prac. (1st Ed.) 508; 2 Daniell, Ch. Prac. (1st Ed.) 214; 1 Daniell, Ch. Prac. (5th Ed.) 398, 399, as to bills; Id. 754, 755, as to answers; Id. 1609, 1610, as to petitions. What is meant by the filing is found explained in the books. Bouv. Law Dict. voce "File"; 8 Enc. Pl. & Prac. 922; Id. 880; 14 Enc. Pl. & Prac. 905; *Fanning v. Fly*, 2 Cold. 487.

At one time the old practice in chancery followed the habit of reciting in every decree the foundation of it and the evidence offered in support of it. With such fullness was this done that every decree within itself was sufficient to indicate to a reviewing court the full error complained of, without reference to any document, except in cases where it was necessary to inspect the original. The old English practitioners and judges gave up this convenient practice with great reluctance even after the act of 3 & 4 Wm. IV, c. 94, § 10, which enacted that without specific directions from the court no such recital should be introduced into any decree, but that "pleadings, petitions, notices, reports, evidence, affidavits, exhibits or other matters or documents on which such decrees shall be founded shall be merely referred to." After this act the mere reference in any decree to a pleading or document was sufficient to make it a part of the record for the purpose of using it on an appeal from that decree. Lord Brougham's orders made to enforce that act, A. D. 1833, and which are a part of the practice referred to by our equity rule 90, declared that the old-time recitals should not be made. 2 Daniell, Ch. Prac. (1st Ed.) 666; Id. 554, pl. 2. The last clause of his order 27 declared "that, before any order made on a petition be passed, the original petition shall be filed with the clerk of the reports." Id. Mr. Daniell's subsequent editions omit a part of the text of this first edition above quoted, owing, no doubt, to subsequent changes in the practice. But our concern is to learn what the practice was under equity rule 90. *Thomson v. Wooster*, 114 U. S. 104, 112, note, 5 Sup. Ct. 788, 792, 29 L. Ed. 105; *U. S. v. Anon. (C. C.)* 21 Fed. 761, 766, note. It is said in one of the Tennessee cases above cited that, inasmuch as extraneous matter can be got into the record only by a bill of exceptions, entering an order

to make a document a part of the record was ineffective, but that a recital of the document in the decree or order would make it a part of the record; and this is, no doubt, a sound distinction, based upon the practice at law, as that case was. *Wynne v. Edwards*, 7 Humph. 418. I assume that it will be found that since the effect of the recitals in old chancery decrees was to make the document recited a part of the record, when recitals were abolished, as above stated, Lord Brougham's order necessarily provided that a petition which afterwards could only be referred to under that order by the decree should be filed with the clerk, no doubt for purposes of future reference in any matter arising as to the contents of the petition as well upon appeals as otherwise. I have not been able to find the point adjudged, but I infer from analogies that a decree reciting that an application to file a petition had been rejected, or an order merely referring to such a rejected petition, as required by the act of 3 & 4 Wm. IV, would, ipso facto, make the rejected petition a part of the record for all subsequent purposes, including that of a review upon appeal.

Now, the difficulty is that, while our practice also abolishes recitals in decrees, we have no rule of the supreme court, or statute, directing that a mere reference to a rejected petition should make it a part of the record, or any other rejected document, for that matter. Equity rule 86. Our practice seemingly takes no note of a pleading or other document not filed, and not allowed to be filed; and if the record may not be enlarged by a bill of exceptions carrying the rejected document, as in Tennessee, it is not clear how it can become a part of a record in the absence of recitals in the decree rejecting it, unless we hold that the mere reference to it in the decree denying it a filing with the record makes it nevertheless, *pro hac*, a part of the record for the purposes of inspection on appeal as to its contents. The supreme court says in the *Story Case* that the court below may properly refuse it a place upon the record; and, of course, the court should refuse it such a place where it proposes, as in the *Story Case*, to reopen the merits of the decree settled by the former appeal. This would make the rejected document an outlaw, so to speak, from the record and from the attention of the appellate court; but I cannot think a proper consideration for the practice would permit such a result. The trouble is that when the clerk comes to make up the transcript for the appellate court he will not, without some special authority, incorporate therein a rejected pleading or document, wherefore some order is necessary to require him to do that thing. Or some rule ought to be adopted which gives him general instructions as to such rejected documents in making up his transcript. That a rejected pleading or other document, upon an appeal which carries the whole case into the appellate court for review, should in some way be sent to the appellate court for its consideration in reviewing the order rejecting it, I cannot doubt.

It was said by Mr. Justice Story in *Dexter v. Arnold*, 5 Mason, 303, 311, Fed. Cas. No. 3,856, that in courts of the United States the decree contains a mere reference to antecedent proceedings, without embodying them, "but that for the purpose of examining all errors of law the bill, answers, and other proceedings are, in our practice, as

much a part of the record before the court as the decree itself, for it is only by a comparison with the former that correctness of the latter can be ascertained." Chancellor Cooper tells us in his edition of Daniell that it is the duty of the register to enter in the minutes of the proceedings a statement of the papers read or offered and overruled, for which he cites *Westmeath v. Salisbury*, 1 Moll. 421. He further says that in New York it is the duty of the clerk to enter on the minutes a statement of the pleadings, depositions, and affidavits read, or which were offered and overruled; and similarly he makes a brief note of practice in this regard in other states, including Tennessee, where the matter is accomplished by a bill of exceptions, as we have seen. 2 Daniell, Ch. Prac. (5th Ed.) 1003, and notes.

The dealing of the supreme court with evidence offered and rejected in courts of equity furnishes a possible analogy to cases of a rejected pleading. In cases at law tried by the court without a jury, either under the federal statute or under such a state practice as they have in Louisiana, or under any like practice, the bill of exceptions is resorted to and always available if needed; but it is often dispensed with by methods that will be readily familiar upon the examination of such cases. Another analogy is found in equity cases, where there is a feigned issue tried before a jury, and there is an application before the equity judge for a new trial. There, again, a bill of exceptions is available, but Mr. Justice Bradley tells us, in the cases already cited from the supreme court, that the practice in such cases permits a bill of exceptions, and that that is the only permissible use of it in equity. 2 Daniell, Ch. Prac. (5th Ed.) 1119, notes 5-8; *Id.* 1137; *Bouv. Law Dict.* voce "Postea." Evidently, then, this use of a bill of exceptions in equity cases is not applicable here. None of these analogies furnish us any guide to the practice under consideration, unless it may be with relation to rejected evidence. Our equity rule 86 abolishes recitals in orders and decrees as absolutely as the act of 3 & 4 Wm. IV did in England; but it gives no direction as to the filing of rejected pleadings or documents which have lost the benefit of the recitals that made them a part of the record, and, so far as I have found, there is no rule applicable to such a condition. Our Revised Statutes (section 698) directs that the transcript certified to the supreme court in equity and admiralty cases shall contain the record "as directed by law to be made," and copies of the proof of such entries of papers "on file" as may be necessary for the hearing of the appeal. It may be inferred from this language that, if the English practice adopted by equity rule 90 makes this rejected petition a part of the record by the reference that is made to it in the order rejecting it from the files, it already may be treated as a paper authorized by the statute to go into the transcript certified by the clerk; and it does seem to me that by the old practice already mentioned in England it would become by that reference a part of the record,—not, to be sure, a part of the technical record, such as mentioned in Rev. St. § 750, but still a part of the record necessary for the hearing on appeal as provided in Rev. St. § 698. Rules 8 and 13 of the supreme court (3 Sup. Ct. vii, x) were evidently intended to adjust the practice to the new method of

sending a transcript to the court of appeals, instead of using the original record, as in England; but no provision is made for the condition of rejected documents. *Blatchf. Rules*, p. 120. The distinction between the practice of making up the record in England and our own country was adverted to by Mr. Justice Miller in an action at law, in the case of *Burr v. Navigation Co.*, 1 Wall. 99, 102, 17 L. Ed. 561; and I take it that the power of the court to direct what papers shall constitute that record which shall be transmitted to the appellate court by the transcript would not be questioned whenever such action becomes necessary because of the fact that the disputed paper has not been admitted to the files in the regular way, and that this power is an essential grant of Rev. St. § 698, if not already inherent in the court without the statute.

The nearest analogy my reading develops to the condition we have here is that of a case where the testimony at the hearing in equity is taken orally in open court, as may be done if the court permits it. Equity rule 67, last paragraph. How is that testimony to be taken and transmitted to the appellate court? Strange to say, I do not find that question answered by the cases or the books on practice or the rules, any more than the one we have in hand, and the necessity for a rule governing the practice is apparent. As said by Judge Simonon in *Coosaw Min. Co. v. Farmers' Min. Co.* (C. C.) 67 Fed. 31, 32:

"Under the practice in the English chancery, no testimony was ever taken in open court before the chancellor. Witnesses were examined before one of the masters in chancery, and their testimony reduced to writing and read at the hearing."

This is the common method prescribed by our equity rule 67, and when the testimony is taken in that manner, or before the examiner, it is easy enough to make a rejected document or any rejected evidence a part of the record by making it a part of the report of the master or examiner when he sends the testimony in for reading at the hearing, and no bill of exceptions can be necessary. But suppose the testimony is taken under the latest amendment to rule 67 of May 15, 1893 (149 U. S. 793, 13 Sup. Ct. iii, 3 *Desty*, Fed. Prac. 1785). How is it to be put upon the record for transmission in the transcript to the appellate court? The rules in admiralty direct in similar circumstances that the testimony shall be taken down by the clerk and transmitted to the appellate court. *Adm. Rules* 49, 50. I should say that a court of equity might resort to the same method, or might require an examiner to attend and take it down, or one of the masters, or in any convenient way; but how, then, is this written testimony to be made a part of the record, except by an order directing it to be filed as such, and which would be the equivalent in all respects of a bill of exceptions embodying the testimony, after the manner of the practice at law? In *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, Mr. Chief Justice Waite held that, notwithstanding the acts of congress and the then existing equity rules, the court could take the testimony in an equity case *viva voce* when produced in the open court; but there is nothing in the case to indicate how such an examination is to be made a part of the record, though the

case decides that, unless it is made a part of the record and sent to the appellate court, no notice can be taken of it. See *Lloyd v. Penrie* (D. C.) 50 Fed. 4, 11. Since that time the specific amendment of 1893 to equity rule 67 has been adopted, as above noted, but neither the rule nor the cases direct the method of taking down the testimony and making it part of the record. In the case of *Connecticut v. Pennsylvania*, 5 Wheat. 424, 5 L. Ed. 125, reference is made to our first judiciary act, and its requirement that oral testimony of witnesses examined in open court should be put upon the record by "a statement of the facts," which requirement was repealed by the act of 1803; and that act required, as does Rev. St. § 698, that a copy of the bill, answer, depositions, and all other proceedings, of what kind soever, in the cause, shall be transmitted to that court. Now, says the opinion, "previous to this act the facts were brought before this court by the statement of the judge," etc. The case then decides that all the testimony on which the judge founds his opinion should be laid before the appellate court, but there is no indication how this is to be done, except by the statement aforesaid.

But, again, it does seem to me that, under the practice there described, the "statement of the judge" would be substantially the equivalent of a bill of exceptions, though not in that precise form; and, further, it seems to me that if now the court should take the testimony under equity rule 67, as amended in 1893, by an oral examination in open court, it must, substantially and necessarily, put the testimony in the record by verifying the writing containing it, either by an order upon the record to that effect, or otherwise, very much after the manner of a bill of exceptions, and that likewise whenever it becomes necessary to make a rejected pleading or other paper a part of the record, similarly, it must be done by a process that is the equivalent of the common-law bill of exceptions. I am constrained to believe, notwithstanding the decision in *Ex parte Story*, supra, and the other cases cited, that for that strictly limited purpose such a method must be resorted to as has been done in Tennessee since the statutes abolished recitals in chancery orders and decrees. What *Ex parte Story* and similar cases really decide that is of serious concern is that a case in equity in the appellate court is not to be narrowly tried upon a bill of exceptions, after the manner of such a trial in a case at law; that is to say, that no such function as is performed by the bill of exceptions in limiting the questions of evidence or others that are to be tried upon a writ of error is known or can be permitted in a court of equity. But that so far as the bill of exceptions becomes a mere vehicle—First, in which to place a rejected paper or any rejected evidence, or any admitted evidence, for that matter, which has been orally given, and not otherwise preserved in writing; and, secondly, for the transmission of these to the appellate court for its consideration on appeal,—it is not so certainly prohibited by *Ex parte Story* and the other cases. Yet, in the face of those cases, I am not prepared to adopt that practice, even for that purpose, convenient as it is, but have concluded that if we have jurisdiction, after an appeal has been granted, to make any further orders in the case (see *Rector v. Lipscomb*, 141 U. S.

557, 12 Sup. Ct. 83, 35 L. Ed. 857), I shall follow the precedent made under a somewhat similar perplexity in *Westmeath v. Salisbury*, 1 Moll. 421, *supra*. I am not willing, in the language of the order presented by counsel, for the plaintiff to direct that the said petition "shall be filed for the purpose of making the same a part of the record," after having, on an application to file it, rejected it wholly and disallowed its filing. The very object of that disallowance was to prevent it from becoming "a part of the record." It was intended that it should have no place in the case for the purpose of reopening it after the mandate came down. An appeal having been taken from that order, I shall do what was done by the lord chancellor in the case last cited, and direct that the document shall be transmitted to the court of appeals, so that their honors may determine whether, or not the order rejecting it was correct, and whether or not it shall become "a part of the record" in the case. By this action the plaintiff will have leave to apply to the court of appeals to use and read the petition that was rejected, for their information, or for any order whatsoever that their honors, "in their greater wisdom, may be pleased to make in regard thereto." For this purpose the clerk will be directed to transmit a copy of the rejected petition with the transcript which he shall certify to that court upon this second appeal. The order may be drawn as follows:

"On application of the plaintiff company, the order heretofore entered, denying leave to file its petition, is so far modified that the clerk of the court is directed to certify the rejected petition to the circuit court of appeals in the transcript which he shall send to that court upon the appeal from that order already taken, so that that court may determine whether or not the petition was improperly refused a filing, whether or not it is properly a part of the record in this case, or may make any other or further order in relation thereto which to the said court may seem just and right in the premises."

Ordered accordingly.

THE YARKAND.

(District Court, S. D. Alabama. July 30, 1902.)

1. SHIPPING—AUTHORITY OF MASTER TO SELL SHIP—NECESSITY.

A master, by virtue of his general authority, has no right to sell the ship in a distant port and in the course of a voyage, but his authority in that respect rests upon necessity solely, and upon the particular emergencies of the occasion. If the circumstances are such that a person of prudent and sound mind, after carefully observing all the facts and weighing all the probabilities, could have no doubt as to the advisability of a sale, the master, acting in good faith, may make such sale and give a good title.

2. SAME—STRANDED VESSEL—RECOMMENDATION OF SURVEYORS.

The master of a stranded ship is justified in giving great weight to the judgment of a board of competent surveyors selected to examine the vessel, and in selling her as she lies, on their recommendation, where he concurs in their opinion that she cannot be floated within a reasonable expense, and is in great danger of total loss, although she may be subsequently rescued and repaired by the purchaser at an expense which saves a material part of her value.

3. SAME—VALIDITY OF SALE BY MASTER.

The Russian ship Yarkand stranded in the night on the coast of the Gulf of Mexico between Pensacola and Mobile Bay. The second day thereafter the master notified the owners by cable, and also the Russian vice consul at Pensacola. The latter, who was also agent for the insurers, selected three competent surveyors, and with them visited and examined the vessel four days after she stranded. She was lying broadside on the beach, bedded in the sand to a depth of 9 feet, heavily listed, bilged, and filled with water to the level of the surrounding sea. Her crew had left her, and were camped on the shore. The surveyors were unanimously of opinion that she could not be salvaged within a reasonable expense; that she was in great peril from storms; and recommended that she be sold, if possible, fixing her value as she lay at \$1,500. The master and vice consul both concurred in their opinion, and two days later, the master, not having heard from the owners, sold her for \$1,600, and executed a bill of sale. She was subsequently floated by the purchaser, repaired, and converted into a barge. The owners, on learning of the stranding, abandoned her to the insurer, which brought suit to recover possession after she had been salvaged. *Held*, that under the circumstances the master had authority to make the sale, and the purchaser acquired a valid title, there being no question of the master's good faith.

In Admiralty. Action by insurer to recover possession of a ship sold by the master while lying stranded.

J. C. Avery and McIntosh & Rich, for libelants.
Gregory L. & H. T. Smith, for claimant.

TOULMIN, District Judge. This is a suit to recover the possession of the ship. On the night of December 29, 1900, she went aground on the beach about 18 miles eastwardly from Sand Island light, near the entrance to Mobile Bay, exposed to the winds and waves of the Gulf of Mexico. On learning of the stranding of the ship soon after it happened, and before this libel was filed, her owners abandoned her to the insurers. The libelants were the insurers under contract with the owners, and accepted the abandonment. D. C. Eitzen, the Russian vice consul stationed at the port of Pensacola, Fla., and who was also the agent of the insurers, appointed a board of surveyors to examine and inquire into the condition of the ship. The board consisted of S. C. Cobb, surveyor for the American Bureau of Shipping, Jacob Kryger, surveyor for the National Board of Underwriters, and Robert H. Langford, ship carpenter and master builder, all of Pensacola. In their report the surveyors valued the ship, as she was lying stranded on the beach, at \$1,500. They expressed the opinion that she could not be gotten off within a reasonable expense, and recommended that she be sold, and, if she could not be sold, as she was lying, for \$1,500, that the master strip the vessel at once, in order to dispose of all material on her to the best advantage. The survey took place on January 2, 1901. On January 4, 1901, the master of the ship sold her, and executed a bill of sale therefor, to W. H. Northrup, for \$1,600. The ship was subsequently gotten off the beach, towed to Pensacola, and converted into a barge. Her value was variously estimated by the witnesses, some of whom had seen her after the survey and before she was gotten off the beach. They differed widely in their opinions of her value,

both as she was lying on the beach and if she were afloat and in repair. On January 5th—the day after the sale—another survey was had by appointment of the Russian vice consul at the port of Mobile. The surveyors, in their report, described the situation of the ship, expressed the opinion that she could be salvaged at an expense that would justify the effort to save her, and recommended that the effort be made. It is contended on the part of libelants that the master had no authority to sell the ship; that there was no necessity for it; that the master was unwilling to make such sale, but was urged by said Eitzen and others to immediately sell her at private sale; and that, yielding to their importunities, he accordingly executed the bill of sale. It is further contended that the consideration was grossly inadequate, and that the sale was fraudulent and void. It is contended by the claimant that, while the master had no express authority to sell the ship, he acted under his implied authority as master, and was justified in doing so by the circumstances of the case.

While it is charged in the libel that the sale was fraudulent and void, it is not shown by the proof, or claimed in the argument of counsel, that there was any fraud or want of good faith on the part of the master in making the sale. But it is insisted by counsel that the master did not act on his own judgment, and that he was unduly influenced. The conduct of the Russian vice consul, Eitzen, in connection with the sale, is especially criticised, and it is suggested that his action and advice in the matter was improper, or at least suspicious. It appears from the evidence that Eitzen did have something to do with the sale, in so far, at least, as aiding the master to find a purchaser, and perhaps in bringing the purchaser and the master together, and in expressing his opinion as to the advisability of a sale. But I see nothing in this that was improper or unreasonable, in view of the fact that he was the representative of the nation to which the ship belonged, and was also the agent of the insurers of the ship. The ship was a Russian ship. She belonged to a distant foreign port, where her owners resided. The insurers were likewise foreign and in a distant country. It was not unnatural that the consular representative of the country to which the ship belonged, and agent of her insurers, should manifest much interest in the matter; and to whom would the master more naturally look for counsel and aid than to such representative and agent? But suppose Eitzen was unduly active in urging a sale, and was acting in bad faith or from improper motives, as intimated by libelants' counsel, how would that affect the sale made by the master, if he acted in good faith, and was justified by the circumstances of the case? The master, through the vice consul, called to his aid disinterested persons of experience, who were competent to advise, after a survey of the vessel and her injuries, as far as they could be ascertained, whether it were better to attempt to save and repair her or to sell her; and, as said by the supreme court in the case of *The Amelie*, 6 Wall. 18, 18 L. Ed. 806: "Although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court reviewing the proceedings such evidence in justification of his conduct." Two of the three sur-

veyors appointed by the Russian vice consul Eitzen, testified in the case with intelligence and clearness and in detail as to the situation of the vessel, and why they considered her in great peril, and of little value, as she lay on the beach. They were shown to have had large experience in such matters, and to have been entirely disinterested. It appeared that the third surveyor had died since the survey, but he, too, was shown to be thoroughly competent and experienced, and as having fully concurred in the views expressed by his colleagues. The testimony of the two surveyors, who were witnesses in the case, was, in substance, that the ship was lying almost broadside on the beach, bedded about nine feet in the sand, and heavily listed off and towards the shore, with water in her up to tide-water mark, and with five feet of water at the stern. The sea was breaking against her side. The crew had left her, and were camped on shore. She was bilged, and water was ebbing and flowing in her, the water being the same height in the vessel as on the outside. The ship was at the time lying still, but the water in her was washing even with and the same as the water on the outside of her. Her position was a very hazardous one, and in their opinion her peril was to her full extent,—that she was too badly bilged ever to be gotten off, and they believed she never could be gotten off. There were fish of considerable size swimming in the water in the vessel, which indicated that there was quite a large hole in her bottom. They could not examine the vessel below the water line. She had about 600 tons of ballast in her, and the water covered the ballast. There was every indication of a gale of wind, and they then believed the vessel was in danger of capsizing, and being pounded to pieces. The master of the ship testified on the part of libelants, and, among other things, said that his ship went aground on December 29, 1900, at night, and on December 31st he sent a cable to the owners of the ship, and a telegram to the Russian vice consul, Eitzen, telling them the condition of the ship, and that she was full of water; that there was water in her hold as high as there was on the outside of her. He saw that the deck was a little bent amidships upward, and the pitch from the seams broken. He could not see that she was started anywhere else. That the crew left the ship and camped on shore. He further stated: That the ship was sold on January 4th, some time about 6 o'clock in the evening. That he understood it was to Saunders & Co. That he got this understanding from Eitzen, who made the trade for the sale. He did not talk with anybody else about the sale of the ship except Eitzen. A few hours before the sale Eitzen told him he could get the full sum at which the ship was valued by the surveyors, and he thought it a good bargain. That he signed the bill of sale about 6 o'clock, January 4th. Did not know W. H. Northrup, and does not know whether he was present when the bill of sale was signed. There were several persons present, but he did not know who they all were. That Eitzen told him he was representing the underwriters, and had authority from them to sell the ship. That Eitzen said, "In such cases as that, nothing else could be done except to sell the ship, and that he got the power from them, or something of that kind." That what witness understood Eitzen to mean was

that in such a case there was nothing else that could be done except to sell the ship. Witness received a part of the purchase money, and left the balance with R. A. Hyer, the ship's agent, to pay her bills. He requested Eitzen to bring the surveyors aboard to examine the vessel, and Eitzen came with them. Witness received no directions from the owners of the ship, and no answer at all, to his cable. He further stated that he was trying to do the best for the underwriters and for the owners, and he believed at the time he signed the bill of sale that he was doing the best for all concerned; that he agreed in opinion with the surveyors that the ship was in danger of being lost, and that he would not have signed the bill of sale if he had not had that opinion. W. H. Northrup testified for claimant that he was the purchaser of the ship. That he and the master negotiated the trade for her; that they had several interviews on the subject before the trade was finally consummated in Eitzen's office; that they met there by previous agreement; that Eitzen was present in his office at the time, but took no special part in the transaction. Eitzen had some conversation with the master there, but did not make the trade with witness, or have any negotiations with him about it further than to ask him, on the same day, and before he had seen the master on the subject, if he could not do something towards helping the master out in the sale of the ship. Eitzen's testimony on this point was substantially the same as that of witness Northrup. He further stated that about noon on the day of the sale R. A. Hyer said to him that Northrup or Saunders would give \$1,600 for the ship; that he told Hyer the master must be seen about it, and he would bring them together; that later on that day Northrup and the master did meet at his office, and that they dealt directly together; that witness said to the master that he thought he made a good bargain, and that it was the best thing that could be done, in which the master fully agreed. Witness stated that he saw the ship on the beach at least twice between the time she stranded and the day of sale, and that his opinion, as a seafaring man of considerable experience, was at the time that she could not be saved, and would become a total loss; that he had no interest in the purchase of the ship. B. C. Tunison testified that he was an attorney at law, and prepared the bill of sale at the request of the purchaser, and he was present at the signing of it by the master, and was a witness to his signature. He stated that the master expressed to him satisfaction at having closed the trade, and reiterated several times after the sale that the ship was in imminent danger, and he believed her bottom was out, and that she could not be gotten off. He said he "had the \$1,600, and the purchaser the ship with the bottom out." There was evidence that tended to show that one Saunders was interested with Northrup in the purchase of the ship.

To entitle the libelants to recover, the sale by the master must have been without authority, and void. "To justify the sale by the master of his vessel in a distant port, and in the course of her voyage, good faith in making the sale and a necessity for it must both concur; and the purchaser, in order to have a valid title, must show their concurrence." *The Amelie*, 6 Wall. 18, 18 L. Ed. 806. The master,

by virtue of his general authority, had no right to sell the ship. His authority in this respect rested upon necessity solely, and upon the particular emergencies of the occasion. His duty was to communicate with the owners, advise them of the facts, and take their directions, if such communication was easy and practicable. If notice to the owners was not easy and practicable, or, if given, and the master failed to ascertain their wishes within a reasonable time, then he was authorized to act upon the necessity and emergencies of the occasion as they then appeared to him from all the lights before him. This necessity is a question of fact to be determined by the circumstances in which the master was placed. *The Amelie*, supra; 20 Am. & Eng. Enc. Law (2d Ed.) 210-212; *Astsrup v. Lewy* (D. C.) 19 Fed. 536. Communication with the owners was practicable, if not very easy. It could be had by cable, and it appears that on December 31, 1900,—the second day after the accident,—the master gave notice by cable of the stranding of the ship. The proof was that an answer by cable could be had and ordinarily was had in from 16 to 24 hours, at the outside, between Pensacola, Fla., whence the master's telegram was sent, and Abo, Finland, the residence of the owners, to which it was sent. The proof further was that the master received no directions—in fact no answer of any sort—from the owners. On the fifth day after his communication to them he sold the ship as stated. The master had before him the report of the surveyors, in which they stated the situation of the ship, the value they placed on her as she was then lying on the beach, their opinion that she could not be floated within a reasonable expense, and their recommendation that she be sold. He had the opinion and advice of the vice consul of his government and agent of the insurers, who had been a seafaring man, and of experience; and the master himself fully concurred in the opinions and views thus expressed. In case of necessity the master has the power to sell. If the sale is justified by necessity, it is valid. It is held by the authorities that this is neither a legal necessity nor a physical necessity, but a moral necessity. Par. Mar. Law, 60. Mr. Justice Story, in the case of *The Fortitude*, 3 Sumn. 228, Fed. Cas. No. 4,953, defines the meaning of "moral necessity." He says: "Moral necessity arises where there is a duty incumbent upon a rational being to perform, which he ought at the time to perform. It presupposes a power of volition and action under circumstances in which he ought to act, but in which he is not actually compelled to act by overwhelming, superior force." "It is perhaps safe to say that, if the circumstances are such that a person of prudent and sound mind, after carefully observing all the facts and weighing all probabilities, could have no doubt as to the advisability of a sale, then a sale will be justified." "So, if a vessel is stranded, and the actual and immediate prospective danger menaces a probable loss, the master is justified in selling, regardless of the condition of the vessel." 20 Am. & Eng. Enc. Law (2d Ed.) 212, 213. "The necessity for the sale is to be determined by the circumstances as they must have appeared at the time of the sale, and not by any subsequent event. Therefore the sale of a shipwrecked vessel is not

to be invalidated merely because the vessel was afterwards rescued and repaired." 20 Am. & Eng. Enc. Law, *supra*; The Raleigh (C. C.) 37 Fed. 125. "The peril of the ship cannot be measured by the ultimate result of the efforts to save her." Hall v. Insurance Co. (C. C.) 37 Fed. 371. The supreme court, in the case of The Amelie, *supra*, said: "What course so proper to pursue as to obtain the advice of that body of men who, by the usage of trade, have been immemorially resorted to on such occasions?"

If it be suggested that the fact that the ship was floated, saved, and restored to a material part of her original value disproves the necessity for the sale, it may be answered, in the language of the supreme court in the case last cited (The Amelie):

"Not so. It may tend to prove the surveyors were mistaken, but does not affect the duty of the master to follow their advice, when given in such strong terms, and with no evidence before him that it was erroneous."

In the case of The Sarah Ann, 13 Pet. 387, 10 L. Ed. 213, Mr. Justice Wayne said:

"Nor can the necessity for a sale be denied when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, though the vessel may in a short time afterwards be got off and put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and their judgment may be shown to have been erroneous by the better knowledge of other persons, showing it was probable that the vessel could have been extricated from her peril without great injury or incurring great expense; and the master's incompetency to form a judgment or to act with a proper discretion in the case may be shown. But from the mere fact of the vessel having been extricated from her peril no presumption can be raised of the master's incompetency, or of that of his advisers."

The master's statement that Eitzen made the trade for the sale of the ship, and the implication thereby that he, in executing the bill of sale, was only carrying out Eitzen's contract and dictation, is contradicted by the testimony of Northrup, Eitzen, and Tunison. Eitzen, no doubt, found the purchaser, and brought him and the master together; but that the trade was actually made by the master, and not unwillingly made by him, I think there can be no doubt from the testimony. I apprehend that the master, being unfamiliar with the English language, did not express himself with accuracy or clearness, and did not say in his testimony exactly what he meant. The fact that the ship was subsequently gotten off the beach and put afloat within a reasonable expense, as compared with her value when afloat, may show that the surveyors on whose advice the master acted in selling the ship were mistaken in their opinion or judgment as to the practicability of getting the ship afloat, and as to her value; but these subsequent events do not affect the duty of the master to follow their advice, when given as it was, and with no evidence before him that it was erroneous. The Amelie, *supra*; The Sarah Ann, *supra*; 20 Am. & Eng. Enc. Law (2d Ed.) 213. I think "the circumstances were such that a person of prudent and sound mind, after carefully observing all the facts and weighing all probabilities, could have no doubt as to the advisability of a sale," and that the

sale by the master was justified. My conclusion is that the claimant acquired a valid title under his purchase of the ship.

A decree will be entered dismissing the libel at the cost of the libelants.

In re GRAFF et al.

(District Court, E. D. New York. July 24, 1902.)

1. **BANKRUPTCY—TRUST FUNDS—RECOVERY BY OWNER.**

Bankrupts, who were brokers, a short time before their bankruptcy purchased certain stocks for a customer, through another firm, which were fully paid for by the customer by money to his credit with bankrupts. The firm through which the purchase was made retained the stocks, and subsequently sold the same, with other stocks purchased for the bankrupts, and from the proceeds paid an indebtedness from the bankrupts to them, leaving a balance in their hands. *Held* that, as against the bankrupts and their general creditors, whose rights were no greater, the presumption was that the proceeds of the customer's stocks were in such balance, and that he was entitled to recover the same.

2. **SAME—BROKERS—STOCKS PURCHASED FOR CUSTOMER.**

The bankrupts purchased other stock for the same customer, which had been paid for, but not delivered. At the time of the bankruptcy the bankrupts held a larger quantity of such stock, some of which had been pledged, and some of which came into the hands of the trustee, who sold the same. *Held*, that the presumption was that a part of the stock on hand was held for the customer, and that he was entitled to the proceeds received therefor by the trustee.

3. **SAME—CONVERSION OF STOCKS BY BROKER—ADJUSTMENT OF CLAIM.**

A broker purchased stock for a customer, and charged the same to his account. On the same day the customer drew out a sum from his account, which left a balance to his credit less than the cost of the stock. Between that time and the broker's bankruptcy the customer had increased his credit, and also some time between the two dates the broker converted the stock, and the customer filed a claim for its value. *Held*, that he was entitled to credit as a payment on the stock for his credit balance at the close of the day on which the purchase was made, together with the subsequent increase in such credit; also that the sum withdrawn on that day was not chargeable to him as a preference, it not appearing whether it was withdrawn before or after the stock was purchased, and the presumption being that it was in either case prior to the accrual of his claim for conversion.

4. **SAME.**

Where a bankrupt converted certain stock purchased by him as a broker some time between the time of its purchase and his bankruptcy, the exact time not appearing, the value of the stock, for the purpose of measuring the owner's damages, may properly be taken as of the date when the petition in bankruptcy was filed.

5. **SAME—PREFERENCES.**

At the time of the making of a general assignment by a firm of brokers, and shortly prior to their bankruptcy, their bookkeeper had a credit upon their books, and also a claim against them for certain stock owned by him, which it appeared they had previously converted. On that date he received payment of the balance due him on the book account. *Held* that, as his claim growing out of the stock transaction was at that time one for damages only, the payment received was a preference, which he must surrender before proving such claim.

In Bankruptcy. On review of referee's decision respecting certain claims.

Welton G. Percy, for trustee.
J. Edw. Swanstrom, for Maxwell.
Cameron & Hill, for Reilly.
A. J. Koehler, for Kreinbrink and Franklin.
G. E. Waldo, for Moss crop.

In re Claim of Maxwell.

THOMAS, District Judge. G. Edward Graff & Co., brokers, made a general assignment for the benefit of creditors on May 16, 1901, and a petition in bankruptcy was filed against them on the following 21st day of May. Graff & Co., through Adams, McNeil & Brigham, bought for Maxwell the following stock: May 7th, 100 shares Southern Pacific; May 15th, 20 shares U. S. Steel preferred; and May 1st, 200 shares Bay State Gas (not purchased through Adams, McNeil & Brigham). For all these stocks full payment was made at the time of ordering by moneys to the purchasers' credit. Keeping in mind the conceded fact that Graff bought for Maxwell the Southern Pacific and the U. S. Steel, through Adams, McNeil & Brigham, the first conclusion is reached that Adams, McNeil & Brigham held the shares specifically bought for Maxwell. What became of these stocks? Between the time of their purchase and May 27th, Adams, McNeil & Brigham sold the stocks bought through them, and other stocks, to meet certain indebtedness of Graff, and there was a general balance therefrom of \$27,791.77. Therefore the proceeds of Maxwell's stock are either in this balance, or were appropriated by Adams, McNeil & Brigham to pay Graff's debt to them. If, now, the question were whether Maxwell should be preferred to Graff in the distribution of this surplus, the state of fact would be that Graff had authorized Adams, McNeil & Brigham to sell Graff's stock and Maxwell's stock to pay Graff's debt, and there would be no doubt that Maxwell should be paid first from the fund. But Graff's general creditors, through the proceedings in bankruptcy, claim the fund to the exclusion of Maxwell. This is not a case where the creditors have a better title than the debtor. Maxwell's money is all in the fund, or, as between Maxwell and Graff, it should be all in the fund, for Graff had no right to authorize Adams, McNeil & Brigham to sell Maxwell's stock in priority to Graff's own stock. What Graff's right would be the creditors' rights now are. The statement of facts shows that no other customer of Graff was long on either of such stocks at the time of the failure, but adds, "except customers who owed a debit balance to the firm against stocks bought for them." But no such marginal purchasers are before the court, nor do such persons make any claim upon the fund. Regarding alone the parties who demand the fund, viz., Maxwell and the general creditors, Maxwell has priority. But it may be urged that the proceeds of Maxwell's stock cannot be traced to the balance. The question is not directly whether it can be traced to the balance, but can it be traced to the moneys in Adams, McNeil & Brigham's hands from which the balance arose. Adams, McNeil & Brigham closed out the last Southern Pacific held by them for Graff on May 10th, but continued to sell other nonenumerated securities in which Graff had an interest until the 16th day of May. Thereafter no securities were

sold until the 27th day of May, when the remainder of the securities held by them for the account of George Steele, in whose name Graff & Co. acted, were sold, and the balance above stated remained. From the 10th day of May to the 27th, the only stock purchased for the account of George Steele was as follows:

May 15.	30	Atchison preferred, 96½, value, less commissions.....	\$2,887 50
" "	21	U. S. Steel preferred, 92½, value, plus commissions....	1,945 13
" "	15	Linseed Oil, 19½ delivered, value, less commissions....	981 25
" 16.	10	Southern Railway preferred, at 60, value, plus commissions.....	801 25
" "	20	U. S. Steel preferred, at 90, value, plus commissions....	1,802 50
			<hr/>
			Total..... \$8,417 63
Deduct 15 Linseed Oil delivered.....			981 25
			<hr/>
			Balance..... \$7,436 38

This includes Maxwell's U. S. Steel preferred.

The evidence does not show the securities, nor the value thereof, sold after May 10th; nor is there any evidence before the court showing how the account stood between Graff and Adams, McNeil & Brigham at any time, save after the sale on the 27th. The presumption is quite as strong that the balance remaining on the 27th contains the proceeds of the sale of the stock of Maxwell as that it is made up wholly of the proceeds of the sale of Graff's stock. The amount added to it after May 10th was only \$7,436.38, as above stated. Hence the fund was not created after May 10th, except to that extent, and to the extent that securities were sold after May 10th and before May 27th, which account is not stated. Adams, McNeil & Brigham were selling Maxwell's stock just as really as they were selling Graff's shares. Why presume that the fund belonged to Graff & Co., the offenders, and place the burden of distinguishing upon Maxwell? Why call the fund Graff's, and not Maxwell's, to the extent of the latter's interest?

It is considered that the fund remaining with Adams, McNeil & Brigham on May 27th, from which the balance of \$27,791.77 arises, contains the proceeds of the sale of the Southern Pacific sold on the 10th, and the U. S. Steel preferred bought on the 15th and sold on the 27th. On May 15th Graff & Co. wrote to Maxwell as follows:

"We inclose herewith notice of purchase of 20 shs. of U. S. Steel Pfd. stock at 90. Will have the stock transferred to your name; also the 100 shs. of So. Pac. which you are long of."

There were no sales of the U. S. Steel preferred until the 27th; therefore, of necessity, the proceeds of its sale were in the amount from which the above-named balance arises. At the time of the failure Graff & Co. had 1,300 shares of Bay State Gas in their office, which was sold by the trustee on December 4, 1901; and 2,100 shares pledged were sold by the pledgee June 19, 1901. It was the duty of Graff & Co. to have 200 shares of the stock on hand for delivery to Maxwell, and presumptively a part of the 1,300 shares were held for that purpose. The presumption is that Graff & Co. did not, by sale or pledge, convert the stock, but rather had it on hand. If it was on hand, it was sold by the receiver, who should return to Maxwell the proceeds

thereof. All the computations employed by the referee with respect to the amounts will be adopted, and Maxwell will be preferred to the amounts found. It is understood that no interest will be allowed, except such interest as the money returned shall have earned during the time that the proceeds of the stock have been in the hands of the receiver or trustee.

In re Claim of Reilly.

The disposition of the Maxwell claim leads to a confirmation of the referee's disposition of the Reilly claim. The claim is against the estate for a conversion of stock by Graff & Co. They did not convert the stock after the petition was filed in this court; therefore a valuation after that time cannot be adopted.

In re Claim of Kreinbrink.

Kreinbrink was a customer of Graff & Co. So far as appears, the account was opened on March 20, 1901. On April 2d, Graff & Co. purchased for Kreinbrink 100 shares of Republic Steel and Iron, at the sum of \$2,212.50, less commissions. The only payment made towards this stock was such cash balance as Kreinbrink had on hand on the day that it was purchased and thereafter maintained or increased. At the close of the business day on April 2d, Kreinbrink's balance appears to have been \$981.55, which left him in debt for the stock at the close of business on that day to the amount of \$1,230.95. Hence, considering the transaction of April 2d, it is concluded that Kreinbrink paid in \$981.55 for the stock and was owing \$1,230.95. The referee valued the stock, as of the filing of the petition in bankruptcy, at \$1,875, and, deducting the amount owing on the stock, it would leave as due the claimant \$644.05. But it appears that after the day mentioned, and to and including May 17th, Kreinbrink's credit increased, so that on the last-named day the balance against him was only \$993.64. The referee has allowed this amount as the payment actually made upon the stock claimed to have been converted. In this he was sufficiently liberal to claimant, but by pursuing such a course it is easily conceivable that he should regard the \$84.72 drawn out on April 2d as a preference, and so, indeed, it might be, if the account is to be simply regarded as an account current between the parties. But in fact the claim is for the conversion of stock some time between April 2d and the time of bankruptcy. The amount paid in on the stock was the amount of Kreinbrink's account at the close of business on April 2d, after charging him with the check for \$84.72 drawn on that day. There is no evidence that he drew the amount after the stock was charged to him. He may have drawn it before. Nor is there the slightest evidence that he drew it after the conversion. Unless he drew it after the cause of action arose, there could be no possible preference. The stock was bought on April 2d, and there is no evidence that it was converted on that date. The presumption is that it was not. Therefore the check was drawn before the cause of action arose. Hence Kreinbrink is entitled to the amount allowed him by the referee, without returning the \$84.72. The claimant contends that the damages may be based upon the value of the stock on April 2d. There is no evidence of conversion on that day, but the evidence shows that the

stock was charged to him on that day, which would be an indication that at that time conversion had not taken place. The claimant asks for no other measure of damages. The trustee claims that it should be at the time of the general assignment. The referee adopts neither rule, but adopts the value at the time the petition was filed. It is believed that the time urged by the claimant is incorrect; that the date suggested by the trustee does not exclude the right of the referee to adopt the date when this court took jurisdiction in the matter; and, if the relation of a broker to his customer be that stated by the court in *Re Gaylord* (D. C.) 113 Fed. 131, then such decision fully supports the referee's decision.

In re Claim of Franklin.

Franklin was the bookkeeper for the bankrupts at their Brooklyn office, and on May 16, 1901,—the time of the general assignment,—he was long 10 shares U. S. Steel Company's stock on the books of the bankrupts, with whom he had two accounts, both showing a cash balance in the claimant's favor,—one for \$15.16, and the other for \$740. On May 16th, at about noon time, Franklin received for the balance of his two accounts Graff & Co's check, which he immediately procured to be cashed. He has filed a claim either for the return of the stock or for conversion thereof, placing the value of the stock at \$523.75. The trial before the referee proceeded upon the theory that there was a conversion of the stock, and that its value as of the 21st of May, when the petition in bankruptcy was filed, was \$432.50; and it was further held by the referee that the amount received by the bankrupts on the 16th of May, as above stated, was a preference, and must be returned, before the claim for the stock could be allowed. Upon the record is found the following stipulation:

"It is conceded that the number of the 10 share certificate of U. S. Steel Co. stock into which the witness' (claimant's) Steel and Wire was transferred was 17685A."

If there is any competent evidence that the firm of Graff & Co. had the stock at the time that it made its general assignment, or the petition in bankruptcy was filed, or that the stock came into the hands of the receiver or trustee, the court has been unable to discover it. Therefore the claim, if any, must be to recover the value thereof. Hence, before the money was withdrawn by the claimant, he had simply claims for damages against Graff & Co. and for the money shown by his account. Under such states of facts he certainly received a preference when he withdrew the money. Claimant's counsel insists that the conversion was on June 3, 1901. Certainly the stock could not be valued at a later time than the filing of the petition in bankruptcy, and the rule pursued by the referee in that regard is correct, as is his finding that the money withdrawn must be returned before the claim can be filed.

In re Claim of Moss crop.

The conclusion reached by the referee in this matter is affirmed. The views heretofore expressed in this memorandum sufficiently account for the attitude of the court towards this claim.

GOODLOE v. TENNESSEE COAL, IRON & R. CO.

(Circuit Court, N. D. Alabama, N. D. August 7, 1902.)

1. FOREIGN CORPORATION—GRANT OF PRIVILEGES—DOMESTICATION OF CORPORATION.

Acts, Ala. 1892-93, p. 454, entitled "Relating to the Tennessee Coal, Iron & Railroad Company, and to confer certain rights and powers on said company," provides that such corporation, "created by and existing under the laws of Tennessee," shall enjoy all privileges and immunities conferred by general laws for industrial purposes. It is authorized to build furnaces, etc., is given the power of eminent domain, authorized to consolidate with other corporations, and form one general one, under another name, but it is provided that the act shall not limit the rights of the corporation under its Tennessee charter. The constitution of Alabama declares that the subject of an act shall be stated in the title. *Held* that, as the statute gave no suggestion of an intent to create a corporation, it did not make the Tennessee Coal, Iron & Railroad Company a corporation of Alabama, nor was the corporation's acceptance of the powers conferred any consent to such a change in its status.

On Motion to Remand.

This suit was commenced in the circuit court of Colbert county, Ala., by E. L. Goodloe against the Tennessee Coal, Iron & Railroad Company to recover \$50,000 damages for personal injuries, and was removed on the petition of the defendant, which states that it is a citizen of the state of Tennessee, "a corporation organized and existing under the laws of the state of Tennessee," and that plaintiff is a citizen of Alabama. Motion is made to remand on the ground that the defendant is a citizen of Alabama, and an act of the general assembly of Alabama "relating to the Tennessee Coal, Iron & Railroad Company, and to confer certain rights and powers on said company," approved February 10, 1893 (Acts 1892-93, p. 454), is relied on to support that contention. The first section of the act provides "that the Tennessee Coal, Iron & Railroad Company, a corporation doing business in this state, but created by and existing under the laws of the state of Tennessee, is hereby vested with, and after the passage of this act, shall have, possess and enjoy all the rights, privileges, franchises and immunities which are now or hereafter may be conferred by the general laws of the state of Alabama for mining, manufacturing or industrial purposes." The second section authorizes said company to lay its lands off into lots, and make donations of lands and money to other corporations, to construct tramroads, etc., and to build railroads to connect different parts of its property. The third section authorizes said company to build furnaces, mills, factories, and industrial enterprises of all kinds, to invest in the stocks or bonds of other corporations, to lease same, etc. The fourth section authorizes the company to build railroads, to own and operate mines, furnaces, and coke ovens, to own water craft, and to operate lines of steamboats in this state, or in the Gulf of Mexico and adjoining waters, etc. The fifth section confers the power of eminent domain upon the company. The sixth section authorizes the company to consolidate with other corporations, etc., and form one general company under such name and style as may be agreed upon, to take up the individual stock of each company, and to replace it with the stock of the general company: provided "such consolidated company shall keep an office in the state of Alabama, and thereupon, said general company shall be invested with all the powers and franchises heretofore belonging to each and all of said corporations so consolidated," etc. Section 7 provides "that nothing herein contained, shall be construed as in any way limiting the rights, priv-

¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 2497, 2498.

ileges and immunities which the said Tennessee Coal, Iron & Railroad Company may now possess and enjoy under the charter granted to it by the state of Tennessee."

Thos. R. Roulhac and Kirk & Rather, for plaintiff.
Walker Percy and W. I. Grubb, for defendant.

JONES, District Judge (after stating the facts as above). The title of the act, "Relating to the Tennessee Coal, Iron & Railroad Company, and to confer certain rights and powers on said company," gives no hint of any intent to create a corporation. According to the title, the corporation which is to take these powers is already in existence, and the title avows no other purpose than to grant unconditionally to the corporation already created by the state of Tennessee the powers, privileges, and immunities named in the act. It does not foreshadow in the least any design to create a corporation. The state constitution exacts that the subject of the act shall be clearly expressed in the title, and renders invalid provisions in the body of the act which do not fall within the scope of the title. It is unnecessary to inquire or decide whether provisions in the body of this act, which it is claimed have the effect to create a corporation, do not infringe this constitutional provision, since an examination of the whole act leads to the conviction that the legislature had no intent to create a corporation, or in any wise to interfere with the corporate character of the Tennessee company. The act simply vests rights and privileges unconditionally in a named corporation, which the act declares is "created by and existing under the laws of the state of Tennessee." It is upon the corporation thus organized and existing, doing business in this state, but owing its powers and corporate organism to the state of Tennessee, that the powers are conferred. Apt words to create a corporation, such as "hereby incorporated," "declared a body corporate," "created a body politic," and the like, are nowhere used in the act. On the contrary, in the only place in which the act refers to the creation of a corporation, it speaks of one already created or existing under the laws of the state of Tennessee, or one that may hereafter be created by voluntary consolidation. The act having singled out a named foreign corporation, which it recognizes as already created by and existing under the laws of another state, to enjoy the powers conferred, there was no necessity to create a corporation to take the benefits conferred by the statute, and no reason for imputing to the legislature the intent to create a different corporation or a new corporation to receive the powers which the act declares it intends to confer upon the Tennessee corporation. The body of the act nowhere deals with the autonomy or internal government of the Tennessee corporation. It leaves its organism just as the state of Tennessee created it. It does not define the relations of the shareholders to each other, the amount of the capital stock, the officers of the company, their powers or tenure, or where they shall meet or have their principal place of business. It does not declare that the Tennessee corporation shall be subjected to the same restrictions as domestic corporations, or that its character as a foreign corporation shall be changed in order that it may enjoy the

powers which are now, or hereafter may be, conferred upon corporations organized under the general laws of the state of Alabama for mining, manufacturing, or industrial purposes. It lays no commands whatever upon the Tennessee corporation, and does not put upon it the slightest duty to undertake any of the things which the act authorizes it to do. The creation of another corporation was in the mind of the legislature in one contingency only, and that was in event the Tennessee corporation chose to consolidate with other corporations. In that event only does the act refer in the remotest way to the creation of another corporation, and in that event only did the legislature contemplate that the corporate character of the Tennessee Coal, Iron & Railroad Company should be changed, and then only by the voluntary merger in "the general company." The sixth section plainly shows there was no intent to interfere in any way with the corporate organism of the Tennessee Coal, Iron & Railroad Company, unless it formed, "under such name and style as may be agreed upon," a new or general company. In that event, the change would be the result of the voluntary act of the Tennessee company, and the terms of the act, unaided and alone, would not create a new corporation. After dealing with the whole subject, and evidently for the purpose of leaving no doubt as to its intention, the legislature expressly provided that "nothing herein contained shall be construed as in any way limiting or interfering with the rights, privileges and immunities which the said Tennessee company may now enjoy and possess under the charter granted to it by the state of Tennessee." The court is not advised as to the general powers granted to the Tennessee company under the Tennessee charter. It is a private charter, and has not been given in evidence. The court does judicially know, however, that one of the rights, privileges, and immunities which the Tennessee Coal, Iron & Railroad Company may now possess and enjoy, under the charter granted to it by the state of Tennessee, is the right, privilege, and immunity to be regarded and treated as a corporation under the laws of the state of Tennessee. The immunity so to be treated carries with it the right or immunity not to be treated as a corporation under the laws of Alabama. This language is contained in the seventh and last section of the act. It is a positive command not to consider the Alabama act as "in any way" limiting the rights, privileges, or immunities of the Tennessee company under the charter granted to it by the state of Tennessee. If this command is obeyed, it forbids any construction of the act which would impute to the legislature the intent to create a new corporation, or to effect the adoption by this state of a foreign corporation as a domestic corporation. The foreign corporation is mentioned in connection with domestic corporations solely to measure the extent of the powers granted to the foreign corporation which it might enjoy under the general laws of this state. Not a word is said in the act about subjecting the foreign corporation to the control of the state in the same manner as domestic corporations are controlled, or which evinces the purpose of the legislature to compel the foreign corporation to abjure allegiance to the state which created it. Whether or not the Tennessee corpora-

tion, under the charter granted to it by that state, had authority to accept the grant of powers from the state of Alabama, or to engage in the matters authorized by the Alabama act, are questions of no moment here. If the Tennessee corporation has transgressed its charter in this respect, it is amenable therefor to the state of Tennessee, and not to the state of Alabama. The state of Alabama has no power, without the consent of the Tennessee company, to alter, amend, or repeal the charter granted to it by the state of Tennessee. Granting to the foreign corporation larger powers under the Alabama laws than it possessed under the charter of the state which created it cannot convert the foreign corporation into a domestic corporation, unless the Alabama legislation so declares, expressly or by necessary implication, and the foreign corporation consents expressly or impliedly to accept the new powers on those terms. There is no such declaration and no such consent here. On the contrary, there is an express avowal on the part of the lawmaking power of Alabama that the legislation shall not affect the status of the foreign corporation under the laws of Tennessee. The acceptance of the act and the exercise of the powers by the foreign corporation are therefore plainly no consent to any change in the status of the Tennessee corporation as a foreign corporation. The Alabama legislation said to the Tennessee company in substance: "Alabama recognizes you as doing business here under the charter granted by the state of Tennessee. You may continue to do business here under that charter, exercising in addition the privileges and rights now conferred, or hereafter conferred, upon Alabama corporations engaged in like business as yours, with certain other privileges in addition; but all upon the condition that the legislation shall not interfere 'in any way' with any of the rights you now possess and enjoy under the charter granted to you by the state of Tennessee." There is nothing in all this which implies either "creation" or "adoption." It amounts to a mere license to the foreign corporation, as such, to do business; it may be, with greater powers than it possessed under the laws of the state of its creation. *Goodlet v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. In the latter case the supreme court said:

"This court has repeatedly said that, in order to make a corporation already in existence under the laws of one state a corporation of another state, the language must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. A mere grant of privileges or powers to it as an existing corporation, without more, does not do this."

The motion to remand, on the ground that the defendant is a citizen of Alabama, must therefore be overruled.

UNITED STATES v. MILNE et al.

(Circuit Court, S. D. New York. May 31, 1902.)

No. 3,160.

1. CUSTOMS DUTIES—CLASSIFICATION—SCRAP STEEL.

Strips of steel cut from the sides of boiler plates after their first trimming, to remove holes or other defects, or to obtain the exact size of plate desired, having two cut edges, but generally untrue, and of varying length, breadth, and thickness, and which after importation are separately rolled into long thin plates, and used for the manufacture of tacks, trunk irons, and other small articles, are "waste or refuse steel fit only to be remanufactured," and dutiable as "scrap steel," under paragraph 122 of the tariff act of 1897, and not under paragraph 135, covering steel in all forms or shapes not specially provided for.

Appeal by the United States from a Decision of the Board of United States General Appraisers Which Reversed the Decision of the Collector of Customs at the Port of New York.

The opinion of the board in the case appealed is as follows:

"The merchandise in question consists of steel-plate shearings, returned by the local appraiser as 'steel boiler plate shearings as steel in all forms and shapes not specially provided for,' and duty was assessed thereon at the rate of four-tenths of 1 cent per pound, under the provisions of paragraph 135 of the act of July 24, 1897. The importers claim said merchandise is dutiable under the provisions of paragraph 122 of said act, the pertinent provisions of which are as follows: 'Scrap steel four dollars per ton; but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel fit only to be remanufactured.' The evidence introduced by both sides to this controversy is voluminous, but there is no contradiction shown as to the facts involved. This merchandise consists of the shearings cut from the ends or sides of steel boiler plates. It appears that when boiler plates are taken out of the rolls at the mills the edges are ragged and uneven; that, in order to make these boiler plates commercially acceptable and practically serviceable, the tops and sides thereof are trimmed off true; and that the pieces which fall off in this process are uniformly known in the trade as scrap. As to these rough and irregular pieces, there is no dispute. They can be used only by remelting or by piling a number of them together, and subjecting them to a rolling process by which they are welded together. Sometimes, however, in order to obtain the exact size desired for the boiler plate, or, in some cases, in order to remove portions containing holes or blemishes, it becomes necessary to subject the boiler plates, after the first trimming, to a second cutting, and the pieces imported are those which are removed from the boiler plates by this second cutting. These pieces vary greatly in length, breadth, and thickness, but have a cut edge on each side, although these edges are as a rule untrue. After importation, the pieces are separately rolled into long thin plates, the width of the resulting plate being about the width of the piece previous to the rolling, and in some cases, before rolling, the pieces are cut into smaller pieces. The plates produced by this rolling process are used for the manufacture of tacks, trunk iron, and other small articles.

"The merchandise is undoubtedly within the established definition of waste. It is spoiled or rejected portions of boiler plates, not suitable for use as boiler plates. It is not a new manufacture in the nature of a by-product, because it has not been made into anything else but steel. It is therefore mere waste or refuse, and the only question to be decided is as to whether or not it is 'fit only for remanufacture.'

"The view of the witnesses on the part of the government seems to be that the plate mill is operated for the production of two things, viz., boiler plates and shearings, and that the scrap or refuse consists only of the pieces first removed, having a single cut edge; that, as the plates are not scrap, but the material for boilers, so these shearings are not scrap, but the material for tacks, hinges, etc.; that, as the making of the boiler from the plates is not a remanufacture, but a further manufacture, so the making of tacks, etc., is not a remanufacture, but a further manufacture; and that remanufacture covers only two processes, (1) melting, or (2) piling up pieces and heating and rolling them together, by which they become welded into one piece. We are unable to agree with this theory. The object of the operation of the plate mill is the production of boiler plates, which are important articles of commerce, especially adapted for one purpose. The pieces sheared off the sides and ends would not be produced if there were any way in which to avoid their production, and this is no more true of the pieces first sheared off, which have only one cut edge, than it is of those afterwards sheared off, having four cut edges. The two processes of shearing produce two grades of scrap, neither of which has been specially manufactured with any particular purpose in view. The tack plates, produced by rolling the shearings, would be in a stage of manufacture corresponding to the boiler plates, and unquestionably would not be scrap or waste. They are material prepared for a particular use; but the merchandise as imported is not tack plates, nor has it been prepared for the purpose of producing tack plates. We are clearly of the opinion that the process to which these shearings are subjected after importation is not further manufacture, but is remanufacture, and we accordingly hold that the merchandise is waste or refuse iron or steel, fit only to be remanufactured. In *G. A. 639* this board passed on similar merchandise to that here in question, and held that it was fit only for remanufacture; and in the case of *Schlesinger v. Beard*, 120 U. S. 264, 7 Sup. Ct. 546, 30 L. Ed. 656, the United States supreme court held that such merchandise was within the definition of 'waste or refuse iron that has been in actual use, and is fit only to be remanufactured.' In the latter case it was conceded that the merchandise was fit only to be remanufactured, and the court passed only on the question as to whether or not it had been in actual use. In treasury decision 21,808 the treasury department, in directing the collector to disregard *G. A. 639* and to assess the goods as 'steel in all forms,' from which action of the collector this appeal is taken, gives as the reason that the decision in *G. A. 639* was based upon the finding of fact that the merchandise was 'waste or refuse steel, fit only to be remanufactured,' and had 'no commercial value for any other purpose.' It is further stated that the 'department is in receipt of information to the effect that large quantities of so-called steel boiler-plate shearings have been imported * * * cut to specified dimensions, * * * and are used in this country as billets, for the production of sheets or plates of superior quality.' The testimony in this case, and an examination of numerous samples, show that the particular merchandise covered by these protests is not cut to specified dimensions, but, on the contrary, is of various sizes and thicknesses, and is invariably untrue as to the edges, and, as shown above, can be used only for the purpose of remanufacture, and has no commercial value for any other purpose.

"For the reasons given, the protests are sustained and the decisions of the collector reversed."

D. Frank Lloyd, Asst. U. S. Atty.

Jacob Fromme, for importers.

LACOMBE, Circuit Judge. The decision is affirmed on the opinion of the board of general appraisers.

INDIA RUBBER CO. v. CONSOLIDATED RUBBER TIRE CO.

(Circuit Court, D. New Jersey. May 8, 1902.)

1. EQUITY—JURISDICTION—ENFORCEMENT OF LEGAL DEMAND.

A federal court of equity cannot entertain a suit to recover a money judgment for damages for breach of a contract merely because such contract contained a provision giving the complainant the right to inspect the defendant's books, to ascertain the amount of liability thereunder, which right complainant seeks to enforce by the aid of a court of equity. Such relief, in aid of a legal action, must be sought in a separate proceeding.

In Equity. On demurrer to bill.

J. Lafin Kellogg, for the motion.
Joseph Kling, opposed.

KIRKPATRICK, District Judge. The bill of complaint alleges that prior to 1897 the India Rubber Company was engaged in the manufacture of rubber vehicle tires of the type claimed to be covered by letters patent of the United States No. 554,675, commonly known as the "Grant" patent, and that in the course of its business it sold large quantities of its goods to various customers; that the Rubber Tire Wheel Company brought suits in various courts against several of the customers of the complainant, claiming to be the sole owner of said letters patent, and charging the said customers with being infringing users of the same. Before any of the questions at issue in said suits were determined, an agreement was made to settle the differences between the parties to said suits, as well as between the complainants therein and the complainant herein, who was interested in the same because it had indemnified its customers against infringement. A copy of the agreement, so entered into between the Rubber Tire Wheel Company and the India Rubber Company, the complainant herein, is set out at length, and appended to the complaint. From it, it appears that, in addition to the discontinuance of its suits against the customers of the India Rubber Company, the Rubber Tire Wheel Company was to give a license to the India Rubber Company to manufacture tires under the Grant patent in suit; but the license was to be suspended so long as the Rubber Tire Wheel Company, or its successors or assigns, performed the covenants by them agreed to be performed. The Rubber Tire Wheel Company by the agreement undertook and promised to purchase each year during the term of the Grant patent 40 per cent. of all the finished rubber tire stock which would be needed by it and its acquired companies, agreeing that, if the amount so required should not equal in value the sum of \$150,000, it should either pay the difference between the value of the amount so purchased and said sum in cash, or take additional rubber stock for the difference, at a price which was fixed. In order that the complainant herein might ascertain if the other party to said agreement was acting

¶ 1. See Equity, vol. 18, Cent. Dig. §§ 110, 114.

in good faith, the agreement provided that an examination might be made by complainant herein, or its agent, of the books of the said other party.

The bill of complaint then alleges:

"That by the acquisition or purchase on the part of the defendant, the Consolidated Rubber-Tire Company, of the business, good will, property plants of every nature, kind, and description whatsoever, of the Rubber Tire Wheel Company, the defendant in this suit has been subrogated to all the rights, and charged with all the obligations, of the Rubber Tire Wheel Company, so far as concerns the matters hereinbefore recited."

Nothing is produced to the court from which it can deduce the conclusions of law here stated.

The bill also sets forth that in the year 1899 an agreement was made between the complainant and defendant herein for the sale by complainant to defendant of rubber tires made according to a formula to be furnished by defendant, amounting in value each year to at least \$500,000, with a penalty for the failure to do so. It alleges breach of this condition, and claims that the complainant has on hand a large stock of goods ordered by defendant which it would be obliged to dispose of at a loss.

The prayer of the bill is that complainant have judgment for \$19,611.96, the amount due for goods sold and delivered under the terms of the contract first set forth, and for the further sum of \$250,000 for damages occasioned by breach of said contract secondly set forth.

The defendant has demurred to the bill, as presenting no ground for equitable relief. It will be observed that the complainant's right of recovery depends upon the existence, validity, and breach of the contracts set out in the complaint. If the defendant be liable for the goods sold and delivered under the contract made between the complainant and the Rubber Tire Wheel Company, or for refusal to take goods ordered in pursuance of the contract entered into between defendant and complainant, the case presented is but that of a simple contract creditor seeking to obtain money damages for breach of a contract obligation. The contract is secured by no lien, nor is there any trust involved. Such actions "can be brought in the federal courts only on their law side." *Scott v. Neely*, 140 U. S. 107, 11 Sup. Ct. 714, 35 L. Ed. 358.

It is urged upon the court that because one of the contracts provides for an inspection of books, to properly ascertain the amount of liability thereunder, a court of equity thereby acquires jurisdiction of the subject-matter. This is not the law. Courts of equity may decide legal questions when they arise incidentally or collaterally in a suit properly instituted for equitable relief, but they will not assume jurisdiction to render a money judgment for breach of contract, because in the prosecution of an action at law its aid may be useful to enforce discovery. "Such aid in the federal courts must be sought in separate proceedings, to the end that the right of a trial by jury in the legal action may be preserved intact"; which right, the court say, cannot be "impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action." *Scott v. Neely*, supra.

This action, then, being one properly cognizable in a court of law, judgment must be for the defendant on the demurrer, and the bill of complaint dismissed.

In re KANTER et al.

(District Court, S. D. New York. September 15, 1902.)

1. BANKRUPTCY—PRODUCTION OF BOOKS—INDICTMENT—EVIDENCE AGAINST ONESELF—CONSTITUTIONAL LAW.

Where a bankrupt is charged in a state court with the crime of having fraudulently removed and disposed of property and with grand larceny in obtaining goods on false pretenses, it being charged that the crimes relate to matters involved in the bankruptcy proceedings, and the bankrupt deposes that a furnishing of books of account and filing of schedules pursuant to the usual order would tend to incriminate him and compel him to be a witness against himself, within Const. U. S., art. 5, and the New York constitution, he will not be required to produce the books, etc.

James, Shell & Elkus, for creditors.
Epstein Bros., for receiver.
Shafer & Levin, for bankrupts.

ADAMS, District Judge. These are motions on the part of the petitioning creditors and the receiver in bankruptcy respectively to punish the bankrupts for contempt in failing to obey the usual order of the court requiring them to file schedules and to compel them to turn over to the receiver all their books of account, records, papers, &c., kept in their business.

The creditors' petition was filed on the 4th day of March, 1902, and the adjudication was made on the 20th day of May, 1902, after a contest on the part of the bankrupts. The latter now seek to defeat the motions upon the plea that the schedules, books, &c., may tend to incriminate them, and that if they are constrained to furnish the required information, they will be compelled to be witnesses against themselves within the meaning and in violation of the fifth article of the Constitution of the United States and of the provisions of the Constitution of the State of New York.

There can be no doubt that if the effect of the granting of the motions will be as contended, the privileges of the parties must be recognized. In re Feldstein, 4 Am. Bankr. R. 321, 103 Fed. 269; In re Franklin Syndicate, 4 Am. Bankr. R. 511, 114 Fed. 205; In re Walsh, 4 Am. Bankr. R. 693, 104 Fed. 518; In re Henschel, 7 Am. Bankr. R. 207; In re Smith, 7 Am. Bankr. R. 213, 112 Fed. 509.

It appears that the bankrupts are under indictments in a state court, charging them with the crime of fraudulently removing, secreting and disposing of property and with the crime of grand larceny in the first degree in obtaining goods upon false pretences. These crimes are

charged to have been committed shortly before the filing of the petition in bankruptcy and relate to matters involved in the bankruptcy proceedings. It is alleged by the bankrupts that the schedules, books, &c., would be competent and relevant evidence against them in the criminal actions and if they are compelled to make the schedules and produce the books &c. they will be deprived of their constitutional privilege.

The answer of the petitioning creditors to the contention is, while recognizing the rule that parties can not be compelled to furnish such evidence where it reasonably appears that it will have a tendency to expose them to penal liability, that it is for the court to determine whether the evidence will incriminate them and that they can not be permitted to judge for themselves in a case of this kind, thus depriving their creditors of an opportunity to ascertain the condition of the estate. And it is urged that schedules, books &c. would not furnish incriminating evidence.

In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which can not possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he can not furnish without accusing himself and where it is not perfectly evident and manifest that the evidence called for will not be incriminating, the privilege must be allowed. *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

Here the inculpatated parties explicitly depose that the books &c. sought to be obtained would furnish evidence against them and so far from being able to say that it clearly appears such would not be the case, I should be inclined to believe that it would, from the nature of the evidence which the books &c. would in all probability furnish.

Motions denied.

In re REED.

(District Court, E. D. New York. July 19, 1902.)

1. BANKRUPTCY—MORTGAGE—VALIDITY—STIPULATION—SALE OF PROPERTY—PROCEEDS—CONTEST IN STATE COURT—SETTING ASIDE STIPULATION—AUTHORITY OF ATTORNEY—GOOD FAITH—LACHES.

According to a stipulation between a trustee in bankruptcy and the attorney for a mortgagee of the bankrupt's property it was ordered in the federal court that the property be sold, the proceeds deposited in a bank, and that the trustee should sue in a state court to determine as to the validity of the mortgage, and that such determination should be final. After the rendition of a decree for the trustee in the state court the mortgagee moved by a substituted attorney that it be relieved of the stipulation with reference to the finality of the judgment, the mortgagee contending that the previous attorney had had no authority to make it, and that the mortgagee was ignorant thereof. It appeared that the whole matter had been left to the former attorney, and that the mortgagee knew the money when in the bank was there by some arrangement by which it was to be a subject of contest. *Held*, that the application was of no merit and too late.

Horace Graves, for Sanchez & Haya Co.
A. T. Stoutenburgh, in pro. per.

THOMAS, District Judge. On the 9th day of October, 1901, the following order was made by this court:

"This matter having come on to be heard on an order to show cause, and it appearing by the affidavit of Arthur T. Stoutenburgh, the trustee herein, that Theodore A. Reed, the bankrupt herein, was duly adjudged a bankrupt on the 22d day of August, 1901; that Arthur T. Stoutenburgh was duly appointed as trustee herein, and has duly qualified as such, and has taken possession of the assets of the said bankrupt; that a substantial part of the assets of said bankrupt estate consist of three large cabinets or show cases, two smaller show cases, and two glass counters, as well as a safe, which chattels are now in the possession of the said trustee at 130 Fulton street, in the borough of Manhattan; that the Sanchez and Haya Company, a corporation, hold a chattel mortgage covering said chattels to secure the payment of ten hundred and thirty-five and $\frac{35}{100}$ dollars (\$1,035.35), on or before the 28th day of June, 1902, for goods sold and delivered by said corporation to the bankrupt some time prior to the execution of said mortgage, which mortgage was executed on the 29th day of June, 1901, and within less than four months of the bankruptcy, and it appearing to be for the best interests of the bankrupt estate that said chattels should be sold, and that the respective rights of the bankrupt estate and the said corporation should be preserved pending the determination of the validity or voidability of said chattel mortgage; and Arthur T. Stoutenburgh, the trustee, in person having appeared in behalf of said mortgage, and Caesar Simis, attorney for the said Sanchez and Haya Company, having appeared in open court and consented thereto: Now, on motion of Arthur T. Stoutenburgh, the trustee herein, it is ordered that the said chattels be sold free and clear of the lien of said chattel mortgage; that the proceeds of said sale to the extent of ten hundred and thirty-five and $\frac{35}{100}$ dollars (\$1,035.35), the amount claimed under said mortgage, be deposited by the said trustee in the Fulton and Market National Bank of New York City, to the credit of said trustee, there to be held as hereinafter provided; that the funds so deposited shall remain in said bank until a judicial determination is had as to the validity or voidability of said mortgage, it being distinctly understood and agreed that the money so de-

posited shall be in lieu and place of the said mortgaged property, and subject to the same rights and obligations as the mortgaged property itself would be, had the same remained unsold; that the said trustee shall at once commence a suit in equity, in the supreme court of the state of New York, county of Kings, for the purpose of such a determination, and such a determination shall be final as between the parties, and that if such final determination shall be in favor of the Sanchez and Haya Company the said fund to be deposited in the Fulton and Market National Bank shall be turned over to the said Sanchez and Haya Company in full satisfaction of said mortgage, heretofore mentioned, and if the final determination of said action shall be adverse to said Sanchez and Haya Company the said fund shall be turned over to the said trustee as part of the bankrupt estate; that the suit so brought shall be without costs to either party; and, further, if it shall be determined that the said proceeds so deposited shall belong to the Sanchez and Haya Company, the said proceeds shall not be chargeable or liable with any commissions or fees by any trustee in bankruptcy or any other person hereafter to be appointed, or any expenses incurred or to be incurred either in the proceedings in the United States district court or the said supreme court hereinbefore referred to; that if the said trustee does not commence said suit to determine the validity or voidability of said mortgage within the period of thirty (30) days from the entry of this order, that then it shall mean and be so construed by said trustee that the said mortgage is a good and valid mortgage, and that the said Fulton and Market National Bank shall pay to said Sanchez and Haya Company the sum of money so deposited in full satisfaction thereof.

Edward B. Thomas, U. S. J.

"We consent to the entry of the above order.

"Caesar Simis, for Sanchez & Haya.

"A. T. Stoutenburgh, Trustee for Theo. A. Reed, Bkpt."

Thereupon the assets of the bankrupt were sold by the receiver at public auction, and such part of them as purported to be covered by the chattel mortgage did not bring sufficient to meet the alleged mortgage debt, but the company's counsel insisted that the court was bound by the order to make good the deficiency from the funds of the estate, and, that there might be no possible breach of the understanding, the court did order that sufficient should be taken from the proceeds of the sale of other property to meet the deficiency. The fund thus constituted was placed in the bank, and the trustee instituted an action in equity to determine title to it, and upon a hearing in the supreme court a decree favorable to the trustee was ordered. Thereupon the Sanchez & Haya Company substituted Mr. Graves as attorney in the action, who now moves that the company be relieved of the stipulation with reference to the appeal, upon the ground that Mr. Simis, the previous attorney, had no authority either to propose, insist upon, or make the stipulation, and that he did it without authority from his clients, who are alleged to have been ignorant thereof. There is no doubt that the whole matter was left to Mr. Simis, a capable lawyer, to exercise his skill and prudence for the purpose of securing the payment of the mortgage; that the money might be taken from the control of this court, and subjected to the determination of the state court, the stipulated arrangement was made between him and the trustee above stated; and, that there might be the least possible delay, the provision that the determination of the trial court should be final was enforced by Mr. Simis upon the trustee, who was bound thereby by the order made in this court. Thus it seems that, through the action of its attorney, the Sanchez & Haya Company have secured

the release of a fund from the restraining order of this court, and its deposit in the bank to await the determination of the title in the state court, and that the Sanchez & Haya Company, having acted upon the order and received whatever advantage there was flowing from it, desire to rescind so much thereof as has proven disadvantageous to them.

Counsel for the moving party relies upon *People v. City of New York*, 11 Abb. Prac. 66, a decision rendered at special term, which sustains his contention. This decision is not in accord with *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468, or *Smith v. Barnes*, 9 Misc. Rep. 368, 29 N. Y. Supp. 692. In the case at bar the attorney made the stipulation for the purpose of putting his clients in what he deemed a state of safety, and in his judgment a proper protection of their interest required the provision. The Sanchez & Haya Company knew that the money was in the bank; that it had been taken away from the jurisdiction of this court by some arrangement whereby it was to be made the subject of contest in the state court; but claims never to have learned under what condition the fund was released by this court; nor does it appear that such company has ever sought any information or exhibited any interest in the matter prior to the judgment against it. It is considered that the present application, tardily presented after awaiting the chance of all benefit from the stipulation forced by its attorney upon the trustee, comes too late, and that it is without merit.

It is desirable to add that there was no intention to reprove counsel presenting this motion; indeed, there was no occasion therefor.

WERCKMEISTER v. AMERICAN LITHOGRAPHIC CO. et al.

(Circuit Court, S. D. New York. Aug. 1, 1902.)

1. COPYRIGHT—PICTURE—EXHIBITION WITHOUT NOTICE OF COPYRIGHT—PUBLICATION—INJUNCTION.

An artist transferred to complainant the copyright in his picture, and complainant caused it to be copyrighted in this country, and published copies, all of which carried the notice of copyright required by Rev. St. § 4962, as amended by the act of June 18, 1874. After such transfer the picture was publicly displayed at the exhibition of the Royal Academy of Arts at London for several months, without a notice of the copyright. Thereafter defendants published copies of the picture, and complainant sought to restrain their further publication. *Held*, that such exhibition of the picture was a publication thereof within the meaning of such section; hence the injunction should be denied.

Briesen & Knauth, for complainant.
Wetmore & Jenner, for defendants.

THOMAS, District Judge. One Sadler, living in England, designed, painted, and was the owner of a picture called "Chorus." The complainant gives evidence of the following instrument executed by said Sadler:

"I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of two hundred pounds.

"London, April 2, 1894.

W. Dendy Sadler."

The complainant also produces the following:

"I hereby certify that on February 3rd, 1894, the proprietor of the Photographische Gesellschaft, Berlin, Germany (The Berlin Photographic Company), Mr. Emil Werckmeister, of Berlin, bought from me the copyright of my picture 'Chorus' for the sum of two hundred pounds sterling, and that the picture was forwarded to the Photographische Gesellschaft, Berlin, for the purpose of reproduction in the first days of March, 1894.

"Hemingford Grey.

"St. Ives, 3rd July, 1902.

Walter Dendy Sadler."

The complainant also offers the following:

"Library of Congress, to wit: Be it remembered, that on the sixteenth day of April, Anno Domini 1894, Photographische Gesellschaft, of Berlin, Ger., have deposited in this office the title of a painting, the title or description of which is in the following words, to wit: 'Chorus.' W. Dendy Sadler. (Photo. on file.) A company of gentlemen with filled glasses, singing in chorus. The right whereof they claim as proprietors, in conformity with the laws of the United States respecting copyrights.

"A. R. Spofford, Librarian of Congress."

All copies of the painting issued by the complainant have carried the notice of copyright required by section 4962, Rev. St., amended by the act of June 18, 1874. The painting itself was publicly displayed at the exhibition of the Royal Academy of Arts, which opened on the 7th day of May, 1894, at London. The evidence shows that such exhibitions begin in the early part of May, and continue during the week days until August, and that they are open to the public generally upon the payment of an admission fee of one shilling by each person admitted. The catalogue of the exhibition, under the title of "Gallery No. X, Oil Paintings (Nos. 781-863)," mentions as No. 810 the painting entitled "Chorus," and "W. Dendy Sadler" as the name of the artist. The painting did not contain the notice of copyright. The thing copyrighted was the painting. If exhibited, it should bear the notice demanded by the statute, if the copyright would be maintained. *Manufacturing Co. v. Werckmeister*, 18 C. C. A. 431, 72 Fed. 54, 58. This case is also authority imperative upon this court that the exhibition of the painting in the manner stated was a publication within the meaning of section 4962. Assuming that the artist, by the instrument executed by him, authorized the complainant to procure the copyright, then it would follow that the complainant had the right to do precisely what the artist himself could have done, and that his rights were subject to the same burdens. The author and proprietor of a painting cannot enable another to take the copyright, reserving to himself the painting, thereby releasing the assignee from his statutory duty. The statute commands that the subject of the copyright—here the painting—shall, if displayed, bear the notice. The complainant's position seems to be that, if he place the proper notice upon the copies, his copyright is protected, although the artist expose the painting to the public.

The complainant could not arrange to procure the copyright in his own behalf, leaving the painting with the artist and proprietor, and rid himself of the responsibility which the statute places upon the owner of the copyright, viz., that the painting, if publicly displayed, shall bear the requisite notice. The rights and obligations of the complainant are those conferred and imposed by the statute upon the author, designer, or proprietor. It is true that the artist, by displaying the picture, has wronged the complainant; but he has also misled the public, and has been able to do this by the failure of the complainant to see to it that the duty imposed by the statute was fulfilled. In short, the statute gives to the assignee what it gives to the assignor, and no more, and all conditions subsequent that would operate against the assignor are equally effective against the assignee. The duty demanded by the statute has not been performed, and it is to be presumed that, in consequence of such nonfulfillment, the persons intended by the statute to be warned that the painting was copyrighted have not been so advised, and have acted accordingly.

The motion for a preliminary injunction must be denied.

BARTLETT v. GATES et al.

(Circuit Court, D. Colorado. September 3, 1902.)

No. 4,331.

1. REMOVAL OF CAUSES—LOCAL PREJUDICE.

25 Stat. 434, provides that, when it shall be made to appear that from prejudice or local influence a nonresident defendant in a suit will not be able to obtain justice in the state courts, he may remove such suit into the circuit court of the United States. *Held* that, irrespective of any moral justification for a widespread or practically unanimous public sentiment in favor of or against a litigant, such a sentiment is, under the statute, ground for removal.

2 SAME.

Where the suit is against several defendants, some of whom are non-residents, it is settled by the letter of the statute, as well as by the great weight of adjudicated cases, that the nonresident defendants may remove the suit.

3. SAME—ORDER FOR REMOVAL—CERTIFIED COPY—FILING IN STATE COURT.

While the law does not require it, proper respect for state courts demands that a certified copy of an order of removal be filed in the state court from which the cause is removed.

D. C. Beaman, A. M. Stevenson, and Daniel Prescott, for plaintiff.
Wolcott, Vaile & Waterman and Thomas J. Leftwich (F. W. M. Cutcheon, of counsel), for defendants.

CALDWELL, Circuit Judge. The case of Bartlett v. Gates and others has been argued and submitted on petition filed by certain

¶ 1. Removal of causes for prejudice or local influence, see note to *P. Schwenk & Co. v. Strang*, 8 C. C. A. 95.

of the defendants in the action who are citizens of states other than Colorado to remove the suit from the state into the federal court, on the grounds of prejudice and local influence.

The act of congress (25 Stat. 434) provides:

"That when it shall be made to appear 'that from prejudice or local influence,' a non-resident defendant in a suit will not be able to obtain justice in the state courts, such non-resident defendant 'may remove such suit into the circuit court of the United States.'"

The existence of "prejudice or local influence," particularly the latter, has been made to appear in this case by a volume of evidence unusual, if not unprecedented, on the hearing of a petition of this kind. The moral justification for a widespread or practically unanimous public opinion or sentiment in favor of one party to a suit or his cause, or against the other party or his cause, may be very great, but, before a trial, such opinion or sentiment constitutes what the law calls prejudice or local influence, and is made by the statute a ground for the removal of a cause from the state to the federal court. By the letter of the statute, as well as by the great weight of adjudicated cases, the nonresident defendants may remove the cause.

Counsel for the petitioners will prepare the order for the removal. When the order is entered on the records of this court, the petitioners will cause a certified copy to be filed in the state court for its information. The law does not require this, but a proper respect for the state courts demands it.

CROCKER v. OAKES et al.

(Circuit Court, S. D. New York. June 9, 1902.)

1. TRUSTS—SUIT TO SET ASIDE TRANSFER OBTAINED BY TRUSTEE—ACCOUNTING.

A federal court, on setting aside a transfer of a life interest in a fund created by will, obtained by the trustee of the fund by fraud or over-reaching, but for which transfer he paid a cash consideration, will not undertake to state the account between the parties, where it appears that it can be better done by the probate court, but will declare the rights of the parties by its decree, and leave the accounting to be taken in the appropriate tribunal.

On Exceptions to Report of a Master Appointed under an Interlocutory Decree.

See (C. C.) 106 Fed. 760.

The complainant was the beneficiary of a testamentary trust of \$10,000, of which the defendant Oakes was trustee. On an accounting in the surrogate court it developed that the amount of the trust had been reduced, by payment of debts, etc., to \$8,786. After this sum had been placed in the trustee's hands, the defendant Dennis secured from complainant the assignment of her interest for \$2,500, on representations, claimed by complainant to be fraudulent, that her interest in the trust estate was less than that amount, that she would not realize anything on it for five or six years,

that she had the lawful right to release it, etc. At the same time complainant and her husband were induced to execute a release to Oakes of all his liability as trustee. The present action was begun in the circuit court for the Southern district of New York, complainant being a resident of New Jersey, for the cancellation of these instruments, to secure an accounting, etc. It was charged in the bill that the defendant Dennis was merely acting as the agent of Oakes in securing the assignment sought to be canceled.

W. T. Read, for complainant.

Mr. Holmes and M. Dennis, Jr., for defendants.

LACOMBE, Circuit Judge. The record submitted upon the hearing is in such shape as to make it well-nigh impossible to form any intelligent opinion as to the various items in dispute, and to demonstrate quite clearly that the proper place for a full accounting is the surrogate's court. The defendant is the trustee of the fund, in which plaintiff has a life interest, and upon canceling the assignments under which he sought to obtain the plaintiff's life interest the corpus of the fund will remain in his hands. From the date of the ineffectual transfer he will be liable to plaintiff for the income, and the amount (\$2,500) he paid plaintiff to obtain the transfer will be available as a credit in his accounting with her. Such a disposition of the case will sufficiently protect him. The master's report is not confirmed, and a final decree may be entered in the language of the second paragraph of the interlocutory decree, setting aside the instruments of June 22, 1898, and refusing to take jurisdiction of any accounting between the parties under the will or the trust thereby created, and providing that the \$2,500 paid by defendant to plaintiff upon the execution of such instruments shall stand as a credit to defendant upon the adjustment of such accounts between them in a proper tribunal.

In re HAWLEY.

(District Court, N. D. Iowa, W. D. September 5, 1902.)

1. **BANKRUPTCY—PURCHASE BY TRUSTEE.**

Though the trustee in bankruptcy purchasing at his own sale, so that the sale cannot be approved, is not required to lose improvements made by him on the premises after the sale, it is not enough to prevent resale that he account for the value of the property at the time of the sale, it having thereafter greatly increased in value.

Submitted on Review of Action of Referee with Respect to Sale of Realty. See (D. C.) 116 Fed. 429.

Taylor & Burgess and L. M. Kean, for creditors.

T. G. Henderson, for trustee.

SHIRAS, District Judge. The questions presented by the exceptions to the ruling of the referee grow out of the fact that it is shown

that the trustee became a purchaser at his own sale of certain realty belonging to the estate in his charge. The referee rightly held that the sale could not be approved, and that the trustee held the property in fact for the benefit of the estate; but further held that, as the trustee had made considerable improvements on the property after the purchase, the rights of the creditors would be sufficiently protected by requiring the trustee to account for the value of the property in the condition it was in when the purchase was made, this value being fixed at \$40 per acre. Upon the hearing before the referee the evidence, by the ruling of the referee, was confined to the value of the land at the time of the sale and purchase. It is probable this ruling was made by reason of the intimation given by the court, when the case was up for discussion at Sioux City, that justice did not require that the trustee should lose the value of the improvements by him placed on the land, but the creditors' rights would be protected by compelling the trustee to account for the value of the land without the improvements; that is, the value as the land was when the sale took place. The creditors now urge, however, that the land, regardless of the improvements, has very greatly increased in value, and that they cannot be rightfully deprived of this increased value, and that, therefore, they insist that the sale must be set aside, the land be resold, that the trustee be repaid the money paid in by him therefor, together with the fair value of the improvements by him put upon the premises. It is clear that if it be true that the land has greatly increased in value, and the ruling of the referee be affirmed, the creditors will be deprived of this increase in value, and the trustee, through his wrongful conduct, will reap the benefit thereof. It is also claimed that the valuation placed on the land by the referee, to wit, \$40 per acre, is too low, even if the inquiry is limited to the value at the date of sale. Under these circumstances there seems to be no escape from the conclusion that, unless the parties in interest can agree upon a sum to be paid by the trustee in consideration of the sale being affirmed, the sale must be set aside, the property be resold, and from the proceeds the trustee be repaid the money by him paid, including the fair cost of the improvements made by him, and the balance left be accounted for as part of the estate of the bankrupt.

The exceptions to the ruling of the referee are therefore sustained, and the referee is directed to enter an order for a resale as above indicated, unless the parties interested agree upon a sum to be paid as representing the interest of the estate in the property in question.

SHAW et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 31, 1902.)

No. 3,139.

1. CUSTOMS DUTIES—PROTEST—CITING WRONG ACT.

A protest claiming under a paragraph of a tariff act different from the one under which the importation was made is insufficient, as not "distinctly and specifically" setting forth the importer's claim, as required by section 14 of the customs administrative act of 1890, although the act applicable has a paragraph identical with the one cited.

Appeal by D. A. Shaw & Co. from a decision of the board of United States general appraisers, which affirmed the decision of the collector of customs at the port of New York.

The decision of the board, which was under review in this case, was on the question of the sufficiency of a protest filed by the importers. The merchandise in question consisted of tapioca flour, which was properly free of duty under paragraph 677 of the tariff act of 1897, which provides for the free entry of tapioca. The claim of the importers was that the merchandise was free of duty under paragraph 646 of the tariff act of 1894, which is identical in language with the said paragraph 677. The board held that the protest did not satisfy the terms of section 14 of the customs administrative act of 1890, which requires that protests shall set forth "distinctly and specifically" the reasons of the importer's objections to the classification of the collector.

Albert Comstock, for the importers.
Henry C. Platt, Asst. U. S. Atty.

LACOMBE, Circuit Judge (orally). Unless well-established rules for the construction of protests are to be set aside, this protest is wholly insufficient. To hold that a reference to paragraph 646 of the act of 1894 is to be read as a reference to paragraph 677 of the act of 1897, as a clerical error, on any theory that the collector must have known what the importer meant, would be to carry the doctrine of liberal construction far beyond any limit it has ever reached before.

Decision of the board affirmed.

UNITED STATES v. TIFFANY.

(Circuit Court, S. D. New York. May 31, 1902.)

No. 2,653.

1. CUSTOMS DUTIES—CLASSIFICATION—WHITING.

A powder put up in small packages for use by jewelers in polishing metals, and composed of over 93 per cent. carbonate of lime, is whiting, and dutiable as such, under paragraph 46 of the tariff act of 1894, and not under paragraph 86, as an article composed of earthen or mineral substances not specially provided for.

Appeal by the United States from a Decision of the Board of United States General Appraisers Which Reversed the Decision of the Collector of Customs at the Port of New York.

The opinion of the board in the case appealed is as follows:

"The merchandise in question is an impalpable powder, which is shown by analysis to contain 93.24 per cent. carbonate of lime, 4.38 per cent. chloride of lime, 2.10 per cent. carbonate of potash, and 24 per cent. hygroscopic water. This powder is put up in small packages, and is used by jewelers to polish the surface of metals. It is alternatively claimed by the appellants to be dutiable at one-fourth of a cent per pound, under the provision of paragraph 46 of the act of August 28, 1894, for whiting. The collector classified the merchandise as an article composed of earthen or mineral substances [under paragraph 86 of said act]. We think the claim of the appellants is well founded. Whiting is chalk which has been dried, and afterwards ground, levigated, and again dried, and chalk, as we all know, is a soft mineral substance consisting almost entirely of carbonate of lime. Analysis having shown that the merchandise in question is composed almost entirely of carbonate of lime, that fact would seem to confirm the testimony for the importers to the effect that the powder in dispute is whiting, and we sustain the claim in the protest that it is dutiable at one-fourth of 1 cent per pound, under paragraph 46.

"The collector's decision is reversed."

Henry C. Platt, Asst. U. S. Atty.
William B. Coughtry, for importers.

LACOMBE, Circuit Judge. The decision of the board of general appraisers is affirmed.

STOWE v. SANTA FE PAC. R. CO.

(Circuit Court, S. D. California, S. D. July 21, 1902.)

No. 1,007.

1. REMOVAL OF CAUSES—FAILURE OF JURISDICTION.

Where an alias summons has been quashed, the federal court having no power to issue process which will subject defendant to its jurisdiction, the action which has been removed to the federal court is within Act Cong. March 3, 1875 (1 Supp. Rev. St. [2d Ed.] pp. 83, 84), § 5, providing that if, at any time after removal, it appears to said court that the action does not involve a dispute or controversy properly within its jurisdiction, it shall dismiss or remand it.

Conclusion of Court on Motion to Remand.

Anderson & Anderson and Joseph Scott, for plaintiff.

C. N. Sterry, Henry J. Stevens, and T. J. Norton, for defendant.

WELLBORN, District Judge. The action was rightfully removed. Since, however, the alias summons has been quashed, and no process can issue out of this court which will subject the defendant to its jurisdiction, the case falls within section 5 of the act of March 3, 1875 (1 Supp. Rev. St. [2d Ed.] pp. 83, 84), which is as follows:

"Sec. 5. That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

A suit in which the circuit court is powerless to acquire jurisdiction of the defendant's person does not involve "a dispute or controversy properly within the jurisdiction of said circuit court." No authority directly in point has been called to my attention, but I find precedents where removals were rightfully effected, but federal jurisdiction subsequently ousted by proceedings had in the circuit court, and the causes thereupon remanded. *Bane v. Keefer* (C. C.) 66 Fed. 612.

The circumstances of the case at bar require, I think, similar action herein, and the pending motion to remand will be allowed.

MODERN WOODMEN OF AMERICA v. TEVIS et al.

(Circuit Court of Appeals, Eighth Circuit. August 28, 1902.)

No. 1,514.

1. PRINCIPAL AND AGENT—LIMITATION OF AUTHORITY.

A principal may limit the authority of his agent, and when he does so the latter cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitations upon his power.

2. INSURANCE—PRINCIPAL AND AGENT—LIMITATIONS OF AGENT'S AUTHORITY BY POLICY OR BENEFIT CERTIFICATE.

Insurance companies and beneficial associations may limit the authority of their agents by provisions in their policies, or by by-laws which are a part of their contracts; and an agent whose powers are thus limited cannot bind his company beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitations upon his powers.

3. INSURANCE—PRINCIPAL AND AGENT—BENEFICIARY'S KNOWLEDGE OF LIMITATIONS OF AGENT'S AUTHORITY.

The insured and the beneficiaries under contracts with insurance companies and beneficial associations are charged with knowledge of the limitations upon the powers of the agents of the companies which are found in the policies or certificates or in the by-laws or applications which are a part of their contracts, and they are bound by these limitations.

4. BENEFICIAL ASSOCIATIONS—LIMITATION OF AUTHORITY OF AGENT—LOCAL CLERK OF MODERN WOODMEN OF AMERICA.

The by-laws of the Modern Woodmen of America, which constitute a part of the contracts with its members and beneficiaries, provide that a member who fails to pay a benefit assessment at the time specified for its payment is ipso facto suspended, and his benefit certificate is thenceforth void; that he may be reinstated within a certain time, if in good health, by furnishing a warranty of that fact, and paying his arrearages; that the clerk of the local camp shall collect and remit to the head camp the assessments paid in accordance with the by-laws; that he shall report to the head camp suspended members; that he is the agent of the local camp, and not of the head camp; and that no act or omission by him shall create any liability or waive any immunity or right of the society. *Held*: (1) The clerk of the local camp is the agent of the head camp to collect and remit the benefit assessments in accordance with the terms of the by-laws. (2) His authority is limited by the by-laws, and the members and beneficiaries are charged with knowledge of these limitations, because they are a part of their contracts. (3) The clerk of the local camp has no authority by contract, estoppel, or waiver to bind the society to its members or beneficiaries either by extending the time of payment of a benefit assessment, or by waiving default in its payment, or by reinstating a suspended member without a warranty of good health, in the absence of notice or knowledge of such acts and acquiescence therein by some of the principal officers of the head camp.

5. BENEFICIAL ASSOCIATIONS—STIPULATIONS FOR PROMPT PAYMENT SUBSTANCE OF THEIR CONTRACTS.

Stipulations to insure the prompt payment of benefit assessments constitute the substance and the essence of insurance contracts of beneficial associations.

¶ 4. Authority of insurance agents to waive prepayment of premiums, see note to *Smith v. Society*, 13 C. C. A. 292.

6. BENEFICIAL ASSOCIATIONS—NOTICE OF ASSESSMENT.

The by-laws of the Modern Woodmen of America constitute a part of its contracts with its members and beneficiaries, and a service of a notice of assessment by mail in accordance with the terms of the by-laws is sufficient and effective.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

L. C. Krauthoff and E. C. Ellis (J. W. White, John Sullivan, Frederick H. Bacon, and J. G. Johnson, on the brief), for plaintiff in error.
James H. Harkless (John O'Grady and Charles S. Crysler, on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This is the second hearing of this case; the decision at the former hearing rested upon the opinion in *Supreme Lodge v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762, which cited with apparent approval *Whiteside v. Supreme Conclave* (C. C.) 82 Fed. 275, a case which ruled the question involved in this action, *Modern Woodmen of America v. Tevis*, 111 Fed. 113, 119, 49 C. C. A. 256, 262. After the former decision of this case the supreme court handed down its opinion in *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 22 Sup. Ct. 133, 145, 151-153, 183 U. S. 308, 46 L. Ed. 313, and thereupon a rehearing of this case was granted, and it has now been again argued and submitted.

This action rests upon a benefit certificate issued on March 31, 1899, by the Modern Woodmen of America, to M. W. Tevis, one of its members, who died on August 10, 1899. The defense of the society is that Tevis was suspended, and his certificate was void on August 10, 1899, when he died, because he had not paid an assessment upon him which fell due on August 1, 1899. Under the certificate the by-laws of the association constituted a part of the contract of membership and of insurance. Those by-laws provided that, if any beneficial member failed to pay any benefit assessment on or before the first day of the month following the date of the notice thereof, he was thereby ipso facto suspended, and his benefit certificate was "absolutely null and void during such suspension." Tevis failed to pay on August 1, 1899, or at any time before his death, an assessment the notice of which was dated July 1, 1899. The by-laws provided that the clerk of the local camp of which Tevis was a member should collect, receive, and report to the head camp all the benefit assessments paid in accordance with the provisions of the by-laws (section 201); that he should report to that camp as delinquent and suspended all members of his local camp who failed to pay any benefit assessment on or before the 1st day of the month following the date of the notice of its levy (sections 260, 261, 263); and that any suspended member in good health might be reinstated within 60 days from the date of his suspension by paying all arrearages due and

furnishing a written warranty that he was in good health (section 49). It had been the invariable custom of the clerk of this local camp to accept payments of benefit assessments from its members at any time within 20 days after they became due, without any warranty of good health, and without reporting them delinquent or suspended; and Tevis had paid one assessment on June 2, 1899, one day after it became due, in accordance with this custom. There was, however, no evidence that the head camp, or any of its officers, had any notice or knowledge of this custom, or of the fact that Tevis had made a payment when it was overdue without any warranty of good health. The by-laws provided that the clerk of the local camp was the agent of that camp, and that he was not the agent of the head camp; that no act or omission on his part should have the effect of creating a liability of the society, or of waiving any right or immunity belonging to it (section 271); and that no officer of the society or of any local camp could waive any provision of the by-laws which related to the substance of the contract for the payment of benefits (section 34). In this state of the case the trial court charged the jury that the clerk of this local camp was the agent of the head camp or of the society in collecting and receiving the benefit assessments; that his acts in connection therewith were the acts of the society, and were binding upon it, whether the head camp or its officers had notice of them or not; and that the company was estopped by the acts of this clerk in accepting overdue assessments, without warranties, from defeating this action on the ground that Tevis had failed to pay his July assessment when it was due.

At the former hearing in this court the question whether the clerk of the local camp was the agent of that camp or of the head camp was carefully considered, and the conclusion was reached that in the collection, receipt, and remittance of the benefit assessments the clerk of this local camp was the agent of the head camp, and not the agent of his local camp only. That position is not assailed on this rehearing. But it is earnestly contended that the terms of the contract with the beneficiaries of this insurance evidenced by the by-laws so limited the power of this agent that he could neither extend the time of payment of an assessment, waive a default in its payment, nor reinstate a suspended member without a warranty of good health; that the beneficiaries knew these limitations, because they were a part of the agreement of insurance which they accepted; and that no act of this agent beyond the limits of his authority prescribed by these by-laws either bound his principal or charged it with notice of his unauthorized acts. The by-laws are unquestionably a part of the contract, and they furnish a broad and substantial basis for this contention. They declare that this local clerk "shall receive and receipt for all moneys paid in accordance with the provisions of these laws" (section 261); that "no act or omission on his part shall have the effect of creating a liability on the part of this society, or of waiving any right or immunity belonging to it" (section 271); and that "no officer of this society, nor any local camp or officer thereof, is authorized or permitted to waive any of the provisions of these laws, or of any other laws of this society which relate to the substance of the contract for the

payment of benefits between the members and the society, whether the same be now in force or hereafter enacted" (section 34). The argument of counsel for the defendants in error that the waiver of a default in the payment, or the extension of the time of payment, of an assessment, which results in the establishment of a liability for the entire amount of a certificate, where no liability would have existed in the absence of such a waiver or extension, is not of the substance of the contract for the payment of benefits, is unworthy of serious consideration. Its statement is its refutation. Fraternal insurance is temporary insurance,—insurance from the maturity of one assessment to the maturity of another,—and stipulations to insure promptitude in the payment of the assessments constitute both the substance and the essence of contracts for it. *Klein v. Insurance Co.*, 104 U. S. 88, 91, 26 L. Ed. 662; *Thompson v. Insurance Co.*, 104 U. S. 252, 258, 26 L. Ed. 765; *Insurance Co. v. Statham*, 93 U. S. 24, 30, 23 L. Ed. 789; *McMahon v. Maccabees*, 151 Mo. 522, 537, 52 S. W. 384; *Harvey v. Grand Lodge*, 50 Mo. App. 472, 479; *Carlson v. Supreme Council*, 115 Cal. 466, 475, 47 Pac. 375, 35 L. R. A. 643. The provisions of the by-laws which have been quoted are broad, positive, and unambiguous. They baldly prohibit the existence and the exercise by the clerk of the local camp of any authority to modify or to waive the provisions of the by-laws relative to the prompt payment of assessments and to the effect of defaults and suspensions. If, therefore, these express limitations upon the authority of this clerk were lawful and effective, he was without the power to extend the time of or to waive defaults in the payments of assessments, or to reinstate a suspended member without a warranty of good health; and the insured and the beneficiaries under the certificate here in suit were not ignorant of these limitations, because they were a part of the contract which they accepted, and upon which they base this action. It is a familiar and acknowledged principle of the law of agency that a principal may limit the powers of his agent, and that all parties who deal with the agent with knowledge of the limitation are bound by its terms. So the old question is presented whether a stipulation in a contract of insurance limiting the authority of the agent of an insurer is binding upon the insured and the beneficiaries. Conflicting arguments and opinions almost without limit might be cited upon this issue. It has long been the subject of debate in this court, and many of the authorities have been cited and reviewed in its opinions in support of the views of its members. *Laclede Fire-Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 9 C. C. A. 1, 8, 12, 60 Fed. 351, 358, 362; *Insurance Co. v. Norwood*, 16 C. C. A. 136, 145, 147, 148, 69 Fed. 71, 80, 82, 83; *Insurance Co. v. Henderson*, 16 C. C. A. 390, 69 Fed. 762; *Northern Assur. Co. of London v. Grand View Bldg. Ass'n*, 101 Fed. 77, 79, 80, 82-84, 41 C. C. A. 207, 209-214. The question became so important, and the opinions upon it so numerous and divergent, that the supreme court removed the case last cited to that court by a writ of certiorari, and in an elaborate and exhaustive opinion, in which many of the cases were cited and reviewed, rendered a decision which was evidently intended to close the discussion in the federal courts, and to finally

put this question at rest. The issue of law there presented was whether or not the provision in a policy of fire insurance that the policy should be void, unless otherwise provided by agreement indorsed thereon or added thereto, if the insured should have at the time of its issue or should thereafter procure other insurance, was waived or avoided by the fact that the agent of the company was aware, when he issued the policy, of the existence of other insurance, which was not indorsed thereon nor added thereto, in the face of a stipulation in the policy that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of the policy except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto," nor unless the agreement therefor is in writing, and indorsed upon or added to the policy. The majority of this court had answered this question in the affirmative, and in an earlier case had held that this stipulation was waived if the agent knew at the time of the issue of the policy that the insured intended to increase his insurance to a certain amount at some time subsequent to the delivery of the contract. *Northern Assur. Co. of London v. Grand View Bldg. Ass'n*, 101 Fed. 77, 79, 83, 84, 41 C. C. A. 207, 209, 213, 214; *Insurance Co. v. Norwood*, 16 C. C. A. 136, 145, 147, 148, 69 Fed. 71, 80, 82, 83. The circuit court of appeals for the Seventh circuit and the supreme courts of Massachusetts, New Jersey, and Kansas had adopted the opposite view. *Insurance Co. v. Thomas*, 27 C. C. A. 42, 82 Fed. 406, 47 L. R. A. 450; *Kyte v. Assurance Co.*, 144 Mass. 43, 46, 10 N. E. 518; *Dewees v. Insurance Co.*, 35 N. J. Law, 366; *Assurance Co. v. Norwood*, 57 Kan. 610, 611, 613, 47 Pac. 529, 530, 532. The supreme court cited and quoted with approval and at great length the opinions of the courts of Massachusetts and New Jersey upon this subject. After approving these decisions, it remarked: "It must be conceded that it is shown in the able brief of the defendant in error that in several of the states the courts appear to have departed from well-settled doctrines in respect both to the incompetence of parol evidence to alter written contracts, and to the binding effect of stipulations in policies restricting the authority of the company's agents," and proceeded to review its own decisions. It quoted from and reaffirmed its opinions in *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044, *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, and *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. One of its quotations is not without special significance in view of another phase of this case. After the death of Tevis on August 10, 1899, his brother paid to the clerk of the local camp, and the latter, in ignorance of the death of Tevis, accepted, all his arrearages, and sent them forward to the head camp, which received them without notice of the fact that they had been paid after they were due, and after the death. In *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, the authority of an agent to waive a forfeiture of a policy of life insurance because the insured lived in a prohibited district by the acceptance of premiums with knowledge of that fact was in question. In the *Northern Assurance Company Case* the supreme court quotes this excerpt from the opinion in that case with evident approval:

"Not only should the company have been informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the payment of which the waiver is claimed. The doctrine of waiver, as asserted against insurance companies, to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked when the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured, if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts,—of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it."

After quoting more at length from this opinion, and after an exhaustive review of its decisions relative to the authority of insurance agents, the supreme court reversed the judgment of this court in the Case of the Northern Assurance Company, and declared as the sum of the whole matter that these principles were sustained by the authorities, and were controlling in the construction and enforcement of contracts of insurance:

"That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot, by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that, where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy, or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and, where such limitation is expressed in the policy executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, where the waiver relied on is an act of the agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

It is impossible to read the opinion from which the foregoing quotations have been made without an abiding conviction that it contains an authoritative determination of the question now at issue in this case by the highest judicial tribunal in the land,—by the tribunal whose decisions are always controlling in this court. Tested by this decision, the clerk of the local camp to which the member Tevis belonged was the agent of the head camp or of the Modern Woodmen of America to collect, receive, and remit the benefit assessments to it. But he was its agent to collect, receive, and remit them at the

time and in the manner prescribed for their payment by the by-laws, and at no other times and under no other conditions. Those by-laws provided that delinquent members were ipso facto suspended; that their certificates were void; that they could be reinstated by the clerk by the receipt of arrearages only when they were in good health, and when they furnished warranties to that effect; and that no act or omission of the clerk of the local camp could have the effect of creating any liability of the society, or of waiving any right or immunity belonging to it. These limitations upon the power of this agent were known to the insured and the beneficiaries named in this certificate, because they were a part of their contract; and, in view of this decision of the supreme court to which we have adverted at such length, there is no escape from the conclusion that these limitations were binding upon all the parties to the agreement, and that the acts of the clerk of the local camp in extending the times of payment of the assessments upon its members and in reinstating delinquent members without warranties of good health were unauthorized by the society, and, in the absence of knowledge of and acquiescence in them by some of the chief officers of the head camp, were ineffective to establish any estoppel against the society, or any waiver by it of any of the provisions of the agreement.

A principal may limit the authority of his agent, and when he does so the agent cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitations of his power. Insurance companies and beneficial associations may limit the authority of their agents in this way by stipulations in their contracts, and, when so limited, such agents cannot by contract, waiver, or estoppel bind their companies to the insured or to the beneficiaries of the agreements beyond the scope of their authority prescribed therein, because the insured and the beneficiaries are conclusively presumed, in the absence of fraud or mistake, to know the terms of their contracts. The Modern Woodmen of America so limited the power of the clerk of the local camp by the terms of its benefit certificate in this case that he was without authority to extend the time of payment of benefit assessments, to waive defaults in their payment, or to reinstate a delinquent member who was not in good health, or who failed to furnish a warranty thereof. The beneficiaries and the insured knew these limitations upon the power of this agent, because they were a part of their contract with the society; and the acts of this local clerk beyond the scope of his prescribed authority, in the absence of notice or knowledge of and acquiescence in them by some of the principal officers of the society, constituted no waiver, estoppel, or contract of the association. They were not the acts of the society, and the insured and the beneficiaries were charged with knowledge of that fact. *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 22 Sup. Ct. 123, 153, 183 U. S. 308, 46 L. Ed. 313; *Graves v. Modern Woodmen of America* (Minn.) 89 N. W. 6; *Field v. National Council* (Neb.) 89 N. W. 773-775; *Elder v. Grand Lodge*, 79 Minn. 468, 472, 82 N. W. 987; *Knights of Honor v. Oeters*, 95 Va. 610, 614, 29 S. E. 322; *Borgraefe v. Knights of Honor*, 22 Mo. App. 127, 142; *Harvey v. Grand Lodge*, 50 Mo. App. 472, 477, 478.

This conclusion is inconsistent with the result of the former hearing in this court, and with the charge of the circuit court, and necessitates a new trial of this case, unless the direction of the court below to the jury to find a verdict for the beneficiaries of the contract can be sustained upon some other ground. Counsel for the defendants in error argue that the judgment below may be sustained, because there was no competent proof that notice of the assessment was ever served upon the insured. Service of the notice was shown by the affidavit of the publisher of the official paper of the society that at the proper time he mailed a copy of the paper containing the notice to each of the persons named in the copy of the mailing list attached to his affidavit, addressed to each of them at the place specified on the mailing list as his address, and that the copy of the mailing list attached to his affidavit was a true copy of the list used in mailing this issue of the paper to the members of the society. The copy of the mailing list attached to the affidavit contains the correct address of the insured. Two objections are made to this proof of notice. It is said that it is insufficient, because the by-laws of the society provide that the affidavit of the publisher of the official paper attached to a copy thereof, together with a copy of the mailing list, shall be evidence of the service of the notice, and this affidavit contains the statement that the copy of the mailing list attached to it is "a true copy of the list used in mailing" the July issue of the paper, instead of a statement that it is a true copy of the mailing list. In view of the facts that the list attached to the affidavit contains the correct name and address of the member, and that the affidavit shows that the notice was duly mailed to him, directed to his proper address, the materiality of this distinction is not perceived.

The second objection to the proof of the service of the notice is that it was notice by mail, when it should have been an actual personal notice. In support of this contention counsel cite two cases, which hold that, where the by-laws of a beneficial association make no provision for notice by mail, personal notice is required. *Courtney v. Association* (Iowa) 53 N. W. 238; *Association v. Loomis*, 43 Ill. App. 599. But the by-laws of this society expressly provide that the mailing of the official paper containing the notice of any assessment shall constitute a sufficient service of such notice, and these by-laws were a part of the contract of the parties to this action. It is contended that the by-laws which authorize service of notices by mail are not a part of the contract, because there is no statement in the certificate that these particular by-laws constitute a portion of the agreement. But the application of the insured for membership is made a part of the certificate by the terms of the latter. That application contains this statement: "I further understand that the laws of this society now in force or hereafter enacted enter into and become a part of every contract of indemnity by and between the members and the society, and govern all rights thereunder." This statement is one of the terms of the proposition which Tevis made to the society when he applied to join it. The terms of his proposal were accepted, and upon them his certificate was issued. All the by-laws of the society became thereby a part of the contract, and the

service of notices of assessments by mail in accordance with the provisions of these by-laws was thereby made sufficient and effective.

Finally, defendants in error insist that the society is estopped from maintaining its defense, because it did not plead any tender or offer to return the moneys which it received in payment of the assessments upon Tevis. A complete answer to this objection, however, is that no such objection was made at the trial, and that no plea of the payment of any assessments, or of any estoppel on account thereof, appeared in the record until after the answer was filed. The complaint is based on a compliance with the terms of the contract. The defendant answered that complaint with a complete defense. The plaintiffs then changed their theory, and in their reply admitted the violation of the terms of the contract, and replied that the defendant was estopped to avail itself of that violation by its receipt of the assessments. In this state of the case it was not incumbent upon the defendant to plead a tender or offer to return them, but it was competent for it to meet the averments of new matter in the reply by proof that they were not true. Moreover, counsel for the plaintiffs admitted at the trial that the defendant offered to return to the beneficiaries the arrearages which it received subsequent to the death of Tevis; that they refused to accept them, and that they would not have accepted them at any time; and the defendant proved, without any objection to the sufficiency of the pleading, that the moneys received for these arrearages had been paid to the clerk of the court after the plaintiffs refused to accept them. After facts which should have been, but were not, stated in a pleading have been admitted without objection thereto, and a verdict has been rendered upon the admission, it is too late to object that they were not pleaded. There is no escape from the conclusion that the judgment in this case must be reversed, and a new trial of this action must be had. It is so ordered.

THAYER, Circuit Judge. I concur in the order reversing the judgment below, because the trial judge, after the case had been under advisement by the jury for some time, eventually instructed them, as a matter of law, that "the defendant company is absolutely estopped from setting up the defense that the policy in this case was forfeited on August 1, 1899," for failure to pay the assessments thereon within the time limited by the by-laws of the defendant company. In view of the by-laws, to which reference is made in the foregoing opinion, which declare, in substance, that benefit certificates shall become null and void if dues are not paid on or before the exact day of maturity, and that neither the local camp nor its clerk or any officer of the society shall have power to waive the provisions of any of the laws of the society, and especially in view of the recent decision in *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 123, 46 L. Ed. 313, wherein it is held that policy holders of insurance companies must, at their peril, take notice of limitations upon the powers of local soliciting agents, of which they are advised by provisions contained in their policies,—it follows, I think, that the learned trial judge should not have instructed the jury that the com-

pany was estopped, by the conduct of the local lodge, from asserting that the benefit certificate in question had become void for nonpayment of assessments on the day of maturity. While the local lodge acted in the capacity of agent for the head lodge in collecting assessments, yet the deceased certificate holder was advised by the by-laws of the society that such agent was without power to extend the time for paying assessments, and he can found no rights, as it seems, on the unauthorized conduct of the agent. The proof was plenary that Tevis did not pay a single assessment, after the issuance of the certificate, within the time limited by the letter of the by-law. Indeed, as was shown in our original opinion in this case (*Modern Woodmen of America v. Tevis*, 49 C. C. A. 256, 111 Fed. 113, 115, 116), a rule of the local lodge, which was in force when Tevis joined the order, expressly exempted all members of the local lodge from the obligation to pay their assessments on the day fixed by the company's by-laws, and practically gave them a month's time thereafter in which to make payments. In view of the doctrine enunciated in *Northern Assur. Co. v. Grand View Bldg. Ass'n*, supra, it is obvious that the learned trial judge erred in declaring as a matter of law that the company was estopped from asserting a forfeiture, although the deceased was doubtless misled, to his prejudice, by a long-continued practice of receiving assessments after they were due, which was well known to all the members of the local lodge. Whether this practice was of such long standing that it was probably known to the officers of the head lodge, or that it ought to have been known to them, as well as to the members of the local lodge, and whether the fact that the head lodge received, and still retains, and has never offered to return, the assessment which fell due May 1, 1899, and was paid after it was due, and after the certificate had become null and void, amounted to a ratification and an approval by the head lodge of the previous conduct of the clerk of the local lodge, are questions which cannot be properly discussed at this time. It would seem that there was as great necessity for returning the assessment that fell due on May 1, 1899, and was paid after maturity, as for returning the assessment that was paid subsequent to August 1, 1899, which the company did elect to return after this suit was brought, inasmuch as the policy became void, by the provisions of the by-laws, on May 1, 1899, and was ever afterwards of no effect, unless the retention of the latter assessment, with knowledge that it was paid after maturity, be regarded as a ratification of the act of the clerk of the local lodge in accepting that assessment. But these are questions which can be considered more appropriately on a second trial, and they may raise issues of fact which can only be determined by a jury. I accordingly concur in the reversal of the judgment.

SYNNOTT et al. v. CUMBERLAND BLDG. LOAN ASS'N.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.)

No. 1,045.

1. BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF SHAREHOLDERS—CHANGE IN CHARACTER OF STOCK.

Complainants were holders of full-paid, or so-called "common," stock of a building and loan association. By the by-laws the holders of full-paid stock were given the sole right to vote and to control the business of the association, but their capital was made subject to reduction to make good any losses sustained by the association in favor of installment stockholders. At a meeting called for the purpose in which both classes of stockholders participated, the laws of the association were amended so as to place both classes of stock on an equality in the respects stated; nearly all of the common stock, including that owned by complainants, who were represented by proxy, being voted in favor of the proposition. *Held* that, in the absence of any evidence of fraud or claim that the meeting was irregular or the proxy exceeded his authority, such action was valid and binding on complainants, and that they could not recover of the association as creditors the price paid for their stock either on the ground that its issuance with the privileges originally accorded to it over installment stock was ultra vires, or that the action taken was a repudiation by the corporation of the contract by which they became stockholders.

2. CORPORATIONS—SPECIAL STOCKHOLDERS' MEETINGS—TRANSACTION OF BUSINESS NOT STATED IN NOTICE.

The requirement that the business transacted at a special meeting of stockholders shall be limited to that stated in the notice of such meeting is one for the benefit of the stockholders, which they may waive, and which is waived by their attendance and participation in the business done without objection.

3. SAME—RIGHT TO REPUDIATE ACTION OF PROXY—LACHES.

A stockholder is bound by the action of his proxy at a stockholders' meeting, unless he exercises the most active diligence in repudiating the same, and is chargeable with such knowledge of what was done at the meeting as he ought to have obtained and would have obtained in the exercise of reasonable diligence and care with respect to his business and property rights; a delay of more than a year before taking any steps to repudiate the action of his proxy, if unexcused, is such laches as will debar a stockholder from the right to relief.

4. BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF SHAREHOLDERS—CHANGE IN CHARACTER OF STOCK.

The holders of full-paid stock in a building and loan association, who were given full control of its business by the by-laws, but were required to make good any impairment of capital in favor of installment stockholders, at a stockholders' meeting charged up against their stock the amount of losses which had been sustained by the association. Subsequently they consented to, and were instrumental in bringing about, a change in the by-laws by which full-paid and installment stock were placed on an equality. *Held* that, in the absence of misrepresentation or deceit inducing their action, they were not entitled to have the losses previously charged to them repaid.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

The complainants are severally holders of shares in the capital stock of the defendant corporation of the class called "common stock." The object

¶ 2. See Corporations, vol. 12, Cent. Dig. § 742.

of the bill is to recover the price paid for their shares upon the theory that the issuance of said "common stock," with the rights and privileges accorded it over the general shares, called "installment stock," was ultra vires the corporation. The defendant is, as its name implies, a building and loan incorporation, and was organized in 1892 under the general laws of Tennessee authorizing such corporations. Section 14, c. 142, Acts Tenn. 1875 (Shannon's Code Tenn. §§ 2128-2142). In April, 1893, its charter was amended so as to acquire the additional powers conferred by chapter 12 of the Tennessee Acts for 1893. The by-laws fixed the authorized capital stock at \$10,000,000, of which not more than \$100,000 should be "common stock." To the shares misleadingly called "common stock" was accorded the entire control and management of the corporation, the general or "installment stock" possessing no vote or voice in shareholders' meetings until fully paid up. Aside from the provisions for an unusual and undue participation of the "common stock" in the profits of the association, to be more fully shown later, and this very unusual disfranchisement, the "installment stock" was substantially like the ordinary shares in the modern building and loan association. To compensate for the disadvantages mentioned the by-laws provided that the fund derived from the sale of the common stock should constitute "an indemnity fund to be permanently held and invested for the protection of investors and installment stockholders." To accomplish this the common stockholders surrendered all right of "withdrawal," and consented that the capital contributed by them should remain until a final winding up, subject to reduction only for the purpose of making good "any losses of the association." The complainants aver and show that, after the corporation had organized and adopted the constitution and by-laws under which the common stock was authorized, they severally, upon solicitation, and because of the peculiar advantages, rights, and privileges accorded such shares, became subscribers for the shares now severally held by them. The total number of shares of common stock issued and paid for was 337, of the par value of \$100 each. The entire affairs of the company from its organization in 1892 until July, 1898, was exclusively in the hands of this small body of common stockholders. While thus in control a loss of 45 per cent. of this total of common stock was charged up against the common stockholders to make good an impairment of capital to the extent of \$15,000. This loss was assumed and charged against the common stock at a meeting of the stockholders of such common stock held on December 14, 1897, at which each one of the complainants was present in person or by proxy, and to which action each said stockholder assented. On January 17, 1898, at a meeting of all the shareholders, common and installment, the distinction between common and installment shares was abolished by amending the by-laws so as to strike out every privilege, right, or advantage which that stock had over the installment stock. The burden of standing as an indemnity against company losses was also removed, and the two kinds of stock put on a common plane in respect of burdens and benefits and in the right of voting. Complainants aver that the issuance of said common stock was in excess of the power of the corporation, and that they therefore stand as creditors to the extent of their several payments on account of their subscriptions to said stock. They further insist that the corporation itself has, by the action taken on January 17, 1898, repudiated said stock by abolishing the distinctions between such shares and the installment shares. They pray for a decree restoring to them the price paid, and tender their several certificates for cancellation. In the alternative they ask, if their shares were validly issued, that the common shareholders be restored to the control of the corporation, and that the installment shareholders be restrained from voting and held to their places in the rear. Upon the pleadings and proof the court below dismissed the bill, and from this decree an appeal has been perfected.

W. B. Russell, for appellant.
A. W. Chambliss, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. It must be conceded that whether the special privileges accorded the "common stock" over the "installment stock" were valid or invalid it was entirely competent for the common stockholders to agree with the company and the installment shareholders that their "common" shares should stand upon the same footing as shares of the "installment" shareholders, and that all distinction between the two kinds of stock should be eliminated. This is precisely what the corporate minute of the stockholders' meeting of January 17, 1898, shows was done. That minute includes the following recital:

"State Examiner Craig then called attention to the feature in the present plan of the association providing for the creation of common stock and endowing it with powers not granted to other classes of stock, and stated that the state department regarded this feature as calculated to destroy the mutuality of the association, and that the state department required that such mutuality be restored. After full discussion, and the common stockholders, by Mr. Hayward, having expressed a desire to be rid of the burdens they had assumed for which they would be willing to give up their special privileges and rights, Mr. Bemis moved and Mr. Chapin seconded the adoption of the following resolution."

The minute following shows the adoption of a series of resolutions amending the constitution and by-laws, operating to place the common and installment stock upon the same footing in respect to profits, burdens, and control. This action was taken upon a stock vote of 7,315 shares in the affirmative to 14 shares in the negative.

The evidence in respect to the occurrences of that meeting support this minute, and shows that the installment shareholders were somewhat reluctant to yield to what they had every reason to suppose was the express wish and desire of the common stockholders, and that in surrendering their claim to be indemnified against losses by the common stockholders they gave a full equivalent for equality in control and in distribution of profits. The evidence furthermore shows that Hayward, who then undertook to voice the wishes of the common stockholders, was the then owner of a full sixth of the whole issue, and that he held the proxies of the great mass of common stockholders, including Mrs. Synnott and her co-complainants.

How do the complainants propose to escape the results of the actions of the stockholders' meeting of January 17, 1898? Although the inspector for the state advised that the powers granted the common stock operated to destroy the mutuality of the association, it does not appear that there was any purpose upon the part of the association to repudiate the common shares or ignore the contract rights of such stockholders. The objection of the state inspector was undoubtedly pointed to that feature by which the small class of common stockholders were given exclusive control of the affairs of the corporation. The prepaid character of the stock and the provisions for dividends to be paid out of earnings were features expressly authorized by the amended charter under the act of April 5, 1893, and therefore not inconsistent with the mutual character of the association. The agreement by the common stockholders to stand as indemnitors of the other class of

stock against losses was an agreement in the general nature of a preference to the installment shareholders, and had proven a very serious burden to the common stockholders, and was probably unobjectionable. *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826; *Cook, Corp.* (4th Ed.) §§ 268, 269. It was this burden, operating as a preference in favor of the installment shares, which the common stock was desirous of escaping, and that they might do so their representative stated to the assembled stockholders of both kinds that to be rid of this burden "they would be willing to give up their special privileges and rights." Upon the face of the minute of the meeting of January 17, 1898, and upon the evidence as to the occurrence at that meeting, there was no repudiation by the corporation of the common stock as *ultra vires*, but an agreement between the two classes of stockholders and the company by which the common stockholders were relieved from the burden they had assumed in conceding a preference out of profits to installment stockholders as far as necessary to make good any impairment of capital by losses, in consideration of their surrender of the power of control and any other special advantages over other prepaid stock in respect of dividends. The bill does not challenge the regularity of the meeting at which this action was taken, nor that complainants were present or represented, or aver that their agent and attorney in fact exceeded his authority. After alleging that the complainants had subscribed for their stock in the full belief that the provisions of the contract in respect thereto would be carried out and that the agreement was valid, it is charged that the installment stock present or represented at the meeting of January 17, 1898, greatly outnumbered in voting power the common stock present, and that the action taken was "solely in the interest of such installment stockholders and against the interests of the complainants and other holders of the common stock." It is then alleged that the "reason assigned" for such action was that the state treasurer, as the statutory inspector of such associations, had declared that the provisions in regard to the common stock were illegal and destructive of the mutuality of the association was not the real reason, but that the real reason for the action taken was:

"That the then acting managers of the association and those connected with them might, by depriving the common stockholders of their right to control the elections of directors of the association, remain in control of affairs of the association without the consent of a majority of the holders of the shares of the so-called 'common stock,' and that they, in combination with certain holders of installment stock, adopted this latter plan for the purpose of taking unto themselves the control of the association, notwithstanding that the holder of each share of the installment stock in the association had expressly waived the statutory right to vote thereon until said stock should mature, and that the object and purpose of this combination and conspiracy was to deprive the holders of the common stock of the benefits and privileges conferred by the constitution and by-laws of the defendant corporation, which benefits and privileges were the real reason and inducement to complainants and to all other subscribers for the said common stock of defendant corporation to induce them to subscribe and pay for said common stock, and but for such provisions in the constitution and by-laws of said association your complainants would not have subscribed and paid for said common stock or any part thereof."

The bill further avers:

"That in view of the acts and conduct of the defendant corporation, its officers, managers, and installment stockholders, as aforesaid, and upon the advice of counsel, your complainants further aver and charge that the issue of said common stock by defendant corporation was ultra vires of the corporation, and rested for support solely upon the contract between the parties and the doctrines of waiver; that, by reason of the aforesaid acts and conduct of the defendant corporation's officers, managers, and installment stockholders, said association has elected to abrogate the contract between complainants and all other holders of said common stock and the defendant corporation, and to rescind and avoid the same, and that by such acts and conduct defendant corporation, its managers, officers, and installment stockholders, have estopped themselves from asserting the validity of the issue of said common stock, or relying upon the contract and the waivers contained therein, under which said stock was issued and accepted by your complainants and the other holders thereof."

We have omitted the averments in respect to the action of a former meeting in charging up to the common stockholders certain losses sustained by the corporation as having no direct bearing upon the prime question in the case. Upon the premises stated the bill prays: First, that the common stock be declared null and void, and that the association be required to account to complainants for the moneys paid for said stock, with interest, "less any dividends or interest they may have received," etc.

No deception in respect of fact is charged as having been practiced by the association or its officers to induce subscription to the stock. If the complainants were misled at all, it was in respect to the legality of the by-laws which undertook to give to these shares, not the ordinary advantage of preference stock whereby a preference is accorded over other stockholders in respect to dividends and corporate property, such as that held valid by this court in *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826, nor the right to issue pre-paid stock as authorized by the Tennessee act of 1893 and sanctioned as not hostile to the usual scheme of such associations in *Fairchild v. Preston*, 140 N. Y. 549, 35 N. E. 979, 24 L. R. A. 57, but an exclusive power of control whereby the borrowing class of stockholders were debarred from any voice in the management of the affairs of a company whose prime purpose was to enable them to secure homes by easy payments.

But this belief in the validity of this very extraordinary privilege over the ordinary stock was a common misconception of law, shared in by all who organized the corporation and by all who became shareholders. As the validity of the stipulations peculiar to the common stock was purely a question of law, the complainants must be presumed to have known the law as well as any one else. *Banigan v. Bard*, 134 U. S. 291, 295, 10 Sup. Ct. 565, 33 L. Ed. 932; *Eaglesfield v. Londonderry*, 4 Ch. Div. 693.

The averments of the bill in respect to a conspiracy between the then officers of the company and the installment stockholders to deprive the common stockholders of their power of control in order that they might be retained in office by the newly enfranchised stockholders has no foundation in fact and is utterly overthrown by the evidence. The officers and agents thus accused were themselves common stock-

holders, placed in office solely by the common stockholders. The averment and the fact that the installment stock present and voting greatly preponderated over the common stock would be a fact of great significance if the common stock had been outvoted and deprived of contract rights against their will. Strangely enough, the common stockholders present in person or by proxy voted with the installment stockholders for all that was done, so that there is no ground for complaining of any oppressive action of the majority acting in their own interest.

Although there is no allegation in the pleadings which questions the validity of the action taken in depriving the common stock of its power of control upon the ground that the notice of the business to be done did not include the action complained of or that complainants were not bound by the consent of their proxy to the action taken because he had exceeded his authority, the case has been mainly staked upon these very questions. The by-laws provided that no business should be transacted at called meetings of stockholders except such as was included in the notice of the meeting. The original notice was for a meeting to be held on January 10, 1898. The notice then sent and received was in these words:

"December 31, 1897.

"Notice is hereby given that there will be a special meeting of the stockholders of the Cumberland Building Loan Association held at its office in Chattanooga, Tennessee, on Monday, January 10, 1898, at 10 a. m., for the purpose of altering, amending, or repealing the constitution and by-laws as a majority of the stock shall determine. A majority being necessary to such action, it is important that you be present either in person or by proxy. The state treasurer has been invited to attend.

J. D. Roberts, President.

"James Hayward, Secretary."

A quorum not attending, the meeting was adjourned to January 17, 1898, and notice of this was sent as follows:

"January 10, 1898.

"Notice is hereby given that the meeting of the stockholders of the Cumberland Building Loan Association called for January 10th has been adjourned to January 17th, at 10 a. m., because a quorum of stock was not present. The purpose of the meeting is to so amend the by-laws as to protect the contracts and assets of the association, so that the rights of the borrowing and persisting members shall not be endangered by paying out to withdrawing members more than is equitably due them. This course is imperative, is requested by the state treasurer, and meets the approval of the officers of the association. If you cannot be present in person, please fill out and return the enclosed proxy by return mail.

"Respectfully yours,

James Hayward, Secretary."

Mrs. Synnott, the principal complainant and owner of 50 shares of the common stock, seems to have sent no proxy for the meeting of January 10th, but on receiving notice of the adjournment sent a proxy to Mr. Hayward, as follows:

"I do hereby constitute and appoint James Hayward my true and lawful attorney for me and in my place and stead to cast the votes I am entitled to cast at the adjourned special meeting (or any adjournment thereof) of the stockholders of the Cumberland Building Loan Association to be held at Chattanooga, Tennessee, Monday, January 17, 1898; hereby ratifying and confirming the acts of my said attorney hereunder.

"Dated ——— day of January, 1898.

Mary D. Synnott.

"Witness: T. W. Synnott."

The contention now is that, although the notice of the business of the original meeting for January 10th was wide enough to cover any kind of amendment of the constitution and by-laws, the notice of the adjourned meeting was restricted to a particular matter, which did not include any such action as that complained of, and that the authority of her proxy did not authorize him to vote her stock upon any other matter than the particular matter mentioned in the notice sent her of the adjourned meeting.

"An adjourned meeting," says Mr. Cook, in the recent edition of his work upon Corporations, at section 601, "is but a continuation of the meeting which has been adjourned; and when that meeting was regularly called and convened, and duly adjourned, the shareholders may at the adjourned meeting consider and determine any corporate business that might lawfully have been transacted at the original meeting." The notice of the adjournment was not necessary, but, being sent with notice of the particular business to be then done, it has the effect of limiting that which might be lawfully done to the business thus noticed. But the notice of the business to be transacted at special meetings of the stockholders is a provision for the benefit of the stockholders, and may be waived and is waived by attendance and participation without objection. *Cook, Corp. (4th Ed.)* § 599; *Trust Co. v. Condon*, 14 C. C. A. 314, 67 Fed. 84; *Stebbins v. Merritt*, 64 Mass. 27; *Richardson v. Railroad Co.*, 44 Vt. 613; *Manufacturing Co. v. McAlpin (C. C.)* 5 Fed. 737; *Chamberlin v. Railroad Co.*, 15 Ohio St. 225.

There was no limitation of the powers conferred in Mrs. Synnott's proxy. Her proxy attended the meeting, and in behalf of Mrs. Synnott, and himself and others represented by him, induced the very action of which she now complains by expressing the wish of the common stockholders to surrender their advantages in consideration of being relieved of their obligation to the ordinary shareholders. It has been held by the court of appeals for the Ninth circuit that any irregularity in the proceedings or call for a meeting which could have been waived by the stockholder if personally present could be waived by his proxy, and that such action would be binding upon him. *Bank v. Matthews*, 29 C. C. A. 491, 85 Fed. 934. To the same effect is *Cook, Corp. (4th Ed.)* § 601.

We deem it unnecessary to express any opinion as to the conclusive effect upon Mrs. Synnott of the action of Hayward in participating in the doing of business not included in the notice for the adjourned meeting, because we are of the opinion that, whether her agent could waive the sufficiency of the notice of the business undertaken at that meeting or not, nothing but the most active diligence in repudiating what was there done in her name and by her apparent consent can avoid the consequences of her agent's action. That action was had on January 17, 1898. This bill was filed May 1, 1899. For more than a year no protest was made to the action of her agent, and, indeed, the bill filed contains no word of complaint that he had exceeded his authority or that the meeting had exceeded the notice or call made for it.

An effort has been made to excuse Mrs. Synnott for her inaction by the claim that she did not know of the action taken at the January

meeting until shortly before her bill was filed. Mrs. Synnott does not testify at all. Her husband says he acted for her in looking after her stock. He states that he cannot say definitely when he got the information as to what had been done, but thinks it was several months afterwards. Mr. Synnott was an old and expert building and loan man, and though he lived in another state it is hardly credible to suppose that he long remained in ignorance of so important and public an action as that affecting this common stock.

District Judge Clark, in an opinion filed in the record, said, in respect to this plea of ignorance as an excuse for more than a year's delay in repudiating the action of the proxy representing the shares of complainants, that:

"Upon a careful examination of the record, I conclude, as a proposition of fact, that the several agreements, made in the form of what is called stockholders' meetings and by proxy, are shown by the weight of the evidence to have been made with the knowledge and consent of this complainant and other holders of common stock. In holding that the evidence preponderates in favor of the proposition that complainant and other stockholders have agreed that a certain loss should be charged against the common stock, and finally that the installment and common stock should be put upon an equal basis, I hold the complainant and other stockholders to the duty of ascertaining and knowing from time to time such facts as persons of reasonable caution and prudence should know in giving reasonable attention to their business and property rights. I really have not the slightest doubt that at each stage of the proceedings the complainant and other stockholders in fact understood perfectly well what was going on, and just what Mr. Hayward was doing on their behalf, and they are chargeable also with presumptive knowledge of these facts, as attention to their business would necessarily have brought such knowledge to them."

This accords with the view of this court as expressed in the opinion of Judge Severens, who, in speaking for the court in reference to the presumption of knowledge indulged in against a stockholder who complains of some corporate action affecting his stock, said:

"The evidence leaves the question whether the Gronewegs have not in fact known all along the character of their stock; but we do not determine how that was, for we are of opinion that with reasonable diligence they should have known it, and that it may be fairly imputed to them that they did know it." *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801.

It will not do to say that no change occurred in the attitude of the company between that action and the filing of the bill. We may take notice that the shares in such companies are constantly changing hands, and new shares being issued at short periods, constituting new series of stock. It may well be presumed that the elimination of the special powers of this common stock by the apparent consent of the stockholders would be an important factor in all the future issues of new stock and sales of old. Mrs. Synnott should have actively repudiated what was apparently done for her. Until she did so every one had a right to suppose that she had agreed to permit her shares to stand upon a plane of equality with other prepaid shares of what is called installment stock, and to act upon that theory. *Cook, Corp.* (4th Ed.) § 268; *Kent v. Mining Co.*, 78 N. Y. 159.

2. There is even less excuse for the delay of the other four appellants, all of whom are shown by the evidence to have been represented

at both stockholders' meetings by Mr. Hayward. They neither challenge his right to represent them in their bill, nor in their evidence do they prove any departure from his authority. The averments in reference to a conspiracy to destroy the exclusive power of the common stock, in respect to control, for the purpose of keeping in office the then officers and agents of the corporation, has no shadow of evidence upon which to stand. This failing, there is no averment of the bill challenging the presumptions of knowledge and notice of the meeting and of participation therein, which is indulged in the absence of such an averment and evidence supporting it. *Cook, Corp.* (4th Ed.) § 600.

3. The insistence that the loss charged up to the common stock December 14, 1897, should be expunged, comes too late. That action, whether right or wrong, was the voluntary action of the common stockholders, every one of whom assented to it. Neither is there any material evidence that this consent was induced by any misrepresentations or deceit. The secretary of the company did express the opinion that the loss thus assumed would be soon made good out of the accruing profits; but this was a mere opinion,—one for which there was some foundation,—for it appears that when this bill was filed the book value of the stock had advanced from 55 to 70 per cent. of par. Whether the loss so assumed was a real loss or an apparent loss, and whether it was a loss within the strict terms of the indemnity afforded by the agreement of the common stockholders, is now of no importance. It was the construction put on their agreement by themselves, and the loss was one which they agreed to assume rather than have the state inspector lay before the whole of the stockholders a report showing in his judgment an impairment to the extent of \$15,000. That impairment had been made good, and the common stock charged off to the extent of 45 per cent. of each share, more than a month before the second stockholders' meeting of January 17, 1898. That meeting dealt with the stock as it then stood, and complainants and all others holding that stock then agreed to surrender their exclusive right of control on condition that they should stand no longer subject to make good impairments in the capital of the association. There is no ground upon which the agreement then made should be set aside or any part of the loss theretofore paid repaid.

The decree of the court below must be affirmed.

EAMES et al. v. MANLY et al.

(Circuit Court of Appeals, Sixth Circuit. August 15, 1902.)

No. 1,012.

1. ADMINISTRATRIX—SALE OF PROPERTY—SETTING ASIDE—LACHES.

A bill to set aside a sale of property of an intestate's estate on the ground that the creditor who bought it, being the legal adviser and confidential friend of the administratrix, who was his sister, fraudulently obtained possession of the intestate's books of account, and, by abusing the confidence of the administratrix, procured the allowance to himself

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1553.

of claims greatly exceeding what was due him, will be dismissed for laches, not having been brought till 12 years after discovery of the fraud, and when such creditor was dead.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This is a bill by some of the heirs at law and creditors of the estate of Lovett Eames to set aside sales of property belonging to the estate for the satisfaction of certain alleged fraudulent claims against the deceased. The bill is one of prodigious length, covering 62 pages of the printed record. Lovett Eames died intestate, in Kalamazoo, Mich., in September, 1863, leaving an estate, real and personal, which the bill avers was of the value of about \$50,000. The defendant Mrs. Lucy C. Eames, mother of the complainants, and widow of the intestate, qualified as administratrix. The deceased left surviving him six children, two of whom are the sole complainants. The bill, in substance, avers that one Elijah W. Morgan, brother of the administratrix, preferred claims against the estate aggregating about \$40,000, and that only about \$11,000 of this sum was justly due and owing; that to enforce payment of the claims so preferred and allowed the said Morgan had caused to be sold various parcels of realty situated within the state of Michigan, as well as certain valuable patent rights and other articles of personal property, and had purchased same at prices much below their value. It is then, in substance, averred that said Elijah W. Morgan had subsequently conveyed the property so acquired to his wife, Lucy W. S. Morgan, and to Franklin L. Parker, part to one and part to the other, for the fraudulent purpose of defeating his creditors and the heirs and creditors of said Lovett Eames. It is averred that E. W. Morgan was the legal and confidential adviser of his sister the administratrix of the Eames estate; that before the burial of said Eames he visited his sister, and obtained from her all of the business books, letters, and papers of the deceased, and carried them away, and has ever since concealed same from the administratrix and all others interested in the Eames estate. Complainants charge that the object in securing the business papers of said Lovett Eames was to better enable him to cheat and defraud the estate by preferring expanded claims and securing fraudulent judgments. It is also averred that the wife of E. W. Morgan, Mrs. Lucy Morgan, and Franklin Parker, both of whom ultimately obtained some of the property of the Eames estate through the Morgan judgments and mortgages, were conspirators with E. W. Morgan in the scheme to cheat and defraud the Eames estate. It is averred that Mrs. Eames placed entire confidence in her brother, E. W. Morgan, and intrusted him with the entire management of the administration, and that Morgan took advantage of this relation of trust and confidence to secure an allowance of claims aggregating about \$40,000, where his just claim was little more than \$11,000. The statement as to how Morgan managed to perpetrate his frauds against the estate of Lovett Eames is somewhat vague. It does, however, appear that he presented certain claims at a hearing before the commissioners appointed under the Michigan procedure in such cases, and that the commissioner allowed claims aggregating \$11,639.62. This allowance was equivalent to a judgment, and was of July 12, 1864. At the same date other claims were allowed to other persons aggregating over \$10,000. The bill alleges that these claims so allowed other persons were valid and just claims. One of them so allowed was in favor of the principal complainant herein, Elisha W. Eames, and was for \$2,800. Two others were for small sums, aggregating \$200, and are now claimed to be due to the other complainant, Wilfred Eames, and furnish him his only status as a creditor. The claims thus allowed and now held by the two complainants are averred to be wholly due and unpaid. The only averment in respect to the fraudulent character of the claim allowed Elijah W. Morgan for \$11,639.62 is that "a large amount of which claim was fraudulent and false." The only specification affecting it is that "the claim was made out in the handwriting of Lucy W. S. Morgan, one of the said conspirators heretofore mentioned, that one of the items in said fraudulent claim was certain notes to one D. A. Mc-

Nair for the amount of \$6,500, but that in truth and in fact the amount due on said notes was only \$3,250." Why this was so is not stated. It is then charged that thereafter, on the 18th day of July, 1864,—six days after the filing of the former claim, and six days after the time had elapsed for filing claims, and without any extension of time having been granted for filing claims,—said Morgan filed "a false and fraudulent bill of some \$28,000 against the estate," and same was allowed. Concerning this claim it is charged, in substance, that it consisted in part of items of money which had previously been charged and settled by notes included in the former claim of July 12, 1864, and was also expanded by duplicating accounts, charging same sums under different heads; that "drafts were charged one day, and when money was remitted to bank to meet the draft the same amount would be charged again"; that interest was charged contrary to an agreement that it should not be charged; "that the entire bill of \$28,000 was not only barred by expiration of time limit, but it was wholly a fraudulent claim, made up and concocted by Morgan and wife." It is then averred "that all of said accounts presented by said Elijah W. Morgan, except something over \$11,000, secured by mortgages as aforesaid, were wholly unsupported by any proof, and were passed upon and allowed on the unsupported statements of said Morgan. That in presenting the same for allowance he was acting as the attorney and confidential adviser for and in the place of said administratrix, he as such having the charge of the whole of the affairs of said estate."

From the elaborate and somewhat vague averments of the bill we gather that Morgan held a mortgage, which included much, if not all, of the realty of the Eames estate in Michigan, and that same was given to secure the honest liability of about \$11,000 due to him. It also appears, though dimly, that Eames and wife, as far back as 1859, joined in conveying, by deed, a certain property known in the record as the 'Kalamazoo Machine Shop Property,' to said E. W. Morgan. It is averred that in fact this deed was a mortgage, and that a defeasance was executed by Morgan, of which complainants say they are ready to produce a duplicate copy, though oddly enough they failed to file same with their bill. It appears that in due course Mrs. Eames filed her petition in the probate court of Kalamazoo county, Mich., and obtained leave to sell both the real and personal property of the estate, including the Kalamazoo shop property. In accordance with the authority so obtained, she did, in August and September, 1864, expose to sale and sell certain parcels of land in Van Buren county, Mich., and the said shop property at Kalamazoo, and that all of same was bid off by said Morgan. The proceedings under which sales were made, the report of sale and confirmation are averred to have been made "in due form of law, and according to the statutes of the state of Michigan." In accordance with the direction of the court and the sale made by her, as aforesaid, Mrs. Eames, as administratrix, is said to have made her deed to said Morgan conveying to him the right, title, and interest of the Eames estate in the said shop property, which deed bears date December 24, 1864. The price paid for same was \$8,100, a credit for that being placed on the mortgage which Morgan claimed to have thereon. The shop property was subsequently conveyed by Morgan to his wife, who is charged with knowledge of the fraud practiced upon the estate, and with active participation in the fraud. For the purposes now in view we need not follow the other parcels of property, for, if the defense of laches applies to the case we have stated, it will apply to the relief sought in respect of every other detail of the case. The defendants to the bill are Mrs. Lucy C. Eames, administratrix of Lovett Eames, C. H. Manley, administrator of E. W. Morgan, O. C. Johnson, executor of Mrs. Lucy W. S. Morgan, and Mrs. Lucy D. S. Parker, individually and as executrix of Franklin Parker. The court below sustained a demurrer for laches, and dismissed the bill, without passing upon other grounds of demurrer. From this decree the complainants have appealed.

Claude S. Carney, for appellants.

Dallas Boudeman (Bowen, Douglas & Whiting, of counsel), for appellees.

Before LURTON and DAY, Circuit Judges, and SWAN, District Judge.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The theory of the bill is that E. W. Morgan fraudulently possessed himself of the books, letters, and papers of the deceased, Lovett Eames, and thus deprived the administratrix of the means to resist or defend against his claims; and that he obtained possession of these books, letters, and papers as the legal adviser and confidential agent of his sister, who was the representative of the estate; and abused her confidence by procuring in his own favor the allowance of claims for an amount greatly larger than the sums justly due him. The further idea of the draftsman of the bill seems to be that as heirs and creditors they had and have some kind of a lien upon the property of the estate which was acquired by E. W. Morgan in satisfaction of his fraudulent claims, and have a right to recover said property from said Morgan and those to whom he conveyed it with notice of his fraud, and to hold the estate of said Morgan and his co-conspirators liable for the value of all moneys and properties which came into the possession of either of them which properly constituted assets of the Eames estate. They specifically seek to have the deed made in 1859 by Lovett Eames and his wife to said Morgan for the machine shop and homestead held to be only a mortgage, and to have a full accounting with said Morgan.

Assuming, as we must, for the purposes of this case, the truth of the averments of the bill, it is very clear that no case of an express trust such as arises out of contract is charged. However false the claims may have been which were preferred by Morgan against the Eames estate, and however iniquitous his conduct in concealing the letters, papers, and books of the deceased from the administratrix or heirs or creditors of the deceased, it is very clear that in presenting claims against the estate for himself he was acting adversely to the estate, and in his own interest. It is also evident that in acquiring property of the estate at a sale held to satisfy his claims, whether his claims were secured by mortgages or not, he was acting adversely to the estate, and acquiring whatever he did acquire for himself, and not for the estate. The trust relation, if any, here was or is in respect to the property of the estate acquired by him under the sales attacked, was one imposed upon his conscience by operation of legal principles, and was not one of that class of trusts called express. *Hughes v. Brown*, 88 Tenn. 578, 589, 13 S. W. 286, 8 L. R. A. 480. Time, therefore, runs against such a trust, for the open attitude of the persons against whom the trust is implied is adverse to those defrauded. In view of the allegations of the bill that Morgan was the legal and confidential adviser of his sister as administratrix, and that she throughout submitted her entire conduct to his advice, and that she had no knowledge of any defense to his claims, and that both she and the complainants believed his repeated assurances of the correctness and justice of his claims, it may be conceded that until the discovery of the fraud so practiced by him mere lapse of time would not defeat an application to a court of

equity to bring him to an account, and compel a disgorgement of the gains so fraudulently acquired.

These claims were allowed by the local tribunal in 1864. This bill was not filed until 36 years had elapsed. In the meantime all of the persons whose conduct is impeached have long since died. Why this delay? The propriety of examining such papers and books in reference to any claims, especially one so large as that presented by E. W. Morgan, could not but have occurred to the administratrix and to the complainants as creditors and distributees. When did they learn that E. W. Morgan had possession of these papers? The inference from the rather vague averments of the bill is that this was known from the beginning, and that no one questioned his custody. Certainly there is no averment of a recent discovery that these papers were in his custody, or of any effort to obtain them prior to the insanity of said Morgan in 1885. The bill admits the discovery of the alleged fraudulent character of the claims allowed Morgan in 1889, and that two years before that "they began to suspect the fraud set forth in the bill." This distinction between the suspicion of the fraud and its actual discovery two years later is important. Twelve years after the discovery that the claims of E. W. Morgan against the estate had been fraudulently inflated from \$11,000 to \$40,000, the complainants file this bill to bring him to account for the fraud thus perpetrated, and to recover the property of the estate which had been acquired by him in satisfaction of his fraudulent claims. Assuming that a right of action under such circumstances exists in favor of creditors and heirs, and that they may sue without showing the complicity of the personal representative of the estate, or her refusal to bring the suit, how long may such creditors and heirs or distributees wait before instituting a proceeding after discovering the fraud? There is a vague effort to explain the delay in bringing the present suit by indefinite reference to certain former proceedings in various courts between 1890 and the filing of the present suit, having as an object the recovery of the books, letters, and business papers of Lovett Eames from the guardian or administrator of E. W. Morgan. If those books, papers, and letters were essential to a discovery of the truth of the case against E. W. Morgan or his estate, and the evidence afforded by them was competent in a suit between his estate and that of Lovett Eames, or those representing it, nothing was easier than to have obtained their production. In *Eames v. Manley*, 121 Mich. 308, 80 N. W. 15, which is one of the proceedings referred to by the bill of complainants as instituted against the E. W. Morgan estate prior to the present suit, the suit was by Mrs. Lucy C. Eames, as administratrix of Lovett Eames, to set aside for fraud the sales of the Lovett Eames lands, etc. The bill was demurred to for laches. One of the excuses for the delay was that "she did not have the possession of the books and papers necessary to advise her of the situation." To this the supreme court of Michigan replied: "The probate court, upon her petition, had abundant authority to require the discovery of any and all books and papers belonging to the estate." 2 How. Ann. St. § 5876; *Perrin v. Calhoun* Probate Judge, 49 Mich. 342, 13 N. W. 767; *Manly v. Washtenaw* Probate Judge, 99 Mich. 441, 58 N. W. 367. Aside from the power of

the probate court to compel the production of papers and books belonging to the estate upon proper application, the power of a court of equity to compel the production of such papers in aid of a discovery cannot be questioned. The judicial and semijudicial proceedings referred to do not show any proper diligence in the pursuit of the rights of these complainants,—rights which must have existed just as effectually 12 years ago as upon the day they filed this bill. They have waited until every one of the parties capable of explaining the transaction attacked has died. There is no security that the truth of the matter can now be satisfactorily discovered. On their own showing complainants have made no discovery in relation to the inflated character of the Morgan claims since the suit of 1889, when it was shown by evidence then filed that there had been some stuffing of his claims. The evidence then discovered has all this time been open to them, as well as the undoubted right to compel the production of the books and papers belonging to the estate of Lovett Eames. So far as the bill seeks to have the deed of 1859 by Lovett Eames and wife to E. W. Morgan for the machine shop property declared a mortgage, it is defective in many particulars. It does not appear that its true character as a mortgage has ever been disputed. On the contrary, we infer from the rather indefinite averment of the bill that E. W. Morgan enforced it as a mortgage, and that the interest of the estate, subject to his claim as a mortgagee thereunder, was regularly sold by the administratrix under the power granted her by the Kalamazoo probate court. However this may be, the bill shows that the complainants knew of the defeasance when or about the time the property was sold, and acquired by E. W. Morgan, and that they have ever since had a copy of the defeasance in their possession. The demand is a remarkably stale one, and no reasonable excuse is shown for the long delay in bringing this suit. The opinion of this court in *Lant v. Manley*, 21 C. C. A. 457, 75 Fed. 627, affords no excuse for the delay of this proceeding. Lant was a judgment creditor, and had levied on property of E. W. Morgan during the life of the latter. The bill was to reach property fraudulently conveyed, in aid of his execution. His efforts to discover the fraud were shown to have been constant, and his bill filed so soon as the discovery was made.

Assuming that complainants have been guilty of no fault or negligence in coming to the knowledge of the alleged fraud practiced upon the estate of their father, they fail to show any such diligence since their alleged discovery as is due under such circumstances. We say nothing of the failure to make averments in respect to the diligence of the administratrix in coming to a knowledge of the fraud, or of the privity which must exist between her and the complainants. We put our judgment upon the fact that the complainants came to the knowledge of the alleged fraud 12 years before filing this bill, and that during all that time there existed no impediment to the filing of this suit. The suits they instituted or caused to be instituted by the administratrix, if they do not operate as a bar to the present suit, are, as stated in the pleadings, wholly insufficient as an excuse for so great a delay. The circumstances were such as to demand diligence in the assertion of any right which the complainants had to open up these

ancient transactions after learning of the fraud. Equity will not aid a slothful suitor to reopen so stale a matter, especially when the opposite parties are dead, and unable to give their explanation of the transaction.

The decree dismissing the bill for laches is affirmed.

FLETCHER et al. v. McARTHUR et al.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.)

No. 1,010.

1. EQUITY—LACHES.

By Act June 2, 1858, congress authorized the issuance of certificates to holders of deferred land claims confirmed under the treaty of cession of Louisiana, which should be receivable at any land office of the United States in payment for lands. A holder of such a claim, who had never applied for or obtained a certificate thereon, died in 1862, domiciled in Mississippi, and his will was there probated, by which he devised all his property to his children, one of the complainants and the father of the other complainants. Subsequently, without the knowledge of the devisees, proceedings were instituted in Louisiana for the settlement of decedent's succession, in which his land claim was sold, and the purchaser, through whom defendants claim, obtained a certificate thereon, which was located on the lands in controversy. *Held*, that complainants were not chargeable with notice of the proceedings in Louisiana, nor barred by laches from asserting their rights against defendants, where suit for that purpose was instituted within two years after they first learned of the existence of any adverse claim.

2. SAME—IMPLIED TRUST—MEASURE OF TRUSTEE'S LIABILITY.

In such case, however, defendants were not chargeable with an express trust in favor of complainants, but with a trust implied by equity, and complainants were entitled to recover only the value of the scrip, with interest from the time of its location, and not the land into which the same had been converted.

3. ATTORNEY AND CLIENT—CONTRACTS FOR COMPENSATION—VALIDITY.

Under the law of Michigan, an agreement that attorneys shall receive a share of the recovery in payment for their services is lawful.

4. TRUSTS—SUIT TO ENFORCE—DEFENSES.

In a suit to recover lands alleged to be held in trust for complainants, defendants cannot plead as a defense a deed executed by complainants to a third person, describing other lands, upon an allegation that it was intended to convey the lands in suit.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Levi L. Barbour and Dwight C. Rexford, for appellants.

James T. Keena and Clarence A. Lightner (Henry M. Duffield, of counsel), for appellees.

Before SEVERENS, Circuit Judge, and WANTY and COCHRAN, District Judges.

SEVERENS, Circuit Judge. This case was before this court on a former occasion upon an appeal from a decree sustaining a demurrer

¶ 3. See Attorney and Client, vol. 5, Cent. Dig. § 351; Champerty and Maintenance, vol. 9, Cent. Dig. §§ 24, 25, 26.

and dismissing the bill. 37 U. S. App. 69, 15 C. C. A. 224, 68 Fed. 65. Those reports may be referred to for facts not repeated in our present decision. For reasons stated in the opinion then filed, we reversed the decree of the court below, and remanded the case to that court, with direction to permit the defendants to answer, if they should elect to do so. The defendant Wellington R. Burt did not answer, and the bill was taken as confessed as to him. The other defendants answered, admitting those allegations of fact upon which their own claim of title rests, but denying knowledge in respect to the domicile of John Fletcher (under whom both parties claim) being in Mississippi at the time of his death, the making of his will, the probate thereof, and the settlement of his estate in the probate court for Adams county, Miss., as alleged in the bill. Their answer avers that at the time of their purchase of the Louisiana land scrip certificates referred to in the bill they had no notice of any defect in the claim of title thereto, or that complainants had any rights or interest in said certificates. It is further alleged that John Fletcher, and the complainants claiming under him, knew, or had good reason to know, or ought to have known, ever since 1837, of the existence of the claim upon which said certificates rest, and, having failed to assert such claim until the filing of this bill, they have been guilty of laches which should preclude the relief they seek. Another allegation is that the suit is being prosecuted under a champertous agreement between the complainants and their counsel. The complainants filed a replication.

Proof of the Mississippi domicile of John Fletcher, his death at Natchez, Adams county, in 1862, and that the complainants are his devisees, or heirs of devisees, was made by the testimony of Jane Virginia Fletcher, one of said devisees, who also testified that, although she had previously known that John Fletcher, her father, had land claims, she had no notice that any one claimed adversely until the spring of 1889, when she was informed by Senator Foster, of Louisiana, of the fact, whereupon she immediately put the matter in the hands of her lawyers. The other devisee of John Fletcher was John Fletcher, Jr., who died a few years after the father, leaving the other complainants, who were then young children, his heirs. Proof was also made of the will of John Fletcher and its probate in Mississippi. By the will all the testator's property was devised to John Fletcher, Jr., and Jane Virginia Fletcher. This bill was filed September 3, 1891. The defendants proved that the complainants gave a power of attorney to their counsel to prosecute their interests in the claim of John Fletcher, Sr.; the expenses to be borne by the complainants and the recovery to be shared equally between the clients and their counsel. They also proved two deeds from complainants to Robert B. Lines of one undivided half of lands located under said claim in the states of Kansas and Minnesota, and under objection gave evidence tending to show that by "Minnesota" was intended "Michigan." Upon those pleadings and proofs the circuit court dismissed the bill. The learned judge who presided did not file an opinion, and the decree does not disclose the grounds upon which it was founded. The only

questions not passed upon when the case was here before are the following:

1. It is said that the complainants and their devisor have been guilty of such laches as should require a court of equity to deny relief at this late day, and the laches is charged to have existed all along from 1858, when John Fletcher, it is said, was charged with notice of the act of congress confirming his claim. But the duty of diligence is not imposed upon one who has no notice that another is denying his right. It is wholly inadmissible to impute laches in not watching for unsuspected fraud and marauding in a foreign state or country having no dominion of the subject-matter. In a similar case, *Hodge v. Palms*, 37 U. S. App. 61, 15 C. C. A. 220, 68 Fed. 61, decided at the same time with this when it was here before, we said, in reference to a like contention to that now made:

"The complainants were the owners of this claim. They, and those from whom they derived title, were the owners of this claim by purchase from the original owner. There was no reason why they should watch the proceedings in the parish courts of Louisiana to see what might be done with respect to the succession of Antonio Vaca; and nothing that was done by the defendants, and those through whom they claim title, so far as we can find, was anything of which the complainants were required to take notice, and of which they would be likely to have any notice in fact. So far as they knew, no entry upon their rights was impending or threatened, and we are unable to see that the defendants have any right to say that the complainants should have moved earlier to prevent that which the complainants had not the least reason to suspect."

It is not shown that any notice of the mischief which was going forward was known to the rightful owners, and certainly the latter owed no duty to those who were engaged in it. It appears that notice of it was acquired by one of the devisees in the spring of 1889. The matter was at once placed in the hands of attorneys, and suit was begun September 3, 1891. It is not shown that the position of the defendants was changed in the meantime. In our opinion, there is no sufficient ground for this defense of laches. The lapse of time was less than a year and a half, and the means of proof widely scattered.

2. But it is further said that, assuming the facts and law to be as we hold, the measure of the relief to be awarded is not the land itself, into which the scrip has been converted by the skill and industry of the defendants, but the value of that which they converted; and we think this contention is well founded. If this were a case where the defendants were chargeable with an express trust in respect to these certificates, the donor of the trust might be able to follow them into whatsoever form they might be converted by his trustee. The doctrine under which this would result rests upon the relation of agency toward the owner, and the rule is that all that the agent profits by his act belongs to the owner. But in the present case the defendants did not hold such relation to the complainants, and the ground for pursuing the property converted fails. The defendants held the certificates upon a trust implied by equity, and the complainants are not entitled to the benefit of the services and judgment of the defendants in selecting the lands upon which the certificates should be located.

By the law of Michigan the agreement that counsel should receive

half of the recovery was permissible. Comp. Laws Mich. § 11,254; *Willey v. Crane*, 63 Mich. 724, 30 N. W. 327. The deeds of lands described as being in Kansas and Minnesota do not affect the present suit. If by those described as being in Minnesota were meant these lands in Michigan, it might give ground for a suit to reform the deed; but, as these defendants were not concerned with that matter, it could only properly be done by an independent bill. In such circumstances, the grantee in that deed would not be a proper, certainly not a necessary, party to this suit.

We think the equity of the case is that the defendants should be held for the value of the scrip which they obtained, and which was the property of the complainants. This was substantially \$1.25 per acre for the number of the acres specified therein. The defendants should also be charged with interest on that sum from the date when they used it in locating the land. The record contains the materials upon which the result can be computed.

The decree of the circuit court will be reversed, and the cause remanded, with directions to enter a decree in conformity with this opinion. The complainants will recover costs in the court below and in this court.

HODGE et al. v. PALMS et al.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.)

No. 1,011.

1. EVIDENCE—PROOF OF INSTRUMENTS—COPY OF RECORD.

A duly authenticated copy of the record of an act of sale from the records of a parish in Louisiana, where such acts are authorized to be recorded by the laws of the state, is admissible to prove title under such sale, where it is made to appear that the original act has been lost.

2. SAME—AUTHENTICATED ACT OF SALE.

By Civ. Code La. art. 2263, an authentic copy of an act of sale, made by the notary before whom such act was executed, is made evidence to prove such sale, equally with the original act; and where such copy is more than 60 years old, and is further authenticated by the certificate of registration by the parish recorder of nearly contemporaneous date, it is admissible in evidence under the common law as an ancient deed.

3. SAME—ANCIENT DEEDS.

Proof of possession of the subject of the grant is not indispensable to render an instrument admissible as an ancient deed, where there is nothing to excite suspicion as to its genuineness, and contemporaneous official acts confirm the presumption of its authenticity.

4. PUBLIC LANDS—LOUISIANA LAND CLAIMS—RIGHTS OF OWNER ON FAILURE OF LOCATION.

Act June 2, 1858, authorizing the issuance of certificates or scrip to holders of deferred land claims confirmed under the treaty of cession of Louisiana, which should be receivable in payment for land by the land department of the United States inured to the benefit of a grantee of land previously located under such a claim, where such location failed or became ineffectual by reason of some prior grant or location.

5. EQUITY—LACHES.

Where the rightful owners of a Louisiana land claim, on learning of an adverse claim thereto by others who had obtained certificates thereon,

¶ 8. See Evidence, vol. 20, Cent. Dig. §§ 1616, 1617.

at once notified such claimants of their intention to assert their rights, they were not chargeable with laches for a delay in bringing suit during the time that both parties were endeavoring to obtain an adjustment of their conflicting claims by the land department.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Levi L. Barbour and Dwight C. Rexford (Geo. Lines, of counsel), for appellants.

James T. Keena and Clarence Lightner (Henry M. Drummond, of counsel), for appellee.

Before SEVERENS, Circuit Judge, and WANTY and COCHRAN, District Judges.

SEVERENS, Circuit Judge. This case, in respect to some of the principal questions involved, is like that of *Fletcher v. McArthur* (No. 1,010, just decided) 117 Fed. 393, and the two cases were argued together. This case, also, was here on a previous occasion on appeal from a decree sustaining a demurrer to the bill. The decree was reversed, and the cause remanded, with a direction to permit the defendants to answer if they should so elect. 37 U. S. App. 61, 15 C. C. A. 220, 68 Fed. 61. Reference is made to those reports for facts not herein recited. The defendants answered, setting up several defenses. Those relied upon here will be presently stated. Proofs were taken, the cause was again brought on for hearing, and the bill was dismissed. The grounds of the dismissal are not disclosed by the record. The questions involved, which were not disposed of on the former hearing and have now been argued, are three in number, and these we are now to determine.

1. It is contended that the complainants have not shown title to the land certificates in question, which they claim to have derived from Antonio Vaca. The devolution of that title which they have shown, and upon which they rely, is as follows: First, an act of sale from Vaca to one Adams; second, an act of sale from Adams to Mellen and Farnam; third, an act of sale from Mellen and Farnam to Allen; fourth, an act of sale from Allen to Andrew Hodge, Jr.; and, fifth, the acquisition of his title by complainants, in part by devise and in part by purchase from other devisees.

First. To prove the conveyance from Vaca to Adams, the complainants gave in evidence a copy of an act of sale by Vaca to Adams from the records of the parish of East Carroll, La., duly certified under the act of congress in that behalf. In connection therewith evidence was given tending to show that the original record of the notary, before whom the act of sale was made, was not to be found in the office of the custodian of notarial records, or at any place where it might have been, and had probably been lost. Civ. Code La. art. 2252, provides that:

"The acts of notaries, when deposited in the office of the parish recorder, shall form part of the archives of his office and shall be immediately recorded by him."

And by article 2267 it is further provided that:

"It shall be the duty of the recorder, or other officer having charge thereof, to grant copies of the original acts deposited with them, under their signatures and seals of office. When the original acts are authentic, such copies shall be considered legal evidence of their contents."

By the civil law, in force in Louisiana, the common mode of making such conveyances was by "an act of sale," so called, done before a notary, who wrote down in a record kept by him the agreement of the parties as stated by them, which was then signed by the parties and attested by witnesses. The record remained with him, but upon request he gave out authenticated copies thereof to the parties, which by article 2268 of the Code "make proof of what is contained in the originals." Upon request, also, the notary delivers the record of the act of sale to the parish recorder to be recorded in his office. It appears that the notary's record of the act of sale in question was lost, but a proper record of it was in the recorder's office; and the copy thereof, duly certified by him and further authenticated as required by the act of congress, was admissible.

Second. To prove the conveyance from Adams to Mellen and Farnam, the complainants put in evidence the notarial or authentic copy of an act of sale from the former to the latter, and the certificate of registration by the parish recorder. By the law of Louisiana, as already stated, this authentic copy of the notary makes proof of what is contained in the original. It is not a mere copy, but it is a "duplicate original," and is per se evidence of the grant. *Mitchel v. U. S.*, 9 Pet. 711, 9 L. Ed. 283, 732; *McPhaul v. Lapsley*, 20 Wall. 264, 22 L. Ed. 344.

Third. The same proof was made of the conveyance from Mellen and Farnam to Allen, and—

Fourth. Of the conveyance from Allen to Andrew Hodge, Jr.

These conveyances were made more than 60 years before they were given in evidence, and were accompanied by other official certificates of registration of nearly contemporaneous date, further tending to prove their genuineness and authenticity. They were severally objected to by counsel for defendants "as incompetent, irrelevant, and not sufficiently proven, and not admissible in evidence as a copy." There is no statute in Michigan governing their admissibility. We think the objection was not well taken. Those which were not proven under the act of congress (Rev. St. § 906) were admissible at the common law as ancient deeds. True, there was no proof of possession of the subject of the grant, but there is evidence of contemporaneous official acts which satisfies us that the instruments are genuine; and proof of possession, which some of the authorities indicate should be required as a condition to the admission of ancient records and documents without further proof, is required solely to fortify and give credit to the instruments when offered in evidence. Upon the question whether confirmatory proof of acts of possession should be required at all, where there is nothing to excite suspicion of the genuineness of the instrument, the cases are somewhat conflicting. *Greenleaf* in his work on Evidence (volume 1, §§ 21, 144), states that the weight of opinion is that proof of acts of possession is not necessary.

Further evidence was offered tending to prove the acquisition of the

title of Andrew Hodge, Jr., by the complainants, upon which no question arises. The deed from Allen to Andrew Hodge, Jr., purported to be executed under a power of attorney. The authority of the attorney is supported by the same presumption as that which supports the deed. The several conveyances above referred to were of land which purported to have been located. The plain inference is that the location turned out to be ineffectual by reason of some prior grant or location. The government has recognized the fact that the location was null, and that the claim remained unsatisfied, and, indeed, the defendants' position rests upon that fact. Vaca's deed recites that the land was located under his claim, and we think, the location failing, his grantee acquired his equity to the relocation thereof, and that the act of congress of 1858 inured to the benefit of such grantee.

2. It is charged that the complainants have been guilty of laches. There is proof that notice of the adverse proceedings of defendants was brought to the complainants in 1881. They notified the defendants of their claim at that time, and the defendants, who had acquired the certificates and located them, were informed by the complainants that they should press their claim. For several years the parties co-operated in an endeavor to obtain some ruling of the land department which should effect an arrangement whereby the conflicting claims of the parties might be adjusted. The complainants opposed the issue of the patents to the defendants without such adjustment. The controversy was pending in the land department for several years, but the patents were at length issued to the defendants during the years 1888 to 1891, whereupon the complainants again gave notice that they should stand upon their claim, and five months after the date of the last patent they filed their bill. The defendants had prompt notice that the complainants asserted their right to these certificates in 1881, when the discovery of the fraud in their procurement was made by complainants. For the reason stated in *Fletcher v. McArthur*, above referred to, there was no laches previous to that time attributable to the complainants or those under whom they derive title. Nor can the lapse of time occurring through the effort to adjust the controversy by the proceedings in the land office be any just ground for the imputation of laches. The defendants had no reason to suppose that the complainants intended to waive their claim in case that method of adjustment should fail. The suit was commenced within a short time after those proceedings failed and patents were issued to the defendants.

3. With respect to the kind and manner of relief to which the complainants are entitled, we think the case stands in substantially the same predicament as that of *Fletcher v. McArthur*, and that for the reason stated in the opinion in that case the decree for the complainants should be for the value of the certificates acquired by the defendants at the date of their location by them; that is to say, \$1.25 per acre of the land called for by the certificates, with interest from the date of such location.

The decree will be reversed, and the cause remanded, with a direction to enter a decree in conformity with this opinion. The complainants will recover the costs in the court below and in this court.

KEYSER v. LOWELL

(Circuit Court of Appeals, Eighth Circuit. August 25, 1902.)

No. 1,737.

1. CONSTITUTIONAL QUESTION—JURISDICTION OF CIRCUIT COURT OF APPEALS.

The circuit court of appeals has jurisdiction to review and to finally determine whether or not a state statute is obnoxious to the constitution of the United States in a case in which the jurisdiction of the circuit court originally attaches solely by reason of diverse citizenship, and the constitutional question subsequently arises.

2. CONSTITUTIONAL LAW—JUDGMENT—FULL FAITH AND CREDIT—LIMITATIONS STATUTE.

A statute of a state (Act April 6, 1899; Sess. Laws Colo. 1899, c. 113), which by its terms bars the maintenance of an action in that state against its residents upon a judgment of a court of another state, which was founded on a cause of action that was barred in the former, but was not barred in the latter state, when the action in which the judgment was rendered was commenced, does not give full faith and credit to the records and judicial proceedings of the latter state, is obnoxious to article 4, § 1, of the national constitution, and to Act Cong. May 26, 1790 (1 Stat. 122, c. 11; Rev. St. § 905), and is without force and void.

3. SAME.

The states may enact limitation laws which accord and limit reasonable times for the commencement of actions upon judgments of courts of other states. But they may not bar all actions upon such judgments within their borders, and thereby render them without beneficial force or effect.

4. STATUTES OF LIMITATIONS—TIME AN ESSENTIAL ATTRIBUTE.

The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which an action may be brought upon the causes of action which it affects. A statute which allows no time, but absolutely bars the causes of action, is not a statute of limitations.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

This writ of error was sued out to reverse a judgment in favor of the defendant upon a directed verdict founded upon the following undisputed facts: On February 5, 1885, the plaintiff, Aaron Keyser, recovered a judgment against the defendant, John W. Lowell, in a court of general jurisdiction of the territory of Utah. In the year 1884 or the year 1885 the defendant, John W. Lowell, who had theretofore been a resident of Utah, removed to, and became and has ever since been a citizen and resident of, the state of Colorado. On January 18, 1901, the plaintiff commenced an action in a court of general jurisdiction of the state of Utah against the defendant upon the judgment of February 5, 1885. The summons was personally served on the defendant, and he appeared generally in that action. Thereupon, and on March 2, 1901, a judgment was rendered by the court of the state of Utah in favor of the plaintiff and against the defendant for the sum of \$9,052.61 and costs. On January 18, 1901, when the action was commenced which resulted in this judgment, the cause of action upon the judgment of February 5, 1885, was barred in the state of Colorado by its general statute of limitations, which limits the time within which such an action may be brought to six years from the accrual of the cause of ac-

¶ 1. Jurisdiction of circuit court of appeals, see notes to *Lau Ow Bew v. U. S.*, 1 C. C. A. 6; *Emigration Co. v. Gallegos*, 32 C. C. A. 475.

¶ 3. See Judgment, vol. 30, Cent. Dig. §§ 1444, 1756, 1766.

tion. On May 31, 1901, the plaintiff commenced this action in the circuit court of the United States for the district of Colorado upon the judgment of the district court of the state of Utah rendered on March 2, 1901. The defendant pleaded that this cause of action was barred by the statutes of the state of Colorado, and the court below instructed the jury to return a verdict for the defendant, on the ground that the third proviso of the act of the legislature of the state of Colorado of April 6, 1899, entitled "An act to amend an act approved on the 29th of April, 1895, entitled 'An act to limit the time in which suits may be brought upon causes of action accrued or judgments or decrees rendered without this state and to repeal various acts in conflict or inconsistent therewith,'" barred the maintenance of the action. That proviso reads in this way: "Provided, further, that if at any time after a period of six (6) months from and after the passage of this act any action, suit or proceeding be brought against any bona fide resident of this state in the courts of any other state, territory or jurisdiction beyond the limits of this state upon any debt, contract, demand or liability that at the time of the commencement of such action, suit or proceeding was wholly barred by the statute of limitations of this state so that no action, suit or proceeding could be commenced upon the same in any of the courts of this state, and a judgment or decree should be rendered upon any such debt, contract, demand or liability in such other state, territory or jurisdiction, and any action, suit or proceeding should afterwards be commenced in this state upon such a judgment or decree so rendered against said defendant and said defendant should still be a bona fide resident of this state, it shall be lawful for such defendant to plead in bar to any such action that said judgment or decree had been so recovered upon a debt, contract, demand or liability, that was wholly barred by the statute of limitations in this state at the time the action, suit or proceeding was commenced upon the same in such other state, territory or jurisdiction." Sess. Laws Colo. 1899, c. 113.

George P. Costigan, Jr., and Edward P. Costigan, for plaintiff in error.

Charles D. Hayt and Ernest Knaebel, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This case involves the question whether or not a statute of the state of Colorado is obnoxious to section 1 of article 4 of the constitution of the United States, but the jurisdiction of the court below was not invoked upon that ground. The sole ground upon which the jurisdiction of the circuit court originally attached was the diversity of the citizenship of the parties. The constitutional question was not presented or suggested, and it did not arise until the answer was interposed. This court, therefore, has jurisdiction to hear and determine the question of the validity of the statute, in view of the constitution of the United States, as well as the other questions in the case, and its decision of each of these questions will be final. Where the jurisdiction of the circuit court originally attaches solely by reason of diverse citizenship and a constitutional question subsequently arises, the circuit court of appeals has jurisdiction to review the decision of that question below and to finally determine it. *American Sugar Refining Co. v. City of New Orleans*, 181 U. S. 277, 280, 281, 21 Sup. Ct. 646, 45 L. Ed. 859; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 17 Sup. Ct. 40, 41 L. Ed. 367; *Carter v.*

Roberts, 177 U. S. 496, 499, 20 Sup. Ct. 713, 44 L. Ed. 861; Robinson v. Caldwell, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745; Mining Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35, 37 L. Ed. 1030; Railway Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 74, 45 L. Ed. 280.

The constitutional question upon which this case turns has already been answered by the supreme court, and its solution does not require any independent investigation or the discussion of any novel issue. This is the question: Does a statute of a state, which bars actions against its residents upon judgments of other states founded upon causes of action which were barred by the statutes of limitations of the state which enacted the law, but which were not barred by the statutes of the state where the judgments were rendered, accord full faith and credit to the records and judicial proceedings of those states? The constitution declares that "full faith and credit shall be given in any state to the public acts, records and judicial proceedings of every other state." Article 4, § 1. The act of congress of May 26, 1790, provides that the records and judicial proceedings of each state "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they have been taken." 1 Stat. 122; Rev. St. § 905. The supreme court has always held that the true interpretation of this statute was that the record of a judgment should have in every other court of the United States the same faith and credit that it has in the state from which it was taken. *Mills v. Duryee*, 7 Cranch, 483, 3 L. Ed. 411; *Hanley v. Donoghue*, 116 U. S. 1, 3, 6 Sup. Ct. 242, 29 L. Ed. 535. In the state of Utah the record of the judgment upon which this action is founded is indisputable proof of an unanswerable cause of action. Does a statute like that of Colorado, which in effect declares that it shall not constitute the basis of any cause of action, that it shall not have any force or effect in that state, accord full faith and credit to the records and judicial proceedings which evidence the judgment?

In *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475, Christmas, a resident of the state of Mississippi, had made his promissory note in 1840 payable in 1841. By the statute of Mississippi the action upon this note was barred in March, 1847. In 1853 Christmas visited Kentucky, was there sued upon this note, and a judgment was recovered against him in one of the courts of that state in favor of Russell, the indorsee of the note. In 1854 Russell brought an action upon this judgment in the state of Mississippi, and Christmas pleaded that this action was barred by a statute of the latter state which provided that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of such action would have been barred by any act of limitation of this state, if such suit had been brought therein." Rev. Code Miss. 1857, c. 57, art. 10. The plea was overruled, and judgment was rendered against Christmas, on the ground that this statute was violative of article 4, § 1, of the constitution.

Upon a writ of error the supreme court affirmed this conclusion, and, after conceding that it was competent for the states to enact statutes of limitations prescribing reasonable times within which actions on judgments of other states might be brought, as in *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177, said:

"But the provision under consideration is not a statute of limitations as known to the law or the decisions of the courts upon that subject. 'Limitation,' as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law. Looking at the terms of this provision, it is quite obvious that it contains no element which can give it any such character. Plain effect of the provision is to deny the right of the judgment creditor to sue at all, under any circumstances, and wholly irrespective of any lapse of time whatever, whether longer or shorter. No day is given to such a creditor, but the prohibition is absolute that no action shall be maintained on any judgment or decree falling within the conditions set forth in the provision. These conditions are addressed, not to the judgment, but to the cause of action which was the foundation of the judgment. Substantial import of the provision is that judgment recovered in other states against the citizens of Mississippi shall not be enforced in the tribunals of that state, if the cause of action which was the foundation of the judgment would have been barred in her tribunals by her statute of limitations. * * * It is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest court in the state, and it was undoubtedly correct; and, if so, it is not competent for any other state to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the state courts from which it was taken."

No legal distinction can be successfully drawn between the facts and the law in the case of *Christmas v. Russell* and those in the action here before us. In that case and in this a judgment had been rendered in one of the courts of a sister state upon a cause of action that was barred by the statute of limitations of the state of the residence of the defendant before the action was commenced which resulted in the judgment. In that case and in this the statute of the state of the defendant's residence interposed its bar against actions upon such judgments. In this case, as in that, the statute was not a statute of limitations. It did not limit the time within which an action might be brought on such a judgment, but it deprived the plaintiff of all time, opportunity, and action to enforce it in the state in which the statute was enacted. The third proviso of the statute of Colorado by its terms absolutely bars all actions in that state upon judgments of other states founded upon claims that were barred in Colorado where the actions which resulted in them were commenced after October 6, 1899, a date six months after the passage of that proviso. The action which resulted in the judgment in Utah of March 2, 1901, was not commenced until January 18, 1901; so that under this statute no time or opportunity whatever has been allowed to the plaintiff to bring his action in Colorado to enforce his judgment.

Counsel for the defendant in error invoke the rule that statutes of limitations are a part of the law of the forum, and that the states

have the power and the right to prescribe the times within which actions may be brought against their citizens upon judgments, as well as upon other causes of action; and they cite in support of this principle *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177, *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316, *Bacon v. Howard*, 20 How. 22, 15 L. Ed. 811, *Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, *Hawkins v. Barney*, 5 Pet. 457, 8 L. Ed. 190, and other cases of like character. The general rule is conceded, but it is always conditioned by the proviso that such statutes must allow a reasonable time to enforce rights of action in the state of their enactment, that they may not lawfully strike down the right of action by destroying or denying all remedy for its enforcement, and that they may not repeal or nullify the provisions of the constitution of the United States and of the act of congress which have been quoted. This law of Colorado is not a statute of limitations. It is a statute of nullification and prohibition. The essential attribute of a statute of limitation is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects. *Price v. Hopkin*, 13 Mich. 318, 324; *Piatt v. Vattier*, 1 McLean, 146, 158, Fed. Cas. No. 11,117; *Pritchard v. Spencer*, 2 Ind. 486; *State v. Swope*, 7 Ind. 91; *State v. Clark*, 7 Ind. 468; *Holcombe v. Tracy*, 2 Minn. 241 (Gil. 201); *Ridgley v. The Reindeer*, 27 Mo. 442; *Call v. Hagger*, 8 Mass. 423, 430; *Hol-yoke v. Haskins*, 5 Pick. 26, 16 Am. Dec. 372; *Railroad Co. v. Stockett*, 21 Miss. 395; *Briscoe v. Anketell*, 28 Miss. 361, 371, 61 Am. Dec. 553; *Bank v. Solomon*, 20 Ga. 408. This statute neither accords nor limits any time for the commencement of actions upon the judgments it describes which resulted from actions commenced in other states after October 6, 1899. It nullifies the causes of action upon these judgments and prohibits any suits upon them in the state of Colorado.

The cases of *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, in which the supreme court held that the federal courts had no jurisdiction of an action by a state on a judgment for a penalty for a violation of one of its statutes; *Donald v. Kell*, 111 Ind. 1, 3, 11 N. E. 782, where the cause of action on which the judgment was based was examined to ascertain whether or not the judgment was released by a discharge in bankruptcy; *Thompson v. Whitman*, 18 Wall. 457, 462, 21 L. Ed. 897, in which it is said that the jurisdiction of the court to render the judgment is always open to inquiry; and various other decisions of the supreme court to the effect that the record of a judgment of one state is evidence of the debt on which it rests in another state to the same extent as in the state of its rendition,—have been cited and reviewed by counsel for the defendant in error. But no decision or opinion has been presented to the effect that a state may lawfully deprive a judgment of another state upon a contract of all validity as the basis of a cause of action in the state of the residence of the defendant, and hence practically of all effect beneficial to the plaintiff, in the face of the constitutional and congressional mandate that full faith and credit shall be given to it.

It is said (1) that courts may look through the judgment to the cause of action on which it is founded to learn whether or not it is such a judgment as the federal court may enforce, and (2) that when this is done in the case at bar it will be seen that the judgment of March 2, 1901, rests upon a cause of action that was barred before that judgment was rendered. The first proposition is conceded. Let us look through the judgment of March 2, 1901, to the cause of action upon which it is based. We find an earlier judgment rendered in a court of the territory of Utah on February 5, 1885, against the defendant, Lowell, but no plea or proof that this judgment was for a penalty, that it was rendered without notice or jurisdiction, or that there was any other reason why it was unjust or why it should not be enforced. From that judgment, as well as from the later judgment upon which this action is founded, a contract is implied by the defendant, Lowell, to pay the amount of the debt which these judgments evidence, and this contract falls under the protection of another clause of the constitution,—the clause which forbids the enactment by any state of any law impairing the obligation of a contract. Article I, § 10. *Scarborough v. Dugan*, 10 Cal. 305, 309. Now, this obligation was payable at the domicile of the obligee in Utah. It was the duty of the debtor, Lowell, to seek out his creditor and to pay him his debt. He failed to do so. He left the territory of Utah in 1884 or 1885, went to Colorado, and remained there. He evaded the law of Utah and the judgment of its court by absenting himself from that jurisdiction and failing to pay the debt which he had been required to pay by the decision of a court of general jurisdiction of that territory. As long as he did this the statute of limitations of Utah ought not to run, and it did not run, against his creditor. *Bank v. Lowery*, 93 U. S. 72, 77, 23 L. Ed. 806. He returned to Utah in 1901, was there personally served with a summons in an action upon this judgment, and the second judgment against him was rendered. The cause of action upon the judgment of 1885 was not barred by or under any law of the state of Utah. The judgment against him there was lawfully rendered. It is not material that an action upon that judgment was barred by the statutes of the state of Colorado, because the legislature of the latter state was without power to project its statutes of limitations beyond the boundaries of its state and to make them effective in the state of Utah. It was the law of limitations of the state of Utah, the law of the forum, which conditioned the right of the plaintiff to maintain his action in the court of that state, and to recover the judgment of 1901, and according to that law he was entitled to the judgment which he obtained. If, therefore, we look through that judgment to the cause of action upon which it rests, we find its foundation solid and its position impregnable.

Attention is earnestly called to frequent repetitions by the supreme court of the statement that while the records of judgments of courts of other states are evidence of their existence, are evidence that they are not re-examinable on their merits and that they are not impeachable except for fraud, yet these judgments are open to attack for lack of jurisdiction of the courts which rendered them and are subject to

the reasonable limitation laws of other states. The correctness of this statement of the law is not challenged. But the full faith and credit which the constitution and the act of congress demand require more than the simple admission of the record of the judgment as evidence of its existence and conclusiveness. They demand that, subject to reasonable limitation and other laws regulating, but not denying, reasonable remedies upon it, and not destroying the right of action, the judgment shall have the same force and effect in other states of the Union which it has in the state in which it was rendered. "A judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered." *Hanley v. Donoghue*, 116 U. S. 1, 3, 6 Sup. Ct. 242, 29 L. Ed. 535; *Mills v. Duryee*, 7 Cranch, 483, 3 L. Ed. 411; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. Ed. 564; *Insurance Co. v. Harris*, 97 U. S. 331, 24 L. Ed. 959; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931. In the state of Utah the judgment of 1901, upon which this action rests, was indisputable evidence of an invulnerable cause of action. It was entitled to the same force and effect, to the same faith and credit, in the state of Colorado, and the statute of Colorado which struck down this cause of action, which deprived the plaintiff of all remedy upon his judgment in that state, and made it as useless as though it had never been rendered, was a flagrant violation of the constitution of the United States and of the act of congress of May 26, 1790, and was without legal force or effect.

There is nothing in the arguments of counsel for the defendant in error or in the authorities which they have cited to modify the opinion or to shake the conclusiveness of the decision of the supreme court in *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475. The judgment of 1901 in Utah was rendered by a court which had jurisdiction of the subject-matter and of the parties. It was based on a personal service of the summons upon the defendant. It is not founded on a penalty or a tort, and it raises the presumption of a contract by the defendant to pay the debt which it evidences. In the state of Utah it has the force and effect of conclusive evidence of a just cause of action against the defendant and in favor of the plaintiff. It is entitled to the same force and effect in the state of Colorado. The third proviso to the act of the legislature of the state of Colorado of April 6, 1899, is not a statute of limitations, but an act which by its terms deprives this judgment of all beneficial force and effect and strikes down all remedy upon it in the state of Colorado. A statute which by its terms strikes down all remedy and prevents the maintenance of an action in that state upon a judgment of a court of another state which was founded on a cause of action which was barred in the former, but was not barred in the latter, state, where the action in which the judgment was rendered was commenced, does not give full faith and credit to the records and judicial proceedings of the latter state, and is unconstitutional and void. *Christmas v. Russell*, 5 Wall. 290,

301, 18 L. Ed. 475; Dodge v. Coffin, 15 Kan. 215, 218; Price v. Hopkin, 13 Mich. 318, 324; Packer v. Thompson, 25 Neb. 688, 691, 41 N. W. 650; Osborn v. Jaines, 17 Wis. 592; Auld v. Butcher, 2 Kan. 135; Scarborough v. Dugan, 10 Cal. 305, 309.

The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial and to take further proceedings not inconsistent with the views expressed in this opinion.

In re DARWIN.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.

No. 1,062.

1. BANKRUPTCY—AVOIDING EXECUTION.

Under Bankr. Act 1898, § 67, declaring void all levies and liens obtained through legal proceedings against an insolvent within four months before the filing of the petition on which he is declared a bankrupt, a lien of execution on property purchased by the bankrupt within sixty days of the petition, he having been insolvent more than four months, is void, though in the state in which the judgment was obtained and in which was the property there prevails the common-law rule that the lien of the execution relates back to the teste thereof,—that is, the first day of the term at which the judgment was rendered,—and this was more than four months prior to the petition in bankruptcy.

Petition to Review an Order of the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

The case was submitted on the following facts: On October 24, 1893, Carney Bros. recovered judgment against John Gollahon, the bankrupt, in the supreme court at Knoxville, Tenn., for the sum of \$261.85 and costs, amounting to \$33.66. An alias execution on this judgment was issued by the clerk of the supreme court September 6, 1900, tested the first day of the preceding term, to wit, the second Monday in September, 1899, which came to the hands of the sheriff of Rhea county, Tenn., on September 7, 1900, and was by him levied September 8, 1900, on a stock of merchandise belonging to the bankrupt. This levy, and another one subsequently levied, precipitated the bankruptcy of Gollahon, who filed the petition the same day, but a few hours later, and was adjudged a bankrupt herein on the 10th day of September, 1900. This stock of merchandise so levied on was taken from the custody of the sheriff of Rhea county, he having seized it in making said levy, and turned over to a temporary receiver on the order of the court in which said bankruptcy proceedings were instituted (the United States district court at Chattanooga), and was subsequently, on September 22, 1900, under a similar order of said court, turned over to a trustee in bankruptcy, who converted same into cash. The judgment creditors, Carney Bros., in a proper manner herein, asserted a prior claim on the stock of goods at the time of the bankruptcy proceedings by virtue of the levy of said execution, and which levy they claimed was unaffected by such bankruptcy and asked that said judgment, with interest and cost, be paid in full to the extent of the property seized under said execution, and subsequently by the bankruptcy trustee converted into cash. The merchandise so levied on by the sheriff was of value sufficient to have paid Carney Bros.' debt and all costs, and was by the trustee sold for a cash sum sufficient for this purpose, but insufficient to pay all his debts; and such cash is now in the trustee's hands. The sheriff made his official return of said execution, showing therein the costs and commission of the sheriff, including protection to the merchandise while holding it under his levy, to be \$19.04. The bankrupt was insolvent

on the date of the levy of said execution, and had been for several months previous (more than four months). Petitioners, Carney Bros., knew nothing of this, however, and the said Gollahon had been, and was at the time of the levy, merchandising at retail, until his stock was seized and his store closed by the sheriff. He acquired the stock of goods on which the execution was levied about 60 days prior to his adjudication in bankruptcy, and had been selling same at retail ever since. He had an interest in a stock of merchandise in an adjoining county at a date more than four months before the filing of the petition, and owned same until some three months before such filing, when he sold it for a note for \$600, all of which he used as collateral in purchasing a part of the stock of goods levied on under said execution. Upon the foregoing facts the referee refused to allow priority to the judgment creditors, Carney Bros., holding that the lien and levy of the execution was avoided by the bankruptcy proceedings, and on petition of said judgment creditors the facts and question of priority were certified to the district judge, who reversed the ruling of the referee, and made an order for the payment of the aforesaid judgment, interest, and costs in full.

Burket, Miller & Mansfield, for Carney Bros.

A. P. Haggard, for trustee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Section 67 of the bankruptcy act provides:

"That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same."

Under this section the question presented is, when did the lien of the levy attach to the property in such sense that it may be said to have been "obtained" within four months, within the meaning of the act? An examination of the decisions of the supreme court of Tennessee discloses that the rule of the common law prevails in that state, and the lien of the execution relates back to the teste thereof, which is the first day of the term at which the judgment was rendered. This was decided in the early case of *Preston v. Surgoine*, Peck, 72-80, and seems to have been adhered to as a general rule since. In *Barnes v. Hayes*, 1 Swan, 304, the supreme court of Tennessee held that the execution related to the date of the teste, "which is the first day of the term from which it issues, and operates as if it were actually running from the date of its teste to the day of its return, and is a lien on all the goods of the defendant owned by him during that period." In *Battle v. Bering*, 7 Yerg. 528, 27 Am. Dec. 526, it was held that, if the judgment debtor sold the property before the execution issued, but the teste of the execution was prior to the day of the sale, the property is bound in the hands of the purchaser. In that case Chief Justice Catron declared that, until the legislature changed the rule, it was the duty of the court to administer it as it had been settled, although, in his opinion, the safer rule was found in the statute of Charles II, declaring that no execution should be a lien on personals so as to defeat bona fide purchasers. In *Berry v. Clements*, 9 Humph. 311, it was held that personal property transferred in good faith before the actual

rendition of the judgment, but after the teste, was not bound by the lien, as it could not fasten upon the property which had been aliened before the judgment was rendered. In that case Justice McKinney observed that the common-law fiction might be repelled, whenever necessary to the attainment of justice, by showing the true time of signing the judgment, providing this could be made to appear from any entry or memorandum in the record. In *Edwards v. Thompson*, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807, the court held that, as a growing crop of corn cannot be levied on in Tennessee until after November 15th, it is not subject to the lien of an execution until that date, so as to overreach or defeat a prior bona fide sale by the owner. Judge Caldwell, who delivered the opinion, recognizes the rule that the lien of an execution in Tennessee relates to the teste, and attaches to all personality owned by the debtor between the teste and the levy of the execution, so as to defeat all intermediate transfers. After pointing out that this doctrine of relation had its origin in the desire to prevent the debtor from alienating his property to the injury of the creditor after judgment, the learned judge adds:

"But if for any reason the property of the debtor cannot be seized under execution, it cannot be affected by the usual lien or the doctrine of relation. If the property be absolutely protected from execution under statutory exemption laws, of course there is no lien upon it. So, if it is free from execution during a specified period, it is free from the lien during the same period. The lien of an execution, as such, exists only in connection with the execution itself, and cannot attach to property before the property is subject to levy."

In the case in hand we think an application of this reasoning results in holding that there could be no lien upon the property before the same was acquired by the debtor. It was not subject to levy until it belonged to the judgment debtor. To extend the lien to the property before that time is to extend a legal fiction to the absurdity of holding the property bound in the hands of strangers to the judgment. As Judge Caldwell points out, the rule was created by the courts to prevent one from alienating his property which ought to be subject to the judgment debt. When the judgment is rendered and execution issued, the lien fastens upon the property owned by the debtor. If he shall acquire more after judgment, it may be seized in execution, and is bound from the time it became subject to the execution; certainly not before. In the present case the property was not the subject of seizure upon execution until the debtor acquired it. No lien could be obtained upon it until that time. The lien arises from the execution, and attaches to the property in order to make the execution effectual, not to make the lien superior to the execution, and by fiction fastening upon property not subject to levy. In this view, as the property was acquired by the bankrupt within four months prior to the filing of the petition, we think the lien was vacated, and the property passed to the trustee freed therefrom. We conclude the referee was right in so holding, and the district court erred in reaching a different conclusion.

The judgment will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

STILWELL-BIERCE & SMITH-VAILE CO. v. EUFAULA COTTON OIL
CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1902.)

No. 1,044.

1. **PATENTS—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.**
When the language of a claim for a combination includes an element only described in general terms, the court may look to the specification to ascertain its meaning, and the claim may be limited by the specification, especially where it contains the expression "substantially as described," and the element in the particular form described in the specification is essential to the production of the result which is its most important function.
2. **SAME—INVENTION—NEW COMBINATION OF OLD ELEMENTS.**
A combination of old elements, if it is novel and produces a new and useful result, may be patentable.
3. **SAME—SCOPE—INCIDENTAL ADVANTAGES OF INVENTION.**
A patentee is not required to describe in full all the beneficial functions of his invention; but if a thing accomplished is a necessary consequence of the improvement made and described, making it obvious that the inventor intended it, though not specifically pointed out, he is entitled to the benefit thereof in construing his patent.
4. **SAME—ANTICIPATION—USE OF OLD ELEMENT TO PERFORM NEW FUNCTION.**
A patent for a combination in which one of the parts performs a new and important function in the operation of the machine is not anticipated as to such feature by a prior patent for a combination in which a similar part was used in a different place, where it did not perform such function.
5. **SAME—INVENTION.**
Simply to do by a steam attachment, without novelty of application or operation, what in the operation of prior machines had been done by hand, does not constitute invention.
6. **SAME—INFRINGEMENT—OIL MEAL COOKER AND CAKE-FORMER.**
The Vaile and Tompkins patent, No. 421,454, for a combined cooker and cake former for oil meal, was not anticipated, discloses patentable invention, and is valid as to claims 1, 2, 4, and 9. Claim 3 is invalid as too broad. Said valid claims also *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

In Equity. Suit for infringement of letters patent No. 421,454, for a combined cooker and cake former for oil meal, granted February 18, 1900, to John H. Vaile and Daniel A. Tompkins. From a decree dismissing the bill, complainants appeal.

E. E. Wood and Wm. R. Wood, for appellants.

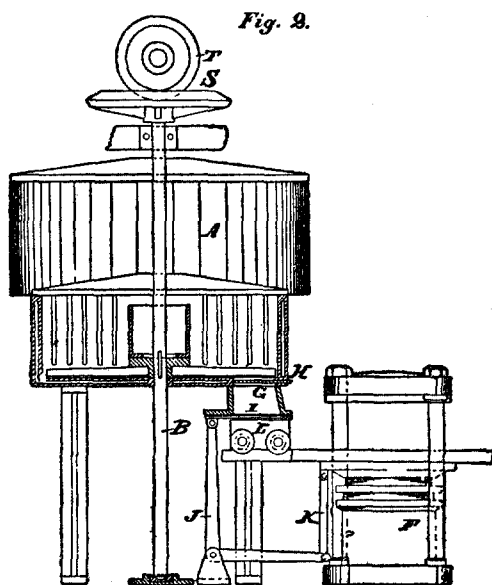
H. E. Hart, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case involves the validity and infringement of letters patent No. 421,454, granted to John H. Vaile and D. A. Tompkins for a combined cooker and cake former for oil meal. The patent sets forth that the invention relates to that class of cookers and cake formers for cooking oil meal and forming it into cakes ready to be distributed into the presses for the extraction of the oil, having for its object the provision of novel means by which

the cooking is rendered perfect and continuous, and the delivery of the cooked meal to the cake former is rendered as rapid and as nearly automatic as possible.

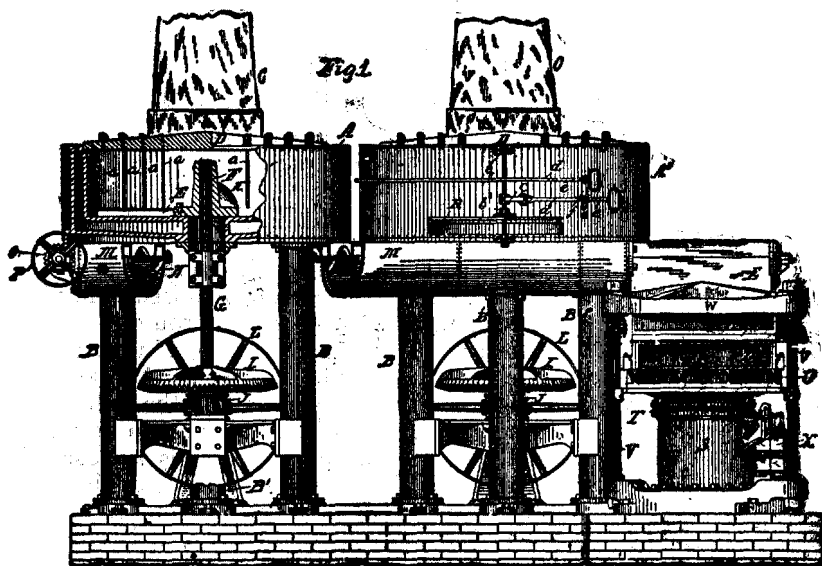
The record establishes that prior to the invention in question the advanced state of the art for cooking apparatus for oil meal was shown in the patent of November 11, 1884, granted to John H. Vaile, one of the patentees in the letters patent under investigation. The Vaile patent of 1884 had for its objects the prevention of the loss of time in cooking the meal, and to promote the thorough and equal cooking thereof, by having one or more cooking tanks combined with a storage tank so arranged that the meal when cooked could be instantly discharged from one of the cooking tanks, and the cooking tanks could at once be filled with a second charge which is being cooked while the other is being taken from the storage tank. An object of the Vaile patent was to prevent the spreading of the meal in the cooking pans by confining the same in an annular space. This patent is illustrated by Fig. 2, taken from the drawings of the patent.

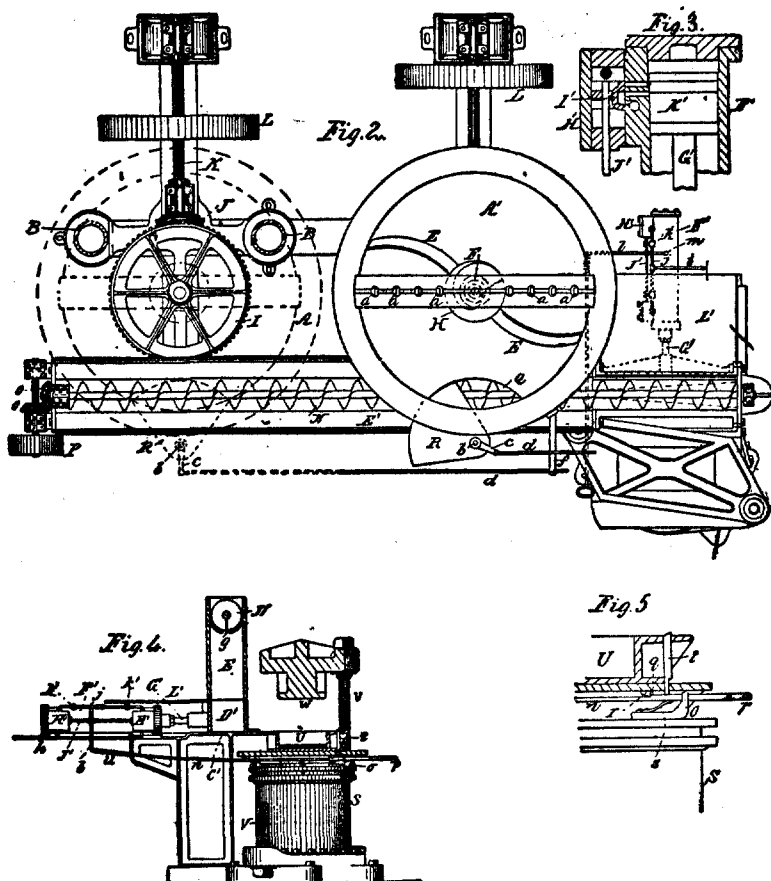


The invention of the Vaile patent will be understood in a general way by reference to this figure. It shows cooker, A, discharging into a receiver from which the oil meal is discharged through the trap, G, into the car, L. The lower gate, I, may be arranged to act automatically, in which case the gate, H, may be left open. As the forming press, shown to the right of the drawing, rises, the bell crank, J, operates to draw back the gate, I, permitting the meal to flow from the receiver into the car, L. When the press descends it closes the gate, I, automatically. The car is then pushed by hand to the press to deliver the charge. A man is required to operate the car, which, of course, should not be pushed away until the gate, I, is closed.

The patent in suit is shown in the accompanying drawings and specifications.

An examination of this mechanism shows, in our judgment, a decided advance in operation and utility over the mechanism shown in the Vaile patent of 1884. When the meal is to be cooked it is placed in the cookers, whence it passes, by the operation of the gates, into the conveyor, N, Fig. 4, through which the meal is conveyed in a stream until it is discharged into the box, E, Fig. 4. Under this box, on a table, C', Fig. 4, there slides an open and bottomless feed box, D', Fig. 4. After being filled this box is carried forward to the forming box, U, Fig. 4, into which the charge is dropped. The feed box then returns to its first position for a new charge. The cylinder, S, Fig. 4, raises the forming box from below, and the meal is pressed into the desired shape in cakes. The feed box is slid backward and forward by the action of the piston in the cylinder, F', Fig. 4, the rod, G', Fig. 4, of which is attached to the feed box. The feed box, D', Fig. 4, has rearward slide extensions, L', Fig. 4, which, as the feed box is carried forward to the forming box, acts as a cut-off to prevent the overflow of the meal except when the feed box is thereunder to receive the meal. The mode of operation is substantially as follows: The operator first arranges the cloth in the feed box. Then pulls the handle of the rod which shifts the steam valve of the cylinder, and, admitting steam behind the piston, the feed box is moved forward and delivers its charge into the forming box. When the feed box has completed its forward stroke it acts upon a trip rod which reverses the steam valve, pushing the piston and feed box back. It may thus be seen that the operator has control of the process, starting by pulling the rod which controls the steam valve. The return stroke is made automatically by the tripping arrangement described at the forward end of the stroke.





The carrying of the meal from the charging box to the forming box is no longer necessary to be done by hand. It is accomplished by the ingenious method of attaching the sliding extension to the piston rod, and operating the same by the mechanism shown, the action of which is entirely controlled by the operator. The steam being let into the cylinder, by pulling the rod and shifting the valve, carries the charging box forward, at the same time closing the bottom of the receiving box. The forward stroke operates to automatically reverse the action of the piston, and the pull rod by the spring is carried back to its first position.

Independent of the evidence which establishes that this method was a great improvement in the ease and rapidity with which these cakes were formed, it seems obvious that this combination effects a decided advance in the process of cooking and forming oil cakes over that shown in former devices. It also discloses to our minds a very considerable degree of mechanical ingenuity in thus arranging and combining the elements to accomplish the desired result.

We come now to an examination of the claims of the patent. Claim 1 is as follows:

"The combination, with a forming press having a horizontally sliding feed box for depositing the meal in the forming box and one or more cookers, of a conveyor extending from said cooker or cookers and discharging into a box with which said feed box registers, and a cut-off slide for last-named box, substantially as described."

The novelty of this claim consists of a horizontally sliding feed box with a conveyor extending from the cookers, discharging into a box with which the sliding feed box registers, so arranged that the feeding is continuous, and the slide acting as a bottom to the feed box when the latter is carried forward to deposit its load. An essential element of this combination is the screw conveyor, which, as the testimony tends to show, feeds the meal in such manner into the charging box as to distribute it evenly and of equal density.

Aside from the experts, there were only two witnesses examined in this case, both being men of practical experience, and their testimony is uncontradicted to the effect that this method of distributing the meal by means of the screw conveyor is of very great advantage in the operation. It is shown that oil meal is moist and sticky, liable to be lumpy, and, but for the distribution made by the screw conveyor, could not be readily formed into a homogeneous mass. The claim does not limit itself to any particular form of conveyor, and is so broad and general in its terms that it claimed to be substantially covered by the Vaile patent of 1884.

While it is the purpose of the statute to require the inventor to set forth the nature and extent of his patent, and it is not the province of the courts to add to or take from a claim that which is not embraced within its language, nevertheless we may look to the specifications for the purpose of construing the language used in the claim. If this language includes an element only described in general terms, we may look to the specifications to ascertain its meaning. *Soehner v. Range Co.*, 28 C. C. A. 317, 84 Fed. 182; *Lake Shore & M. S. R. Co. v. National Car Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. 33, 28 L. Ed. 129. In this sense it has sometimes been said that claim may be limited by the specifications. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 107; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241.

In the latter case the claim then under consideration contained the expression, "substantially as described," of which Justice Strong said:

"The first claim in the reissued patent, dated February 3, 1863, is unquestionably too broad to be sustained, unless limited to the means described in the specification. So, it was doubtless intended by the patentees to be limited, for the claim speaks of the combination claimed as 'substantially as described'; that is, described in the specifications."

To the same effect is *Westinghouse v. Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. In this claim there is no limitation in terms upon the kind of conveyor intended to be used, but the screw conveyor is shown in the specifications, and its presence at the place where located is essential to the production of the result in the distribution of the meal, which, the testimony tended to show, is its most important function. As to the sliding attachment, broadly speaking, it is found in the Vaile patent of 1884, above the car, L, but it does not have the operation of this attachment in the combination now under

consideration. The elements of the combination in claim 1 may all have been taken from other machines, yet it is well settled that if the combination is novel, producing a new and useful result, it may be patentable. Most combination claims are for old parts, which acting together, and one upon another, produce a new result. Nor is it any valid objection that the invention does not point out in terms every function of an improvement. From the location of the conveyor and its office in the distribution of the meal the result is necessarily obtained, and we cannot doubt that the inventor placed such a conveyor in the location named for the purpose of accomplishing this result. An inventor is not required to describe in full all the beneficial functions to be performed by his machine. If the thing accomplished is a necessary consequence of the improvement made and described, making it obvious that the inventor intended the thing accomplished, though not specifically pointed out, he is entitled to the benefit thereof in construing his patent. The cases upon this subject are collected and the principle fully discussed in the opinion of this court by Judge Lurton in the case of Goshen Sweeper Co. v. Bissell Carpet Sweeper Co., 19 C. C. A. 13, 72 Fed. 67. See, also, opinion of Judge Severens in the case of Dowagiac Mfg. Co. v. Superior Drill Co. (not yet officially reported) 115 Fed. 886.

It is true that there was a screw conveyor in the original patent to Vaile of 1884. It was used not for the purpose of carrying the meal into the charging box, but to convey it into a receiver, not accomplishing the purpose which it does in the patent under consideration. In the patent now before us it performs the important function of distributing the meal in the charging box, and is so arranged with the sliding attachment that it is in continuous operation. Although not specifically mentioned in the specifications, it accomplishes this result, as the inventor obviously intended it should, and which the testimony shows, without contradiction, is highly important in the operation of the machine. Within the principle of the cases referred to, this feature is entitled to consideration in determining the patentability of the combination under investigation. The fact that this conveyor is found at a different place in a former combination will not defeat the claim for invention, if the new location is such as to produce a new and useful result. It was so held by this court in *Star Brass Works v. General Electric Co.*, 49 C. C. A. 409, 111 Fed. 398, and in *Dowagiac Mfg. Co. v. Superior Drill Co.*, supra, not yet officially reported. Limited to the mechanism shown in the drawings, we think this is a valid claim.

Claim 2 is for the same general combination as claim 1, adding the controlling gates in the cookers, and it is not necessary to dwell further upon it.

Claim 3 is as follows: "The combination with a forming press of a feed box actuated by a piston rod and piston inclosed in a cylinder, substantially as described." This claim is too broad, and its patentability can only be sustained by writing into it features not mentioned therein. Simply to do by a steam attachment, without novelty of application or operation, what had previously been done by hand does not disclose invention, and this is all that is included in the language used.

The fourth claim is like the third, adding the initiation of the return of the feed box by the trip attachment operating at the end of the forward stroke. Nothing is shown to have anticipated this claim. It limits this reversal to the automatic trip mechanism actuated at the end of the forward stroke. The utility of this device is apparent. When the meal is discharged into the forming box this automatic trip device releases the pull rod, which initiates the return movement, leaving the rear valve to close and be ready for the repetition of the forward movement at the will of the operator.

Claim 9 adds the element of the forming press, U, to those shown, and is, in our opinion, a valid claim.

An attempt has been made by ingenious and capable experts to show that these claims have been anticipated by other inventions, all of which we have examined, notably the Koch and Then patent, No. 351,780, for a brick press, much relied upon. It is claimed that the forward and backward movement of the charging box is practically the same as is shown in the invention under consideration. An examination of that patent shows that the movement of the charging box is produced automatically by an hydraulic engine working continuously. It is quite a different machine from the one under consideration, but some suggestions might be derived from it by one skilled in its use.

The spiral conveyor is shown in other patents as well as in the Vaile patent of 1884, but none of the other patents are for oil cake pressing machines, which require for their successful operation a peculiar mechanism. If they did contain the elements of this machine, it would be none the less invention to combine them so as to produce the new and useful result which the inventor in this case, we think, has accomplished. We are of opinion that the claims herein referred to are valid for the reasons stated.

As to infringement, the testimony tended to show that the inventor of the machine used by the defendants, Mr. Bushnell, visited and examined one of the complainant's machines, taking measurements thereof, and subsequently constructed his machine. This testimony is undisputed. There are apparent some changes and departures from the complainant's invention. The conveyor, instead of being attached directly to the conveyor trough of the cookers, has an intervening receiver, but the spiral conveyor accomplishes the purpose of the complainant's method by direct attachment to the charging box, an added argument as to the utility of the complainant's device, and we think an infringement of it. The method of operating the machine is a little different, but it has the meritorious feature of continuous movement by means of a lever or pull actuated by the operator with the automatic trip device, differently constructed, it is true, but operating at the end of the forward stroke with the practical effect of the complainant's mechanism.

We think infringement is clearly shown of claims 1, 2, 4, and 9.

For the reasons stated, we think the circuit court erred in holding the patent void for want of novelty, and the decree is reversed, and the cause remanded to the circuit court, with instructions to render the usual decree, in conformity with this opinion, for the complainant and against the respondent for an injunction and accounting.

SOUTHERN RY. CO. v. ENSIGN MFG. CO.

CENTRAL TRUST CO. et al. v. RICHMOND & D. R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1902.)

No. 449.

1. CONTRACT—PARTIES—PURCHASE OF RAILROAD EQUIPMENT BY LESSEE.

The general purchasing agent of a railroad company ordered certain equipment to be furnished to his company from a manufacturer with whom he customarily dealt, but directed the bills therefor to be made against another company, whose lines his own company operated under a lease. Such lease provided that where new equipment was needed, and was agreed on between the two companies, the same should be furnished by the lessor; but it did not appear that any such agreement was made with respect to that in question. The equipment was shipped as ordered. *Held*, that the lessee, and not the lessor, was the purchaser.

2. RAILROADS—RECEIVERSHIP—PREFERENTIAL DEBTS.

Three things are necessary in order to give a claim for supplies against a railroad company, in the hands of a receiver, a preference over the mortgage lien: (1) That the supplies furnished must be of that ordinary character necessary for operating a railroad and keeping the mortgaged property a going concern; (2) that the person furnishing them relied upon the interposition and protection of his equity by the court, and did not contract upon the personal responsibility of the railroad company; (3) that the debt was contracted but a short time before the appointment of the receivers, and was left unpaid because of the sudden action of the court in making such appointment.

3. SAME.

One furnishing car wheels under a contract with a railroad company, relying upon being paid for the same in 60 or 90 days in accordance with a previous course of dealing, and with knowledge that they were to be used in repairing the equipment of a leased road, while he has a legal claim therefor against the company, has no equity which entitles him to preference of payment over its mortgagees, whose mortgages do not include the leased road, and where the receivers appointed in the foreclosure suit did not take possession of, nor operate, the same.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

This case comes up on appeal from the circuit court of the United States for the Eastern district of Virginia. The questions in the case arise in the administration of the affairs of the Richmond & Danville Railroad Company, in the consolidated cause of Central Trust Company of New York v. Richmond & Danville Railroad Company. This consolidation was of two causes, one known as "Clyde v. Richmond & Danville Railroad Company," brought by stockholders and unsecured creditors, and the other by the Central Trust Company against the same defendant, seeking foreclosure of a mortgage executed October 22, 1886, by the railroad to secure certain bonds. This mortgage covered the main line and property of the Richmond & Danville Railroad Company, between Richmond and Danville, all its rights in the Richmond, York River & Chesapeake Railroad, all of its rights in the Piedmont Railroad, and all its leasehold interest in the Virginia Midland Railway, the Western North Carolina Railroad, the Charlotte, Columbia & Augusta Railroad, and the Greenville & Columbia Railroad. The decree of foreclosure was entered. Among its provisions was the following: "The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will pay off and satisfy all debts or obligations, incurred or to be

incurred by the receivers having possession of such property, which have not been or shall not be paid by said receivers, and which shall be adjudged by this court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of said mortgage of October 22, 1886." Receivers had theretofore been appointed, first under the Clyde bill, June 15, 1892, and then under the consolidated bill, April 13, 1894. The sale took place, the Southern Railway Company became the purchaser, and the sale was confirmed June 15, 1894. On June 28, 1892, special masters were appointed, before whom claims coming within the order of sale could be presented and proved. On November 23, 1892, the Ensign Manufacturing Company filed with Messrs. Pleasants and Atkins, the special masters, its claim under the order of reference. From time to time it made inquiry as to the result of its application. Receiving no satisfactory reply, finally on July 18, 1901, it filed its petition in the consolidated cause, seeking payment of its claim. The petition was answered. The cause was heard before A. B. Dickinson, who had succeeded Messrs. Pleasants and Atkins as special master, and the claim was allowed by him in the sum of \$1,590. Exceptions were taken to the report, were heard by the circuit court, were overruled, and the report was confirmed. Leave to appeal was given, and the cause is here on the assignments of error.

One of the grounds of defense, included in exceptions to the report of the special master and in the assignments of error, is laches on the part of the Ensign Manufacturing Company in pressing its claim after filing it with the special masters. The record discloses no ground for such a charge, and we concur in this respect with the court below. The claim is based upon three orders of Joseph Minetree, styling himself "General Purchasing Agent of the Richmond & Danville Railroad Company." Two of these orders are for car wheels, and the other is for car wheels and spoke truck wheels. This is the form of one of the orders (the others are precisely similar, except as to dates and amounts):

"Order No. 9,994.

"Please Put This No. on Your Invoice and Make All Invoices in Triplicate.

"Joseph P. Minetree, General Purchasing Agent, Richmond & Danville Railroad Company.

"Office of General Purchasing Agent, Atlanta, Ga., Oct. 17, 1891.

"Ensign Manf. Co., Huntington, W. Va.: Please furnish the Richmond & Danville Railroad Company with the following supplies, viz.: 100 33" Passgr. Car Wheels Bored 5". Make bill against Central Railroad of Georgia. Prepay freight to Rich'd, Va. Guaranties herewith. Ship via C. & O., via R. & D. at Richmond, Va., and Central R. R. at Augusta, Ga. Mark: 'Richmond & Danville R. R. Co. To D. D. Curran, Supt., Care of F. H. McGee, M. M., Macon, Ga.'

Joseph P. Minetree, General Purchasing Agent.

"Acknowledged."

One order has direction to ship to "B. C. Epperson, Supt., care G. W. O'Brien, M. M., Augusta, Ga."; another, to "D. D. Curran, Supt., care of F. H. McGee, M. M., Macon, Ga."; the third, to "B. C. Epperson, Supt., care E. M. North, Storekeeper, Augusta, Ga."

The Ensign Manufacturing Company for some time had had frequent dealings with the Richmond & Danville Railroad Company, furnishing the railroad company with supplies of this character. It is alleged, and not seriously denied, that these articles were purchased to be used on the system of the Central Railroad & Banking Company of Georgia. They were charged on the books of the Ensign Manufacturing Company to this last-named company, and an effort was made to collect the bill. This failing, the claim comes here. At the date of this purchase and the delivery of the goods the railroad part of the system of the Central Railroad & Banking Company of Georgia was operated by the Richmond & Danville Railroad Company under the terms of a lease executed by the former company to the Georgia Pacific Railroad Company, and by it turned over to the Richmond & Danville Railroad Company. This lease was dated June 1, 1891. Whether this lease was valid or not (and that has been a subject of controversy not now concerning

us), under its operation the railroad property of the Central Railroad & Banking Company was managed and controlled by the Richmond & Danville Railroad Company from June 1, 1891, to March, 1892. The rental under the lease was to be paid in the shape of meeting all increments of interest on the obligations of the Central Railroad & Banking Company, and a further sum in cash of \$625,000 per annum, being a dividend of 7 per cent. on its capital stock. Neither this lease nor any part of the property of the system of the Central Railroad & Banking Company of Georgia was included in the mortgage foreclosed in the main cause, and no part of it, or of the lease, ever came into the hands of the receivers in the main cause or of the purchaser under the sale for foreclosure.

Willis B. Smith, for appellants.

Wyndham R. Meredith, for appellees.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). Our first inquiry is, between whom was the contract of purchase of these goods? Was the Richmond & Danville Railroad Company, or the Central Railroad & Banking Company, the purchaser? The goods were delivered upon an order of the general purchasing agent of the Richmond & Danville, with whom the Ensign Manufacturing Company had had long and frequent dealing, and in the regular course of that dealing. The goods were shipped upon that order, and as directed in that order. The Richmond & Danville did not profess to be acting as agent for the Central Railroad & Banking Company, and in fact had no authority to act as such agent. One of the express terms of the lease was that when additional equipment was needed for the lessee, and its supply demanded by the lessee, and the lessor shall agree that such additional equipment is necessary, the moneys requisite to pay for the same shall be provided by the lessor. There is no evidence in the record of such demand, or of any concurrence in the necessity for it. So the contract was between the Ensign Manufacturing Company and the Richmond & Danville Railroad Company. This being so, the direction upon the order, "Make bill against Central Railroad," could only have been intended to direct the purchasing company upon what part of the property it was operating the goods were to be used and against whom in its own books they were to be charged,—a part of its system of bookkeeping.

But this does not constitute the case. The vital question is: Granting that this is in law a debt of the Richmond & Danville Railroad Company, is it in the class of those favored debts to which the court gives a claim prior in lien to the mortgage foreclosed in this suit? It will not do to stand upon the legal demand. Were this the case, the legal demand of the bondholder, secured by his recorded mortgage, must prevail. The intervenor must rely on its equity, and then the question arises, can this equity be asserted against the mortgagees of the Richmond & Danville Railroad Company and the Southern Railway Company, its purchaser, or is it more properly an equity to be asserted against the Central Railroad & Banking Company of Georgia? The supreme court of the United States, in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and the many cases following it,

applying the principles therein established, has recognized an equity in creditors, who supplied a railroad company with labor and supplies necessary to keep it a going concern, to be reimbursed from earnings of such road in the hands of a receiver. This equity is held to be superior to the claims of the mortgage creditors. Sometimes it is so potent as to justify payment out of the corpus of the property, in the absence of earnings. The reason for this exceptional rule, which is applied only to railroads, is because of their quasi public character. They obtain and use certain franchises granted by the public, and in consideration thereof must subserve the interests of the public. Especially must every railroad be kept a going concern. To this end, their earnings are first applied to debts incurred for labor and supplies necessary to keep the road in actual operation. In this way not only is the public interest served, but the value of the property covered by the mortgage is maintained, and the interests of all concerned not allowed to go to ruin. *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 289, 20 Sup. Ct. 347, 44 L. Ed. 458. In this way those furnishing such necessary labor and supplies are assured that, even if the railroad should unexpectedly go into the hands of receivers, the earnings thereafter will be applied to meet their demands; and if, in the operation of a railroad by a receiver, earnings which should have been used in meeting obligations for current supplies are diverted from this purpose, and are used for the advantage of the mortgage creditors, such diversion must be made good, even if it be necessary to encroach upon the corpus of the mortgaged property. *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; *Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825; *St. Louis, A. & T. H. R. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832; *Southern Ry. Co. v. Carnegie Steel Co.*, *supra*. The rule is expressed in terse form in *Burnham v. Bowen*, *supra*:

"If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been applied improperly to their use."

In *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, the general doctrine was recognized. But the court, speaking with emphasis of the sacred character of vested liens, declared that the rule should be applied only in a few specified and limited cases. In *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, the doctrine of *Fosdick v. Schall* was recognized, but was not applied, because the party seeking the preference over the mortgage lien had contracted upon the responsibility of the railroad company, the mortgagor, and not in reliance upon the interposition of a court of equity. In *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068, a rule is laid down reconciling *Burnham v. Bowen* and *Thomas v. Car Co.* See *Niles Tool Works Co. v. Louisville, N. A. & C. R. Co.*, 50 C. C. A. 390, 112 Fed. 561.

No hard and fast rule has been adopted. Each case depends upon its own circumstances. "Whether the debt was contracted upon the personal credit of the railroad company, without any reference to its

receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction." *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 285, 30 Sup. Ct. 358, 44 L. Ed. 458. One of these circumstances upon which great stress is laid is that this equity is applied to such claims only as arose within a reasonable time before the receiver was appointed. *Paine v. Railroad Co.*, 118 U. S. 159, 6 Sup. Ct. 1019, 30 L. Ed. 193; *Miltenberger v. Railway Co.*, 106 U. S. 288, 1 Sup. Ct. 140, 27 L. Ed. 117; *Thomas v. Railway Co. (C. C.)* 36 Fed. 817; *Blair v. Railway Co. (C. C.)* 22 Fed. 471. In this last case Judge Brewer says that six months is the longest time within his knowledge that ever has been given. In the opinion of this court in *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 473, 8 U. S. App. 472, these claims to be preferred are said to be for "those ordinary and necessary current expenses of operating a railway contracted within a short time before a receivership, which by the sudden action of the court in appointing a receiver were left unpaid."

Three things, therefore, are necessary in order to give a claim against a railroad company, in the hands of a receiver, a preference over the mortgage lien: The supplies furnished must be of that ordinary and necessary character for operating a railroad, and keeping the mortgaged property a going concern; that the person furnishing them relied upon the interposition and protection of his equity by the court, and did not contract upon the personal responsibility of the railroad company; that the debt was contracted but a short time before the appointment of the receivers, and was left unpaid because of the sudden action of the court in making such appointment.

Taking these up in their order: The car wheels, no doubt, were of that character of supplies necessary for the operation of a railroad; but in the case before us an equity is claimed, superior to the vested lien of these mortgagees of the Richmond & Danville Railroad. The supplies were not furnished for the use of any railroad on which these mortgagees had a lien, nor for the benefit of any such railroad. On the contrary, they were furnished to the Richmond & Danville Railroad, in the performance by it of the obligations it assumed for the Georgia Pacific Railroad Company to the Central Railroad & Banking Company, and were on the latter road, in which these mortgagees and the receivers appointed at their instance had no interest whatever, and from which there is no evidence in the record that they derived any benefit. The claim does not come within "those ordinary and current expenses of operating a railroad," referred to in *Bound v. Railway Co.*, supra. In this respect the case differs essentially from *Southern Ry. Co. v. Carnegie Steel Co.*, supra, in which case the steel rails upon which claim was made were furnished for the use of the mortgaged property, came into the hands of the receivers, were used by them, and at the sale went into the hands of the purchasers.

Did the Ensign Manufacturing Company furnish these goods, relying upon the interposition and protection of their equity by the court, or did they contract upon the personal responsibility of the Richmond & Danville Railroad Company? On this point Mr. Ensign, the manager of this company, speaks as follows:

"I further desire to state that the supplies furnished to the Richmond & Danville Railroad Company, being car wheels and in small lots, and being sent to different points along the line of its road, were furnished because of the fact that the Ensign Manufacturing Company had had a running account with the Richmond & Danville Company for a number of years, and had been engaged in making and shipping car wheels, and would fill orders from time to time from the said Richmond & Danville Railroad Company, and ship them wherever and to whatever points the said Richmond & Danville Railroad Company, or its purchasing agent, desired, without question as to who would pay the same, looking to the Richmond & Danville Railroad Company, and the current receipts of the road for payment for said supplies. These supplies were usually paid for in the course of 60 or 90 days. Payments were made by checks from the Richmond & Danville Railroad Company office, and while the Ensign Manufacturing Company made out bills for the goods in controversy in this matter, amounting to \$1,590, against the Central Railroad & Banking Company of Georgia, it was simply because the Richmond & Danville Railroad Company's purchasing agent so requested on the orders, and not because the Ensign Manufacturing Company looked to the Central Railroad & Banking Company of Georgia for payment."

It appears from this that the manager knew that the goods were purchased for and were used by the Georgia railroad. In *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, the court, animadverting upon the disposition to extend the equitable doctrine of *Fosdick v. Schall*, says:

"No one is bound to sell to a railroad company, or to work for it. Whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage. * * * It is the exception, and not the rule, that such priority of lien can be displaced. We emphasize the fact of the sacredness of the contract lien."

Following the *Kneeland Case*, the court, in *Thomas v. Car Co.*, 149 U. S. 110, 13 Sup. Ct. 824, 37 L. Ed. 663 decided that, in order to secure this equity, the creditor must have furnished the supplies relying upon the interposition of the court. In *Southern Ry. Co. v. Carnegie Steel Co.* the same doctrine is reiterated, having previously been recognized in *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. The same doctrine was applied in this court in *Bound v. Railway Co.*, *supra*.

So the question comes, were these goods furnished on the credit of the Richmond & Danville Railroad Company,—its personal credit,—or in reliance on this equity? The testimony of Mr. Ensign, above quoted, answers this question. His company had had frequent dealings with the Richmond & Danville Railroad Company, had had a running account with it for years, had filled orders when made, looking to the Richmond & Danville Railroad Company and the current receipts of that road, presenting its bill in 60 or 90 days, and in all previous instances had been promptly paid. The goods had been in this instance charged to the Georgia railroad simply because the purchasing agent of the Richmond & Danville so requested it, and not because the Ensign Company looked to the Georgia road for payment. Now, as the goods furnished under the order of the Richmond & Danville Railroad Company were for the use of the Georgia road, and were actually used by it, the Ensign Company could have relied upon

this equity, and could have asserted it against the current earnings of the Central Railroad & Banking Company of Georgia in priority to its mortgages. *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 368, 369, 18 Sup. Ct. 657, 42 L. Ed. 1068. The equity exists, notwithstanding the mortgages, notwithstanding the lease which is subordinate to the mortgages, notwithstanding the fact that the Richmond & Danville Railroad Company ordered the goods. It is an equity in favor of the materialman, existing against any person interested in the railroad property, either as owner, lessee, or mortgagee. If, however, the goods were not delivered in reliance on this equity, but because they were ordered by the Richmond & Danville in the satisfactory course of dealing existing between it and the Ensign Company for years, they were delivered on the personal credit of the Richmond & Danville, and under the cases cited above the claim for them cannot be preferred.

The mere fact that the payment for the goods was expected from the earnings of the railroad company is not sufficient to put the equity in motion. See *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 303, 20 Sup. Ct. 393, 44 L. Ed. 475; *Bound v. Railway Co.*, *supra*. This conclusion is strengthened by the fact that the account in this case was made in October and November, 1891, and the receivers were not appointed until August, 1892. We have seen how much stress the court places on the period elapsing between the incurring the debt and the sudden action of the court in appointing a receiver. Indeed, in the order appointing receivers in the main cause, the only current and unpaid pay rolls and vouchers and supply accounts incurred in the operation of the railroad system which they were directed to pay out of the earnings coming to their hands were limited to such as were incurred within six months prior to the date of the order.

The case at bar strongly resembles, if it is not on all fours with, *Virginia & A. Coal Co. v. Central R. & Banking Co. of Georgia*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. In that case the same purchasing agent of the Richmond & Danville Railroad Company, while that company was operating this Central Road, contracted with the coal company to furnish coal to the Central Railroad for 12 months from July 1, 1891, to July 1, 1892. The coal was furnished. The bill not having been paid, the coal company intervened in a suit in which the receiver of the Central Road and the Richmond & Danville Railroad Company were parties. To its petition for intervention it made both of these parties defendant, and by it sought payment for the coal. They claim against the Richmond & Danville under the contract. That against the Central was through the equity, in that the coal was purchased for the use of, and was used by, the Central Road. The supreme court held that the equity, under which payment for supplies should be paid out of current earnings in the hands of the receiver, existed against the Central Railroad & Banking Company, because the supplies were used in its operation, notwithstanding that the contract of purchase was that of its lessee. As the result of the case, payment was ordered to be made by the company for whose use the goods were brought. No decree was entered against the Richmond & Danville. The court, in fact, held that the legal contract was with the Rich-

mond & Danville, but, when it was sought to enforce the equity, the earnings of the Central were liable to it. So we hold in this case. Although the contract was made with the Richmond & Danville Railroad Company, and the Ensign Manufacturing Company is a creditor thereunder against this company, yet, as the goods were purchased for and were used by another company, no equity exists, as against the mortgagees of the Richmond & Danville, giving the claim priority over them.

The decree of the circuit court is reversed, and the cause is remanded to that court, with instructions to dismiss the petition.

Reversed.

SOUTHERN RY. CO. v. CHAPMAN JACK CO.

CENTRAL TRUST CO. et al. v. RICHMOND & D. R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1902.)

No. 450.

1. RAILROADS—RECEIVERSHIP—PREFERENTIAL DEBTS.

Jackscrews purchased by a railroad company for use on its road, within six months prior to the appointment of receivers in a foreclosure suit, are within the terms of the decree making the appointment, requiring the receiver to pay supply accounts incurred in the operation of the road within six months; but the same articles, purchased nearly a year prior to the receivership, for use on a leased road not included in the mortgage, and which did not pass into the hands of the receivers, are not supplies necessary in operating the mortgaged road, and the seller is not entitled to preference in payment over the mortgage debt.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

This case comes up on appeal from the decree of the circuit court of the United States for the Eastern district of Virginia. It is one of the cases arising in the administration of the affairs of the Richmond & Danville Railroad Company. The claim is made by the Chapman Jack Company against the Southern Railway Company, purchasers of the property of the Richmond & Danville Railroad Company at the sale made under a decree of foreclosure of the mortgages upon this property. The decree on this point is in these words: "The purchaser or purchasers at said sale shall as part of the consideration of such sale, and in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they would 'protect the security given for the lien of the North Carolina Railroad Company,' and will also pay off and satisfy any and all outstanding and unpaid receivers' certificates or receivers' notes and obligations issued under the order of June 28, 1892, and having priority over the lien of said mortgage of October 22, 1886, and all other claims heretofore filed in this case, or in either of the causes consolidated herein, but only when said court shall allow such claims and adjudge the same to be prior in lien or superior in equity to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto." In this connection is inserted a clause from the decree of June 15, 1892, appointing the receivers: "The said receivers shall, from time to time, out of the funds coming into their hands from the operation of the property, pay the expense of operating the same and executing their trusts, and all taxes and assessments upon the said property or any part thereof, and also pay and discharge all such traffic and car mileage balances as may be due to connecting and other

railways, and all such loss and damage claims arising from the previous operation of said property as, in their judgment, on examination, are proper to be paid as expenses of operation, and shall also, out of the moneys coming into their hands, pay and discharge all the current and unpaid pay rolls and vouchers, and supply accounts incurred in the operations of said railroad system, at any time within six months prior hereto." When the receivers were appointed, the court also appointed special masters, who were directed to call in creditors of the Richmond & Danville Railroad Company. This they did, and among others the Chapman Jack Company filed the present claim. There was much delay in examining and passing upon the various claims. Among those so delayed was this of the Chapman Jack Company. It was not finally passed upon until 1901. This delay has been charged as laches upon the part of the claimant; but we concur with the special master and the court below that this charge will not lie. The claim of the Chapman Jack Company is on the following accounts:

Central R. R. & Bkg. Co., to the Chapman Jack Company.

July 13, 1891. 20 Chapman jackscrews, \$126, less 33½ per cent.. \$ 84 00

The Same to the Same.

Aug. 20, 1891. 12 Chapman jackscrews at \$3, \$36, less 33½ per cent \$ 24 00

Richmond & Danville R. R. Co., to the Chapman Jack Co.

Jan. 28, 1892. 24 Chapman jackscrews, \$324, less 33½ per cent.. \$216 00

The Same to the Same.

April 6, 1892. 12 Chapman jackscrews, \$162, less 33½ per cent... \$108 00

The Chapman jackscrews for the Central Railroad & Banking Company were ordered by the purchasing agent of the Richmond & Danville Railroad Company, and were sold, shipped, and delivered under and because of that order. The Central Railroad & Banking Company was at that time operated by the Richmond & Danville Railroad Company, which had assumed the obligations of the Georgia Pacific Company, which latter company had secured a lease of the property of the Central Railroad & Banking Company. The articles purchased and charged to this last-named company were for use on its road. From all that appears in the record, the articles purchased and charged to the Richmond & Danville Railroad Company were for the use on the property of that company covered by the mortgage foreclosed and purchased by the Southern Railway Company. Special Master Dickinson, who heard the case, reported in favor of the entire claim of the Chapman Jack Company and recommended its payment. The court, hearing his report and the exceptions thereto, concurred with the master and confirmed the report on the whole. The matter comes here on assignments of error.

Willis B. Smith, for appellant.

Wyndham R. Meredith, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and WAD-DILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). The questions in this case naturally divide themselves.

1. As to the claim against the Richmond & Danville Railroad Company for the articles charged to it in its own name. The articles were in the class of supplies necessary in operating a railroad, and those claims come within the very terms of the order of June 15, 1892, appointing the receivers and stating their duties. They are instructed "from time to time, out of the funds coming into their hands from the operation of the property, to pay and discharge all the current and unpaid pay rolls and vouchers and supply accounts incurred

in the operation of the said railroad system at any time within six months prior hereto." These are supply accounts, incurred February 16, 1892, \$216, and April 16, 1892, \$108. Both are within the six months provided in the order, and must be paid. In this respect we concur fully with the court below, and on this point its decree is affirmed.

2. The claim for supplies furnished for the use of the Central Railroad & Banking Company stands on a different footing. In one very material point they were not incurred within the six months of the order appointing receivers, bearing date June, 1892. They bear date July 20, 1891, and August 22, 1891. Besides this, they were ordered by the Richmond & Danville Railroad Company, and are a debt of that company. But they were ordered for supplies furnished to the Central Railroad & Banking Company of Georgia, property not included in the mortgage foreclosed in the main cause, over which the receivers had no control, which never came into their possession, from which they derived no revenue. The debt was incurred by the Richmond & Danville Railroad Company, to meet an obligation of the Georgia Pacific Railway Company, which obligation the Richmond & Danville Railroad Company had assumed. The doctrine has been established beyond controversy that holders of bonds of a railroad company, secured by mortgage, take them subject to this condition that the earnings of the company shall first be applied to keeping the railroad property a going concern, and that debts incurred for labor or materials, needed to keep the mortgaged property a going concern, must be paid before the earnings can be applied to the mortgage debt. And if the mortgagees proceed on their security and obtain the appointment of a receiver, the earnings in the hands of the receiver must be applied to the liquidation of unpaid debts for operating expenses accrued within a limited period, due by a railroad suddenly deprived of its property, the payment of laborers, and of balances due to other roads, and debts of like character (*Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 367, 18 Sup. Ct. 657, 42 L. Ed. 1068), or, as expressed by Judge Morris, speaking for this court, in *Bound v. South Carolina R. Co.*, 7 C. C. A. 322, 58 Fed. 473, 8 U. S. App. 472, "to those ordinary and current expenses of operating a railroad, contracted but a short time before a receivership, which by the sudden action of the court in appointing a receiver were left unpaid."

But, except as against this small and limited class of claims, the lien of the mortgage is paramount and must be protected. This debt of the Richmond & Danville Railroad Company, incurred in carrying out the obligation of another company, is surely not one of those ordinary and current expenses incurred in its operation which the mortgage creditor could expect and for which he must waive his lien. The claimant, as to these items, comes under the head of a general creditor, having no special equity on the earnings in the hands of the receivers. The claimant relied upon the personal credit of the Richmond & Danville Railroad, and its claim is in that category. In this respect this claim resembles that of the *Ensign Manufacturing Company*, decided at this term (117 Fed. 417), and our conclusion is the same with regard to both claims.

So much of the decree of the circuit court as allows payment of the two accounts of the Chapman Jack Company against the Central Railroad & Banking Company—that is to say, one of \$84 and the other of \$24, in all \$108—is reversed. In all other respects, the decree below is affirmed.

Modified.

CITY OF BEATRICE, NEB., v. EDMINSON.

(Circuit court of Appeals, Eighth Circuit. August 25, 1902.)

No. 1,726.

1. EVIDENCE—LAWS OF STATES—PRINTED STATUTES.

Printed copies of the statute laws of Nebraska, purporting to be published under its authority, are prima facie evidence of the passage and existence of the laws there published, in the courts of the United States and of the state of Nebraska. Comp. St. Neb. 1899, § 5993; Rev. St. §§ 721, 905.

2. CONSTITUTIONALITY OF STATUTE.

Chapter 14 of the Laws of Nebraska of 1885 is not unconstitutional, and its title is not obnoxious to section 11, art. 3, of the constitution of Nebraska.

3. SAME.

Webster v. City of Hastings, 81 N. W. 510, 59 Neb. 563, which holds this chapter unconstitutional, is conclusive or controlling upon no court or party, except the parties to that action and their privies, in the absence of proof of the fact, established in that case, that the title of chapter 14 of the Laws of Nebraska of 1885, when it passed the legislature, differed from the title of that act published by authority of the state in the Session Laws of 1885.

4. STATE CONSTITUTION—CONSTRUCTION BY STATE COURT—EFFECT IN FEDERAL COURTS.

The federal courts uniformly follow the construction of the constitution and statutes of a state announced by its highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the constitution and laws of the nation.

5. SAME—EFFECT OF FINDING OF FACT.

But the finding by a state court of the terms of a statute or of its title held unconstitutional is not conclusive or controlling upon a federal court in an action between other parties.

6. MUNICIPAL BONDS—POWER TO ISSUE—RECITAL OF WRONG STATUTE—IMMATERIALITY.

Where the power to issue municipal bonds has been vested in a city by appropriate legislation, a recital in the face of the bonds of a statute which does not grant the authority is not fatal to the securities or material to the issue of their validity.

7. MUNICIPAL BONDS—RECITALS—EXCESSIVE INDEBTEDNESS—ESTOPPEL OF CITY.

Recitals in municipal bonds which import an issue in accordance with the terms of the law or constitution which contains the limitation of indebtedness will estop the municipality from defeating the bonds on the ground that its debt exceeded the prescribed limitation, where the recitals were made by municipal officers in whom the power was vested and upon whom the duty was imposed of determining whether or not the limitation was exceeded before they issued the bonds, and where no notice of the fact of the excessive indebtedness was given to the buyer

¶ 4. State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

by the face of the bonds or by any public record which was prescribed by the constitution or by the act under which the securities were issued, as a test of the limitation.

8. SAME—DEFECT IN ELECTION.

Recitals in municipal bonds by officers empowered to determine and certify the fact that a proposition to issue the bonds was duly submitted and sustained by a favorable vote of the electors, and that all precedent conditions to the lawful issue of the bonds were complied with, will estop a municipality, as against an innocent purchaser, from defeating the bonds because the proposition actually submitted failed to contain a required provision authorizing an annual levy to pay the principal of the bonded debt.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

William C. Dorsey (Robert S. Bibb and Samuel Rinaker, on the brief), for plaintiff in error.

John L. Webster (L. C. Krauthoff, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment against the city of Beatrice in the state of Nebraska upon coupons cut from two series of bonds of \$1,000 each issued by that city, one series of 80 bonds dated on March 9, 1886, and another series of 35 bonds dated November 2, 1891. The case was tried by the court without a jury, and all the issues of fact were found against the city and in favor of the plaintiff below. This plaintiff was a bona fide purchaser of the bonds without notice of any defects or defenses with which he was not charged by the statutes of the state of Nebraska. The bonds of the first series contained a recital that they were issued for the purpose of constructing, maintaining, and operating a system of waterworks for the city in pursuance of and by authority of an act of the legislature of the state of Nebraska authorizing cities of over 5,000 inhabitants to construct, maintain, and operate a system of waterworks, and that the mayor and council, being vested with authority for that purpose, had found that all the requirements of law and conditions precedent and necessary to authorize the issue, negotiation, and delivery of the bonds had been fully complied with. The second series contained a recital that they were issued for the same purpose "under and by virtue of section 66 of an act of the legislature of the state of Nebraska, as now amended, entitled 'An act to provide for the organization, government, and powers of cities of the second class having more than five thousand inhabitants,' approved March 1, 1883, and the title to which was amended March 5, 1885, so as to read as above set out, said section being section 66 of article 2 of chapter 14 of the Compiled Statutes for the year of 1887," that a proposition to issue the bonds had been submitted to, and a favorable vote secured from, the electors, that the amount of the bonds was within the limit

† 8. Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

of bonded indebtedness which the mayor and common council were empowered to contract, and that they were authorized to borrow the sum of \$35,000 and to pledge the property and credit of the city by its negotiable bonds for the repayment of this money.

It will be seen that these recitals refer to the act for the government of cities of the second class having more than 5,000 inhabitants. The chief complaint of counsel for the city is that there never was any such act, and hence that there never was any power in this city, which contained a population of more than 5,000 and less than 10,000 inhabitants, to issue any of these bonds. This complaint is founded on the contention that the amendatory act of March 5, 1885, which constitutes chapter 14 of the Session Laws of the State of Nebraska for the year 1885, is unconstitutional and void, and that contention grows out of this state of facts: In the year 1883 the legislature of the state of Nebraska passed an act entitled "An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants." By this act it empowered any city having more than 10,000 and less than 25,000 inhabitants to issue its negotiable bonds to an amount not exceeding \$100,000 for the purpose of constructing, maintaining, and operating waterworks. Sess. Laws Neb. 1883, c. 16, § 66. In the year 1885 the legislature of that state passed the act of March 5, 1885, which is the principal subject of controversy in this action. That act provided that the title of the act of 1883 should be so amended as to read, "An act to provide for the organization, government, and powers of cities of the second class having more than five thousand inhabitants"; that section 1 of the act of 1883 should read in substance that all cities of the second class having more than 5,000 and less than 25,000 inhabitants should be governed by the provisions of this act; and that other amendments should be made therein not material to the present issue. Sess. Laws 1885, c. 14. The legal effect of these amendments, if valid, was to confer upon the city of Beatrice, and upon all cities which had more than 5,000 and less than 10,000 inhabitants, the powers previously conferred upon cities of more than 10,000 and less than 25,000 inhabitants by the original act of 1883. The act of 1883 was treated as amended by this act of 1885, and the act so amended was carried forward into the Compiled Statutes of the state under its amended title, and the city of Beatrice proceeded to issue these bonds under this amended act. Comp. St. Neb. 1887, c. 14, art. 2; Comp. St. Neb. 1889, c. 14, art. 2. In the year 1891 the legislature of Nebraska passed another amendatory act, which by its terms changed section 66, art. 2, c. 14, of the Compiled Statutes of 1889, which was the same section numbered 66 in the original act of 1883 and in the amended act of 1885, so that this section empowered cities subject to its terms to issue bonds for waterworks in an amount not exceeding \$125,000, instead of \$100,000.

It is not claimed that these statutes did not confer plenary power upon this city to issue the bonds and coupons here in question if the statutes ever became applicable to a city of less than 10,000 inhabitants. But it is insisted that the existence in the city of Beatrice of the power to issue these bonds is entirely dependent upon the validity

of the act of March 5, 1885, which alone undertook to extend to cities of more than 5,000 and less than 10,000 inhabitants the powers vested by the act of 1883 in cities of more than 10,000 inhabitants, and it is earnestly and persistently argued that the act of 1885 is unconstitutional and void. Thus it will be seen that the sole basis of the contention that this city was without authority to issue these bonds and coupons is the claim that the act of 1885 is unconstitutional. If that position is unsound, the entire argument fails, and the power of the city to issue the bonds is not denied. What, then, is the support of this proposition? It is the decision of the supreme court of the state of Nebraska in *Webster v. City of Hastings*, 59 Neb. 563, 81 N. W. 510, and that alone. It is insisted that that decision declares the unconstitutionality of this act, and then the familiar rule is invoked that the national courts uniformly follow the construction of the constitution and statutes of a state announced by its highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the constitution and laws of the nation. *Madden v. Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570; *Clapp v. Otoe Co.*, 104 Fed. 473, 477, 45 C. C. A. 579, 582. But is the judgment in *Webster v. City of Hastings* conclusive or controlling upon the issue of the constitutionality of this act? We turn to the opinion in that case to learn the issues involved and the effect of the decision there rendered.

The provision of the constitution of the state of Nebraska to which the act of 1885 is alleged to be obnoxious is that "no bill shall contain more than one subject and the same shall be clearly expressed in its title." Article 3, § 11. The printed copies of the statute laws of the state of Nebraska purporting to be published under the authority of that state are *prima facie* evidence of the passage and existence of the laws thus printed in all the courts of the United States and of the state of Nebraska. Comp. St. 1899, § 5993; Rev. St. §§ 721, 905. The journals of the senate and house of that state are evidence of the proceedings of those bodies. Comp. St. 1899, § 5992. The courts of Nebraska have adopted the rule that the authentication and enrollment of a statute, or, in other words, the printed copy of it published by authority of the state, is *prima facie* evidence of its passage and existence as there published, but that this evidence may be overcome by entries in the journals of the senate and house which explicitly contradict it. *Webster v. City of Hastings*, 59 Neb. 563, 568, 81 N. W. 510, and cases there cited. Now, in the printed copies of the statutes of the state of Nebraska, purporting to be published by its authority, which contain the act of March 5, 1885, here in question, the title to that act reads: "An act to amend the title and sections 1, 2, 3 and 4 of an act entitled 'An act to provide for the organization, government and powers of cities of the second class having more than ten thousand inhabitants,' approved March 1, 1883." Sess. Laws 1885, c. 14. That title is not obnoxious to the provisions of section 11, art. 3, of the constitution of Nebraska, but it sufficiently complies with the terms of that section. It clearly and plainly expresses the entire subject treated by the act, the amendment of the title and of the act itself relative to the organization and government of cities of the second class, and

the bill treats of but one subject, the subject expressed in the title. No court has ever held, so far as we are advised, and the supreme court of Nebraska did not decide in *Webster v. City of Hastings*, that this title was defective, or that the title or the act passed under it was unconstitutional or invalid. The question determined in *Webster v. City of Hastings* was other and different. In that case the prima facie evidence of the authentication, enrollment, and publication by authority of the state of this act and its title was overcome either by the admission or by the proof that the entries in the journals of the two houses disclosed the fact that the words "the title and" were not contained in the title to this act when it passed the senate or the house, and that they had been surreptitiously inserted after its passage and before its enrollment. The decision in *Webster v. City of Hastings* is founded upon this fact, and it simply holds that the title of this act of 1885, without these words, failed to give fair warning that the proposed amendments which it contained would change the title of the original act, as well as its body, so that it would apply to other cities than those having more than 10,000 and less than 25,000 inhabitants. But this basic fact upon which that decision stands was neither pleaded, proved, nor found in the case in hand. The entries in the journals of the legislative bodies in Nebraska were not presented to the court below or to this court, and the prima facie evidence of the printed statute laws, published by authority of the state of Nebraska, that the title to this act contained the essential words "the title and" when it passed the legislature of that state, stands uncontradicted and unassailed in this case, while it is supported by the express finding of the court below that the city of Beatrice had the power to issue these bonds and their coupons to an amount not exceeding \$125,000.

It is only when the legal conclusion of a state court relative to the constitutionality of a statute of its state is based upon the same facts, upon the same statute, that it controls the decision of the federal courts upon that question. The determination of the issues of fact which conditioned the terms and passage of a statute, like the finding of any other issue of fact, concludes no one, either in a state or in a federal court, except the parties to the action in which the decision is rendered and their privies. And the finding of the supreme court of Nebraska, in *Webster v. City of Hastings*, that the words "the title and" were not contained in the title of the amendatory act of 1885 when it was passed, and its legal conclusion that the title without those words was unconstitutional estopped no court and no party but Webster, the city of Hastings, and their privies, from again litigating the questions there decided. In the case at bar the evidence and the finding are to the effect that the words "the title and" were contained in the title to the amendatory act of 1885 when it was passed. That title clearly expressed the subject of the act, the act was constitutional and valid, and the city of Beatrice had plenary power to issue all the bonds and coupons here in controversy when she sent them forth.

Moreover, these bonds and coupons would not have been invalid in the hands of innocent purchasers if the amendatory act of 1885 had not been valid. In that case the city of Beatrice would have been governed by the act of 1879 (Sess. Laws 1879, p. 193), as amended by

Sess. Laws 1881, pp. 163, 168, 177, and by Sess. Laws 1885, pp. 162, 167, 168. This act governs cities of more than 1,500 and less than 25,000 inhabitants which were not governed by the act cited in the earlier part of this opinion. It empowered these cities to issue negotiable bonds to an amount not exceeding \$100,000. Sess. Laws 1885, pp. 167, 168. There was ample authority here for the city of Beatrice to issue these bonds, and the fact that the recitals in them referred to other statutes was not material. If there was any law which authorized the mayor and council to issue the bonds and coupons, they were valid, and the recitals that they were emitted by virtue of other statutes which gave no such authority could not divest the municipality and its officers of the power with which the legislature had endowed them, nor invalidate their lawful exercise of that power. Commissioners v. January, 94 U. S. 202, 206, 24 L. Ed. 110; Ninth Nat. Bank v. Knox Co. (C. C.) 37 Fed. 75, 79; Board v. De Kay, 148 U. S. 591, 595, 596, 13 Sup. Ct. 706, 37 L. Ed. 573; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 95, 13 Sup. Ct. 267, 37 L. Ed. 93.

It is contended, however, that the amended act of 1879 did not authorize the issue of the second series of bonds for \$35,000, for the reason that they increased the amount of bonds emitted by this city for waterworks to the sum of \$125,000, which was \$25,000 above the limit fixed by that act. The answer is that recitals in the face of bonds made by officers of municipal or quasi municipal corporations in whom the power is vested and upon whom the duty is imposed of determining whether or not conditions precedent to the issue have been fulfilled, or whether or not limitations have been exceeded, estop the corporations, as against a bona fide purchaser of the bonds or coupons, from defeating them on the ground that these recitals were false, unless notice was given to the buyer by the face of the bonds, or by some public record prescribed by the constitution or by the act under which the bonds were issued as a test of the limitation or condition. Board v. Sutliff, 97 Fed. 270, 277, 38 C. C. A. 167, 173, 174; Dudley v. Board, 26 C. C. A. 82, 87, 80 Fed. 672, 677; Marcy v. Oswego Tp., 92 U. S. 637, 641, 23 L. Ed. 748; Humboldt Tp. v. Long, 92 U. S. 642, 645, 23 L. Ed. 752; Sherman Co. v. Simonds, 109 U. S. 735, 737, 3 Sup. Ct. 502, 27 L. Ed. 1093; Dallas Co. v. McKenzie, 110 U. S. 686, 687, 4 Sup. Ct. 184, 28 L. Ed. 285; Wilson v. Salamanca Tp., 99 U. S. 499, 504, 25 L. Ed. 330; Chaffee Co. v. Potter, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 273, 274, 19 Sup. Ct. 390, 43 L. Ed. 689. The act which authorized the issue of these bonds prescribed no public record as a test of the limitation of the indebtedness of this city. The bonds contained no notice that they were in excess of the limit fixed by the act. They were for only \$35,000, and the limit was \$100,000. They contained these words and this figure: "City of Beatrice, Waterworks, Series 3." But they also contained the recital:

"The amount being within the limit authorized by law, the mayor and council of the city of Beatrice, Nebraska, were authorized to borrow thirty-five thousand dollars and pledge the property and credit of said city upon its negotiable bonds."

The fact that this issue of bonds was series 3 contained no notice or warning that the bonds previously issued aggregated so much that this series could not come within the limit fixed by the statute. The certificate of the officers of the municipality was that the bonds came within this limit. The statute intrusted to them the power and imposed upon them the duty to examine, see, and decide whether or not a favorable vote of the electors had been taken, whether or not the issue of these bonds would raise the debt of the city for waterworks above the statutory limitation, and whether or not every prerequisite of their lawful issue existed. They could not discharge their duty in the issue of these bonds without a careful consideration and decision of these questions. And the power in these officers to issue the bonds on behalf of this city under the conditions and limitations specified in the statutes necessarily imposed and carried with it the power to certify that these conditions had been fulfilled, that these limitations had not been exceeded, and that they "were authorized to borrow thirty-five thousand dollars and pledge the property and credit of the city upon its negotiable bonds." The mayor and city clerk of this municipality certified that there had been a compliance with the conditions and limitations prescribed by the statute, and that they were authorized to issue these bonds. The purchaser bought them in reliance upon this certificate. The city retained and used the proceeds of their sale. It is now too late and too unjust for it to deny the truth of the recital of its officers for the purpose of defeating its promises to repay the money which it received by means of their certificate.

Finally it is said that the bonds and coupons of the series of \$80,000 are void because the proposition which was submitted to, and which received the approval of, the electors of the city contained no provision for the levy of a tax to pay the principal of the bonds. But the mayor and city clerk, whose duty it was to ascertain and determine, before they sent the bonds forth, whether or not a legal proposition for their issue had been sustained by a majority of the electors of their city, certified in the face of the bonds that their issue had been "duly authorized by a vote of more than a majority of all the electors voting on the proposition to issue the same," and that the mayor and council had found that all the requirements of law and conditions precedent and necessary to authorize the issue, negotiation, and delivery of the bonds had been fully complied with. This is, in legal effect, a recital that a lawful proposition to issue the bonds was submitted to and sustained by the voters. The statutes required the mayor and the city clerk to ascertain and determine, and empowered them to certify, this fact. Innocent purchasers bought the bonds in reliance upon it, and as against them the city is estopped from asserting its falsity to defeat them. The recitals in these bonds import that they were issued by authority of a majority vote of the electors of the city of Beatrice upon the proposition to issue them prescribed by law and by authority of just and honest action by the mayor, the council, and the clerk of the city. They relieve innocent purchasers of all inquiry, notice, and knowledge of the actual proposition submitted, and of the action of the mayor and council thereon, and estop the city from denying that the proposition prescribed by the statute was submitted to and sustained

by the electors, and that the bonds and coupons were issued in pursuance of that action. *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 788, 792, 793, 10 C. C. A. 637, 647, 651, 652; *Hughes Co. v. Livingston*, 43 C. C. A. 542, 553, 104 Fed. 306, 317; *Clapp v. Otoe Co.*, 104 Fed. 473, 485, 45 C. C. A. 579, 591; *Board of Com'rs v. National Life Ins. Co.*, 90 Fed. 228, 231, 32 C. C. A. 591, 594; *City of Evansville v. Dennett*, 161 U. S. 434, 439, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Wesson v. Saline Co.*, 73 Fed. 917, 919, 20 C. C. A. 227, 229; *Rathbone v. Board*, 83 Fed. 125, 131, 27 C. C. A. 477, 483; *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449, 31 C. C. A. 585; *Walnut v. Wade*, 103 U. S. 683, 696, 26 L. Ed. 526; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *Board v. Heed*, 41 C. C. A. 668, 101 Fed. 768.

There is no legal or just defense to these bonds, and the judgment below is affirmed.

BANKERS' MUTUAL CASUALTY CO. v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 14, 1902.)

No. 1,727.

1. MAILS—RAILROADS AS CARRYING AGENTS—MEASURE OF LIABILITY.

A railroad company carrying the United States mails, whether under contract or by virtue of the requirements of the constitution and laws, is not in respect to such service a common carrier, but is a public agent of the United States, employed in performing a governmental function and as such it is liable for its own negligence, but not for the negligence or tortious acts of its subordinates or employees in the selection of whom it has exercised ordinary care.

2. SAME.

A complaint against a railroad company alleged that under the requirements of the constitution and laws of the United States, but without any contract therefor, it was engaged in carrying the mails between the stations on its line; that by section 713 of the postal regulations of 1898 it was required: "to take the mails from, and deliver them into, all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station" at which it had an agent; that the postal agent on one of its trains delivered a mail sack to defendant's agent at an intermediate station which was within 80 rods of a post office, and that, through the negligence of defendant and its said agent, while the mail sack was in defendant's station house some person to plaintiff unknown obtained access to it, and by means of a false key opened it, and stole therefrom a registered package containing money, to recover the value of which the action was brought. *Held*, that the complaint stated no cause of action; no facts being alleged which showed any negligence or breach of duty on the part of defendant as a public agent of the United States.

In Error to the Circuit Court of the United States for the District of Minnesota.

Plaintiff in error brought an action in the court below against defendant in error, for the purpose of recovering \$3,000 and interest, by reason of the facts alleged in its complaint. The complaint alleged the following facts:

"That the Bankers' Mutual Casualty Company, during all of the year A. D. 1900, and up to the present time, is and was a corporation duly or-

ganized under the laws of the state of Iowa, and a citizen of said state, with its principal place of business at Des Moines in said state, engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money, while in the course of transmission from place to place, while regularly carried in the United States registered mails.

"That defendant, during all of the year A. D. 1900, and up to the present time, is and was a corporation duly organized under the laws of the state of Minnesota, and a citizen of said state, with its principal place of business at Minneapolis in said state, engaged in operating a line of railroad situated in the states of Minnesota and North Dakota.

"That the German State Bank, during all of the year A. D. 1900, and up to the present time, is and was a corporation duly organized under the laws of the state of North Dakota, and a citizen of said state, with its principal place of business at the town of Harvey in said state, engaged in a general banking business at said town.

"That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the post-office department of the United States government, and in pursuance of a fixing of the compensation to be paid to defendant by the United States government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails, and upon notice in writing, in the usual form, from the second assistant postmaster general of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot at or near the town of Harvey was an intermediate station on that part of defendant's said line of railroad within the state of North Dakota which extends from the station at Hankinson to the station at Portal, and the railroad line between said stations at Hankinson and Portal is designated by, and known to the post-office department of the United States as, 'Railroad Route No. 161,018,' being a distance of 344.58 miles, and the compensation fixed by the United States post-office department to be paid annually by the United States to defendant, during all the period herein referred to, for the carriage of said mails and the person in charge thereof, is and was the sum of sixty-four thousand eight hundred and fifteen and $\frac{49}{100}$ dollars (\$64,815.49) at the rate of \$188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That, during all of the period hereinbefore referred to, there was no contract of any kind between defendant and the United States government concerning or providing for the carriage by defendant of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

"That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the state of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis in said state, and on or about said date said bank deposited, in the United States mails at Minneapolis in said state, a package containing lawful money of the United States, commonly known and called 'currency,' of the actual cash value of three thousand dollars (\$3,000.00), in an envelope properly addressed to the German State Bank at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the postmaster at said post office; that, from and after the time of depositing said package in said post office at Minneapolis, said package and its contents was the property of said German State Bank.

"That said registered package was covered by insurance and indemnity against loss, while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers' Mutual Casualty Company, the substituted plaintiff; said insurance being

for the use and benefit of said German State Bank; that a true copy of said policy is hereto attached as part hereof, and marked Exhibit A.

"That on or about November 10th, A. D. 1900, and while said package was in good safety, and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States mails, at the post office in said city of Minneapolis, a letter of advice properly addressed to said Bankers' Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid; that said letter of advice notified said Bankers' Mutual Casualty Company of the shipment by said Metropolitan Bank of said sum of three thousand dollars to said German State Bank of Harvey, and upon said mailing of said letter of advice the contract of insurance and indemnity of said registered package of currency immediately attached thereto, and became a valid and complete contract of insurance and indemnity, by the said Bankers' Mutual Casualty Company, in favor of said German State Bank.

"That, in the regular course of transmission of the United States mails between the said city of Minneapolis and the said town of Harvey, said registered package was duly delivered by the post-office officials of said city of Minneapolis to the railway mail clerk or other proper postal official, and placed in a railway mail car or other proper car, the property of defendant, then standing upon defendant's said line of railway, and was transported by defendant railway company to defendant's railway depot or station situated in or near said town of Harvey, North Dakota.

"That, prior to the arrival of said registered package at said town of Harvey, the same, together with other registered mail packages and other mail matter, was, by said railway mail clerk in charge of said mails, duly inclosed in a regular United States mail sack or mail pouch, which said mail sack or mail pouch was securely locked or fastened by the official government strap and lock.

"That from and after the time of the depositing of the mail sack containing said currency in defendant's mail car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the exclusive care, custody, and control of the postal clerks regularly employed by the United States government, and in charge of the mail in said car; that the mail sacks containing said registered package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody, and control of the said postal clerks or authorities.

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent or night operator of defendant at said town of Harvey; that said night station agent or night operator was not sworn as an official or employé of the post-office department of the United States government as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot at Harvey, North Dakota, and did so receive, take charge of, and deposit said mail sack or mail pouch.

"That defendant was not sworn as an official or employé of the post-office department of the United States government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States mails, or the performance of defendant's duties as such carrier of the mails.

"That section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered postage, is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located

not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said post office at Harvey was an intermediate post office, and was located not more than 80 rods from defendant's railroad station or depot at or near said town of Harvey.

"That, under said postal regulation, it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody; also to safely care for and guard said mail sack and its contents during the night; also, to safely deliver the same to the postmaster or postmistress at the post office in said town of Harvey, North Dakota. But, neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the post office, to the postmaster in said town of Harvey; that by reason of defendant's said negligence some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail sack, and opened the same, and abstracted or took therefrom said registered package, whereby the same was wholly lost to said German State Bank.

"That one George A. Soule was then the roadmaster or foreman employed by said defendant at said town of Harvey, or one of defendant's employes or servants, but was not sworn in as an official or employé of the post office department, as required by law, and was not authorized or employed by defendant to take charge of said mail sack, or to perform any duty in relation thereto, and had no right of access to said mail sack, or to the mail therein contained, by virtue of his said employment by defendant.

"That said Soule had previously unlawfully obtained, and caused to be made, a key to the United States government mail sacks or mail pouches, and personally, or with the aid and assistance of some person or persons to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail sack or mail pouch had been placed by defendant's operator or night agent on the floor or wall of said room, and not in any separate room, closet, or other safe receptacle capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise; that said room was not designed for or capable of safely keeping valuable articles or property.

"That said Soule, or other person, had no right of access to said room, or to said mail sack or mail pouch, but through the negligence of defendant and its said night operator or night agent, as set forth in this complaint, did gain entrance to said room, and obtain access to said mail sack or mail pouch, and the mail matter therein contained, and did find said mail sack or mail pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail sack or mail pouch wholly unprotected and unguarded by said night operator or otherwise.

"That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail sack or mail pouch, and did unlock the same, and abstract and take therefrom the aforesaid registered package containing said three thousand dollars (\$3,000.00) in currency, and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State Bank or to said Metropolitan Bank of Minneapolis, or to this plaintiff, the Bankers' Mutual Casualty Company, or to any one for the benefit of any of them.

"That in consequence of the loss of said package, as hereinabove stated, said Bankers' Mutual Casualty Company, substituted plaintiff, became indebted to said German State Bank of Harvey under its said policy of insurance, and was compelled to and did pay said German State Bank the full amount of the loss so sustained by it, to wit, the sum of three thousand dollars (\$3,000.00) in good and lawful money of the United States; the same being the amount of insurance or indemnity held by said German State

Bank, and covered by said policy of insurance. That written demand has been made by said German State Bank and said Bankers' Mutual Casualty Company of and from defendant, for repayment to them or one of them of said sum of three thousand dollars, a copy of which written demand is hereto attached as part hereof, and marked Exhibit B, which payment defendant has refused, and still refuses, to make.

"That, by reason of the foregoing facts, the said Bankers' Mutual Casualty Company has been and is now subrogated to all rights and remedies which said German State Bank of Harvey had against defendant, to recover the sum of three thousand dollars so lost, with interest on said sum from and after the 10th day of November, A. D. 1900.

"That for the purpose of further effectuating the rights of subrogation of this substituted plaintiff, against defendant, and to enable it to recover from defendant the sum so lost, said German State Bank in writing transferred and assigned to the plaintiff all of its rights in and to said money lost, and to sue for the recovery thereof. A true copy of said instrument of assignment is hereto attached as part hereof, and marked Exhibit C."

Defendant in error demurred to said complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and, the plaintiff in error having elected to stand upon its complaint, the action was dismissed on the merits. The order sustaining the demurrer was duly excepted to, and this ruling of the court is assigned as error.

H. F. Dale (William Connor, George W. Bowen, and Henry Conlin, on the brief), for plaintiff in error.

Alfred H. Bright, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge, after stating the case as above, delivered the opinion of the court.

This case presents but one question for our consideration, and that is whether or not the defendant in error is liable to the plaintiff in error upon the facts stated.

No federal decision is called to our attention, and we are unable to find any, parallel to the case at bar. There are, however, well-settled principles of law which we believe must determine the case. It is claimed by plaintiff in error that it is alleged in the complaint, and admitted by the demurrer, that defendant in error had no contract relation with the United States in pursuance of which it carried the mail between Minneapolis, Minn., and Harvey, N. D.; that the duty to carry the mail safely was imposed upon defendant in error by the constitution and laws of the United States; and that, this duty being imposed by law, any person injured by a violation thereof would have his remedy. If we correctly understand counsel, it is argued that there was no contract relation between the defendant in error and the United States, in order to avoid the objection that plaintiff in error stands in no such relation to that contract as would enable it to maintain an action for a breach thereof. In the view we take of the case, however, we do not see how it makes any difference whether defendant in error was carrying the mail under and by virtue of a contract with the United States, or whether that duty was imposed by the constitution and laws thereof; in either event it was a public agent of the United States, and its liability must be determined accord-

ingly. The defendant in error, in regard to its liability for the loss of the money, was in no sense a common carrier. As was said in the case of *Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334:

"Between a contractor for carrying the public mails and the sender of letters, there is no privity of contract, and the contractor has no right to and receives no remuneration from the sender. The government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the government, and by it his compensation is paid. He owes a duty, not to the sender of the letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public mail is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire. The railroad company was not transformed into a common carrier as to the mails because, being engaged in the regular business of transporting goods for the public, it was, at the same time, carrying the mails by direction and employment of the proper department of the government. The occupation of the company was of a dual character. It was acting in two capacities, created and regulated by separate and distinct contracts and employments. The liability of the defendant cannot, therefore, be determined by the rules governing the responsibility of a common carrier."

It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail, for the reason that the constitution of the United States conferred upon it the power to establish post offices and post roads, and this power was granted by the people as one of the sovereign powers, to be exercised by the general government exclusively. By virtue of this grant of power, the United States has always, through its post-office department, assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of the mail by the authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function. As a practical illustration as to whether the defendant in error was engaged in the discharge of a governmental function, let us suppose that some person had attempted to obstruct the carriage and delivery of this mail sack, which contained the money in controversy, at the post office at Harvey, N. D., while it was in possession of defendant in error. Would not the person be liable to punishment under the penal laws of the United States? Beyond question he would. From whence springs the power of the United States to punish such an act? It springs from the authority that all governments possess of punishing the person who obstructs that government in the lawful discharge of its duty. It now becomes necessary to ascertain what the liabilities of public agents are, and upon this question there seems to be little, if any, conflict of authority. A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences or omissions of duty, of the subagents or servants, or other persons properly employed by or under him in the discharge of his official duties. Rob-

ertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203; Story, Ag. § 319. In reference to the post-office department, it has been uniformly held that the postmaster general, the deputy postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders. *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Despencer*, 2 Cowp. 754; *Dunlop v. Monroe*, 7 Cranch, 242, 3 L. Ed. 329; *Schroyer v. Lynch*, 8 Watts, 453; *Bishop v. Williamson*, 11 Me. 495; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; Story, Bailm. §§ 462, 463; *Robertson v. Sichel*, 127 U. S. 507.¹ The same doctrine has been extended or applied to mail contractors by the cases of *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504. The court, however, refused to extend the rule to mail contractors in the cases of *Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Sawyer v. Corse*, 17 Grat. 230, 99 Am. Dec. 445. The Alabama court adopted and followed the reasoning of the Virginia court. The reasoning of the cases cited is illustrated by the following language taken from the opinion in *Banking Co. v. Lampley*:

"The contractor, being the person who contracts with and is paid by the government, and who gives a guaranty for the faithful discharge of the service, is the public agent if such contract constitutes an agency. He is the one directly responsible to, and with whom, the government deals. He employs his own carriers, who are paid by him, and who are not known to the government other than as his employes. As to civil responsibility, the contractor stands between the carrier and the government, although, for the purpose of public security, an oath may be required of the carrier, and penalties imposed for violations of the laws of the postal service. In a sense the carrier may be said to do work for the government, not as an agent, but as one employed by the contractor, in his own name, for his individual benefit, and on his personal responsibility, as necessary help to do the service which he has contracted to do. Laborers employed by a contractor for the construction of naval vessels, or for the erection of public buildings, may in the same sense be said to do work for the government, but they are not public laborers. We approve and adopt the legal propositions as to the liability of a contractor, maintained and asserted in *Sawyer v. Corse*, 17 Grat. 230, 99 Am. Dec. 445."

This reasoning would make the defendant in error a public agent, but would deny that position to the agent at Harvey; the subordinate agent of the defendant in error being what is called a carrier in the opinion under consideration. We do not think that the comparison between a laborer employed by a contractor for the construction of naval vessels or for the erection of public buildings an apt one. The United States in building a public building, or in constructing a naval vessel through a contractor, is not exercising sovereign power or engaged in a purely governmental function. It is acting in its purely private or business capacity. Any one possessed of sufficient means may construct a vessel or build a building. The United States only can carry the mail. Hence we believe that the character of the service in which the agent is engaged must determine in the case at bar as to whether the subordinate agents of the defendant in error, in

¹ 8 Sup. Ct. 1286, 32 L. Ed. 203.

so far as they were engaged in carrying the mail, were or were not public agents. Let us now apply the principles of law which, in our opinion are controlling, to the facts in this case. There is nothing alleged in the complaint that would connect the defendant in error personally with the wrong complained of; that is, there is no allegation that any officer of the defendant in error whose act or omission the court would be bound to hold was the act or omission of defendant in error did any act, or omitted to do any act, which caused the loss of the mail. There is no allegation that the defendant in error did not exercise ordinary care in the selection of competent persons to handle the mail after it reached Harvey. The allegation of the complaint in regard to the agent at Harvey is as follows:

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent or night operator of defendant at said town of Harvey; that said night station agent or night operator was not sworn as an official or employé of the post-office department of the United States government as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot at Harvey, North Dakota, and did so receive, take charge of, and deposit said mail sack or mail pouch."

The fact that Magson was not sworn is not controlling, for if the defendant in error, in its business in carrying the mail, was a public agent, then it was responsible for its own negligence only, and not for the negligence of its servants engaged in the same business. If the defendant in error was a person, this case would be plain. The apparent difficulty arises from separating the negligence of defendant in error from the negligence of its subordinate agent arising from the fact that a corporation must perform all its acts through agents. We think, however, that there is a well-defined distinction with reference to its duties as a carrier of the mail. To illustrate: Supposing the agent Magson had left the mail sack on the depot platform, and by reason thereof the same had been stolen. This, in the absence of any showing that defendant in error had not used proper care in the selection of Magson as its agent, would have been the negligence of Magson, for which he would have been liable, but it would not have been the negligence of defendant in error. If, however, some officer of defendant in error who stood in such a relation to the company that his negligence would be its negligence should negligently do some act whereby a loss occurred from the mail, then defendant in error would be liable. Let us now examine the acts of negligence alleged. Section 713 of the postal regulations of 1893, set out in the complaint, determined the duty of defendant in error in relation to the mail sack after its receipt by Magson. The regulation is as follows:

"The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

Whatever duty this regulation imposed upon defendant in error must be determined from the regulation itself. The demurrer admits the existence of the regulation, not the pleader's opinion or legal conclusion of its effect. It simply made it the duty of defendant in error to deliver the mail sack at the post office. There is no allegation that the mail sack was not delivered at the post office, but that, after it was delivered to Magson, some person unknown to the pleader opened the mail sack, and abstracted the package of money in controversy. We know nothing about the facts connected with the loss of the money except what is alleged in the complaint, and in the discussion of the case we of course disclaim any intention of reflecting on the character of any one. The allegations of the complaint are entirely consistent with the theory that Magson stole the money. If so, in the absence of any allegation of negligence of defendant in error in employing him, there is no evidence of negligence that would charge the defendant in error, as all the precautions that it is alleged would have prevented the theft would not have prevailed against Magson, for by the act of the postal clerk and defendant in error the custody of the mail sack was delivered to him. Mere proof that the package of money was stolen, no matter by whom, creates no liability against defendant in error, unless its own negligence was the direct cause of the larceny, as contradistinguished from the negligence of its agent at Harvey. We are not informed by the record as to what was done with the mail sack after Magson deposited the same in defendant in error's depot, or what became of it afterwards. We are satisfied, however, that, if the negligence of any one directly contributed to the larceny, it was the negligence of Magson, for whose negligence in the matter of carrying the mail the defendant in error is not liable.

The judgment below must be affirmed, and it is so ordered.

KERR v. MILWAUKEE MECHANICS' INS. CO.

(Circuit Court of Appeals, Eighth Circuit. August 25, 1902.)

No. 1,706.

1. FIRE INSURANCE—ACTION ON POLICY—ESTOPPEL.

In an action on a fire insurance policy defendant is not estopped, by a notice given plaintiff denying liability on the ground that the property was not in existence when the policy was delivered, from proving that a prior policy of another company covering the same property, which was to be replaced by defendant's policy, had not been canceled when the property was burned; the two defenses being entirely consistent.

2. SAME—SUBSTITUTION OF POLICIES BY AGENT—DELIVERY AFTER DESTRUCTION OF PROPERTY.

An insurance agent wrote a policy in a company represented by him, which he intended to substitute for a subsisting policy in another company, which had demanded an increased premium, but had taken no steps to cancel its policy. The agent marked the first policy "Canceled" in his books, and transferred the credit for the premium paid, but the second policy was not delivered, nor was the intended substitution known to the insured (who still held the first policy), nor to either company, until after the property had been destroyed by fire. *Held*, that the first

policy remained in force, and liability thereunder became fixed by the destruction of the property, and that the second policy did not become effective as a valid contract of insurance by its subsequent delivery by the agent.

In Error to the Circuit Court of the United States for the District of Nebraska.

The plaintiff in error (plaintiff below) was the owner of a frame, steam-power grain elevator and fixtures of the value of more than \$4,000, situate on a railroad right of way at Western, Neb., which he had leased to the firm of Rundberg & McCann at a monthly rental, and an agreement on the part of the lessees to keep the property insured in plaintiff's name, and for his benefit, against loss and damage by fire. In November, 1899, said lessees procured the property to be so insured for and in the name of the plaintiff for one year, for the sum of \$4,000, by a policy of insurance of the Hanover Fire Insurance Company of New York, issued by U. S. Rohrer, who was then the recording agent at Hastings, Neb., of that insurance company, and also of the other insurance companies hereinafter mentioned. Said lessees paid the premium for such insurance, and the policy was delivered to and accepted and kept by the plaintiff. On the expiration of that policy in November, 1900, said property was again, at the request of said lessees, insured for another term of one year in the same sum of \$4,000 by a policy in the Phenix Insurance Company of Brooklyn, issued by said Rohrer, as its agent, on the payment therefor by said lessees of a premium of \$80, being 2 per cent. of the amount of the insurance. Said policy was also issued in the name of the plaintiff, and delivered to and kept by him. Afterwards, on December 8, 1900, Mr. Coryel, the state agent in Nebraska of said Phenix Insurance Company, conferred with said Rohrer and with Mr. McCann, one of said lessees, and informed them that, unless the rate of the premium for insurance upon said policy of the Phenix Insurance Company was increased to 2½ per cent., and a "query sheet" furnished, such policy would be canceled. No definite agreement was reached in respect to this matter, other than may be inferred from the following testimony of Mr. McCann, who was a witness for plaintiff: "Q. You had a talk with Mr. Coryel, the general agent of the Phenix Insurance Company, along about the 8th day of December, 1900, did not you, Mr. McCann? A. Yes, sir. Q. And at that time he told you that the Phenix policy could stand at 2½ per cent., subject to your furnishing some sort of a query sheet, didn't he? A. I am not positive about the exact words, but he told me the rate would have to be raised. He says, 'I have raised Mr. Ferguson's,' and I think 2½ is the rate he agreed to let it stand at, provided we furnished the query slip. Q. Did they ever furnish you that query sheet? A. I think not. We were to furnish it. They never furnished me the blank to fill out. They were out of them at the time, and Mr. Coryel agreed to send them to Mr. Rohrer, and he was to send them to me. Q. And the policy was to stand, Mr. Coryel told you, until they should send you the query sheet, or in substance that? A. As far as they were concerned." On Monday, December 10, 1900, McCann came to Rohrer, and asked if he could not place the insurance in some other company at the rate at which it had been written, and save him from paying the increased premium, and was told by Rohrer that the Milwaukee Mechanics' Insurance Company had shown him some favors, and possibly might be got to carry the risk at the old rate. McCann then told Rohrer that he wished Rohrer would make an effort to place the insurance in that company, "or somewhere," if possible, to save him the increased premium. Nothing more was done about the matter by any one until Wednesday, December 12, 1900, when, without notice to anybody, Rohrer caused his office assistant to prepare and fill out the policy of defendant company on which this action is brought, and Rohrer countersigned the same as defendant's agent, and placed it in his safe, with the intention of afterwards delivering it to plaintiff on the surrender to him by plaintiff of said policy of the Phenix Insurance Company. On Saturday, December 15, 1900, Rohrer, by letter, reported to defendant company the making of its policy, which letter was received on December

17, 1900, when defendant at once telegraphed to Rohrer to cancel the policy. Other facts are concisely stated in the testimony of Rohrer, a witness for the plaintiff, as follows: "Q. After the policy was written, what did you do about the premiums? A. Well, in the course of business, of course, the premiums were transferred from one company to another on my books. The Milwaukee Company was credited with the \$80 premium, and the Phenix was charged with it. Q. You had that money in your own hands at that time? A. The money had been paid to me in November. Q. And still remained with you? A. Yes, sir. Q. Now, what did you do with the Phenix Insurance Company's policy? A. I did not do anything. Sunday morning, the 16th of December, 1900, while I was in my office, Mr. McCann came in, and said: 'We have had bad luck,' and I said 'Why?' He said that the elevator at Western had burned that morning. I said, 'Is that so?' And he asked me, 'Did you make that change?' And I said, 'Yes'; that I had written the business in the Milwaukee Mechanics', but I said, 'I still have the policy in my possession; I have never delivered it.' I questioned him in regard to the fire, and found that he knew merely that there was a fire; had been a fire or was a fire; didn't know the particulars or circumstances. So I waited until Monday morning—the following morning—to learn more particulars about it before sending in any advices; and Monday morning I advised the Milwaukee Mechanics' of the loss,—both the Milwaukee office and Mr. Freeman at Omaha. When the bank opened in the morning, I took the Milwaukee Mechanics' policy down to the bank, and told Mr. Kerr that it had become necessary to take up the Western policy again, and replace it with a new one, and he took the policy, and handed it to Mr. Schrek, and told him to get me the other policy. Then I turned to Mr. Kerr. I was astonished that he didn't say something about the fire, and I said to him, 'Have you heard the news?' He said, 'No, I hadn't heard any news.' I said, 'The elevator at Western had burned.' He said, 'Is that so,' and he then said,—I do not know whether I can give his exact words or not, but something to this effect: 'How about this?' or something about 'Hadn't I better keep this policy?' Mr. Schrek was standing there at the time, with both policies in his hands, and I said, 'I do not know.' This Milwaukee Mechanics' policy had been written by me on Wednesday, to take up the Phenix policy, so he directed Mr. Schrek to give me the Phenix policy, and I took it to my office, and put it in the safe." Mr. Rohrer also gave the following testimony on his cross-examination: "Q. Now, at the time of the writing of the policy in suit, which you say was on the 12th, it was written by your clerk and countersigned by you on that date? A. Yes. Q. It was then placed in your safe? A. Yes. Q. Did you at that time notify Mr. Kerr of the writing of this policy? A. No, sir. Q. Had he ever said anything to you about the writing of the policy in the Milwaukee Mechanics' Company? A. No, sir. Q. Had you ever had any conversation with him at that time in which you informed him of any cancellation on your records of the Phenix policy then held by him? A. No, sir. Q. Did you at that time, or prior to the 16th day of December, notify McCann or Rundberg & McCann of having written policy in the Milwaukee company? A. No, sir. Q. Did you at any time prior to the 16th of December, after McCann had informed you of the fire, notify Mr. McCann or Rundberg & McCann that you had written upon your policy register a cancellation of the Phenix policy? A. No, sir. Q. Did Mr. McCann, or Rundberg, or Mr. Kerr, or any of them, ever tell you to cancel the Phenix policy prior to the time when you delivered the Milwaukee policy to Mr. Kerr at the bank on the morning of the 17th of December? A. No, sir. Q. What was the form of the Phenix policy? Was it the usual standard New York form? A. Yes. Q. And was it substantially the same as the policy in suit? A. I think it was identical in form outside of the officers, and everything like that, and the title of the policy. Q. At the time on the 17th of December, or prior to that time, had you received any instructions from the Phenix Insurance Company of Brooklyn, or any of its authorized agents, instructing you to cancel the Phenix policy, after the conversation you have related between Mr. McCann and Mr. Coryel? A. No, sir. Q. Now, when Mr. McCann came to your office, Monday, the 10th of December, did he direct you to write any policy in the Milwaukee Me-

chanics' Company? A. No, not in words, he didn't. Q. Did you at that time agree with him, or say to him, that you would write a policy in the Milwaukee Mechanics' Company? A. No, sir; I do not think I did." There was no contradictory testimony in the case. To the plaintiff's petition seeking to recover on said policy of defendant company the defendant answered, alleging that such policy was written at its date by defendant's agent at Hastings, Neb., with the intention of offering the same to plaintiff in exchange for the surrender of an outstanding policy of insurance of the Phenix Insurance Company of Brooklyn, which continued in force when the property was burned, and that defendant's policy was not so exchanged or delivered to plaintiff until after the property had been destroyed; and never became effective. At the close of the testimony the jury, by direction of the court, returned their verdict in favor of defendant, and judgment was rendered accordingly.

John M. Ragan (J. B. Cessna, on the brief), for plaintiff in error.

C. C. Wright (John F. Stout, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. Defendant was not estopped by its notice to plaintiff, in which it denied liability on the ground that the property described in its policy was not in existence when such policy was delivered, from proving that the policy of the Phenix Insurance Company covering the same property had not been canceled when the property was burned. These matters are so far from being inconsistent that proof of the one almost necessarily proves the other, and no element of an equitable estoppel is even suggested.

2. In this case there is no claim that there was, prior to the execution of the written policy of the defendant company, and its delivery to and acceptance by the plaintiff, any verbal agreement on behalf of that company to insure the property, which might make the contract of insurance take effect before the delivery of the written policy, and render that writing only the better evidence of the terms of the contract which the parties had agreed on. *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 277. If, therefore, at the close of the testimony, it clearly appeared that the written policy of the defendant company had not, at the time of the burning of the elevator, become, by delivery and acceptance, a completely binding contract, then the defendant company never incurred any liability as insurer, and the court's direction to the jury was proper; otherwise it was not. As all the evidence shows that the policy of the defendant company was not intended as a new or additional insurance of the property, independent of other existing insurance, but was intended only to take effect upon the surrender for cancellation of the outstanding policy of the Phenix Insurance Company, which policy it was to replace and become substituted for, it becomes important to consider the status of the Phenix Company's policy at the time of the fire, as it is certain that the two policies were not in force at the same time. The policy of the Phenix Company was issued in November, 1900, insuring this elevator property for one year. It is admitted that it was valid and binding. It could

only terminate "by the expiration of the risk, by the agreement of the parties, or by some means provided by the contract." *Massasoit Steam Mills v. Western Assur. Co.*, 125 Mass. 110, 114. It did not terminate by lapse of time, as it had about 11 months to run at the time of the fire. It was not terminated by the means provided by the contract, which was by giving five days' notice of cancellation and returning the unearned portion of the premium. This notice of cancellation and return of premium must be to the insured, and not to the agent who procured the insurance, and whose authority is executed and exhausted by the procurement of the insurance. *Insurance Co. v. Nill*, 114 Pa. 248, 6 Atl. 43. But though the state agent, Coryel, expressed a purpose to cancel the policy of the Phenix Company unless a higher premium was paid and query sheet furnished, he took no steps toward such cancellation; and his conference with McCann ended with the expectation, at least on his part, that the policy of the Phenix Company would be continued by McCann's compliance with his demands. Two days later the conversation between Rohrer and McCann shows that the latter still expected to pay the additional premium and retain the Phenix Company's policy, unless Rohrer should succeed in inducing the defendant or some other company to consent to assume and carry the risk at the old rate. Up to the end of this conference between Rohrer and McCann on December 10, 1900, there was certainly no termination of the policy of the Phenix Company by any agreement of the parties, nor any insurance, or agreement to insure, on the part of the defendant company. The plaintiff, who was insured by the Phenix Company's policy, which he had in his bank, and without whose consent it could not be surrendered nor invalidated except by the five-days notice of cancellation and return of unearned premium, had no notice or information that its cancellation or replacement by other insurance was even being considered by anyone.

From that time until after the destruction of the elevator property by fire on December 16, 1900, there was no agreement between the parties for the surrender or cancellation of the policy of the Phenix Company, nor for the insurance of the property by policy of the defendant company in substitution for the insurance by the Phenix Company. Nothing was done about the matter in the meantime except what was done by the insurance agent Rohrer alone, without conference with or direction from either the plaintiff, or the Phenix Company, or the defendant company. On December 12, 1900, he caused his clerk to fill out the policy in suit of defendant company, and countersigned it as agent of that company, and placed it in his safe. On September 15th he advised defendant company by letter of the making of this policy, and was promptly, by telegraph, directed to cancel it. He did not deliver it to plaintiff, nor seek to take up the policy of the Phenix Company, until one day after the property was destroyed by fire. The claim of the plaintiff now is that, when defendant's policy was written and countersigned, and the agent of the insurance company noted on his books a transfer of the premium, and that the Phenix Company's policy was canceled, the last-named policy thereby became canceled and terminated, and the policy of

defendant company in force, and held by Rohrer as plaintiff's agent. Many cases hold that an agent of fire insurance companies to issue their policies may also be constituted by the insured his agent to receive the policies, and to keep and care for them, with plenary power to keep the property insured in accordance with general directions of the insured, and attend to all renewal, cancellation, and replacement of insurance, without consulting the assured in respect to particular policies or other details. *Hamm Realty Co. v. New Hampshire Fire Ins. Co.*, 80 Minn. 139, 83 N. W. 41; *Dibble v. Assurance Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470; *Buick v. Insurance Co.*, 103 Mich. 75, 61 N. W. 337. In those cases such had been the course of dealing between the insured and the agent for a term of years. Here no such authority is shown; nor was there any course of dealing shown from which such unusual authority can be presumed; and the conversation between plaintiff and Rohrer when the policies were exchanged after the fire shows that no thought of the existence of any such authority was in the mind of either. *Rundberg & McCann* were bound to keep the property insured and pay the premiums. They procured the insurance through Rohrer, but it had to be to the satisfaction of the plaintiff, the insured; and policies had been always delivered to and accepted and retained by him. He could refuse any policy offered that was not satisfactory to him. And when, in response to McCann's inquiry after the fire, as to whether any change had been made, Rohrer stated that he had written the business in the *Milwaukee Mechanics'*, his further statement, "I still have the policy in my possession; I have never delivered it," indicates strongly that at the moment he regarded the transaction as incomplete. "An agent of an insurance company has no authority to insure property already destroyed; and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered, and of which the assured has no knowledge until after the property is destroyed by fire, is not a valid contract of insurance." *Stebbins v. Insurance Co.*, 60 N. H. 65. To the same effect, see *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Insurance Co. v. McKenzie*, 70 Ill. App. 615; *Insurance Co. v. Turnbull*, 86 Ky. 230, 5 S. W. 542. These cases hold that the written but undelivered policy never matured into a contract for insurance, and that liability upon the subsisting policy which was intended to be replaced was fixed by the burning of the property while it was still in force. The acts of bookkeeping of Rohrer in marking cancellation on his office record of the Phenix Company's policy and transferring in his accounts the credit for premium from that company to the defendant company, all done in anticipation of his purposed delivery of defendant company's policy in replacement for the expected surrender of the policy of the Phenix Company, were futile, and affected no existing rights or liabilities. *Insurance Co. v. Turnbull*, 86 Ky. 230, 237, 5 S. W. 542; *Insurance Co. v. McKenzie*, 70 Ill. App. 615, 623. In the present case it clearly appeared that at the time of the burning of the elevator the policy of the Phenix Insurance Company was a valid contract of insurance, which had never been surrendered nor canceled; and that plaintiff, the insured, then held it as such.

The policy of the defendant company was then an undelivered writing, not yet a contract, and because of the destruction of the property while it was in that condition it never became a contract.

There was no error in directing the verdict for the defendant, and the judgment is affirmed.

In re NEVITT et al.

(Circuit Court of Appeals, Eighth Circuit. August 28, 1902.)

No. 29.

1. **HABEAS CORPUS—FUNCTION—CHALLENGE TO JURISDICTION—REVIEW OF ERRONEOUS RULINGS.**

The writ of habeas corpus challenges only the jurisdiction or power of the court to commit the prisoner, and it may not be invoked to review or avoid the erroneous rulings or judgment of a court of competent jurisdiction.

2. **COMPROMISES FAVORED BY THE LAW.**

It is the policy of the law to promote and sustain the compromise of disputed claims, and the fact that a judge advises the compromise of litigation pending before him does not disqualify him from deciding the questions it presents.

3. **CONTEMPTS—POWER TO PUNISH—FEDERAL COURTS—INHERENT CHARACTER.**

The power to punish for contempt and disobedience of their judgments, orders, writs, and processes is an attribute of the federal courts, as inherent and indispensable as judges. It was vested in them, the moment they came into existence, by the grant to them of all the judicial power of the nation by section 1, art. 3, of the constitution.

4. **CONTEMPTS—CLASSES.**

Proceedings for contempts are of two classes,—criminal or punitive, and civil, remedial, or coercive. The former are conducted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders. The latter are instituted to protect, preserve, and enforce the rights of private parties, and to compel obedience of the orders, judgments, and decrees of the courts made to enforce the rights and remedies to which the courts have decided that such parties are lawfully entitled.

5. **CIVIL CONTEMPT—REFUSAL TO LEVY TAX TO PAY JUDGMENT.**

The commitment of the judges of a county court to prison until they comply with a mandamus which directs them to levy a tax to pay a judgment against their county is not criminal, but is civil, remedial, and coercive in its nature, because it is of the character of an execution to collect the judgment, enforce the rights, and administer the remedies of the plaintiff in the suit.

6. **CIVIL CONTEMPT—PRESIDENT HAS NO POWER TO PARDON.**

Proceedings to compel by fine or imprisonment obedience to such a mandamus, or to coerce obedience to an order of a court made in a civil suit to enforce the rights or administer the remedies to which a court of competent jurisdiction decides that a party to the suit is entitled, are not executions of the criminal laws of the land, but proceedings to secure suitors their legal rights, and the president is without authority, under the grant to him of power to issue reprieves and pardons for offenses against the United States, to relieve from imprisonment to enforce obedience to, or to pardon for disobedience of, such a mandamus or order, because he may not release or destroy the legal rights or remedies of private citizens.

¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. §§ 24, 25, 81, 82.

7. CRIMINAL CONTEMPTS—POWER OF PRESIDENT TO PARDON.

Suggestions relative to this power, but no decision of the question of its existence.

8. CONTEMPTS—EACH COURT HAS EXCLUSIVE JURISDICTION OF ITS OWN.

Each court has exclusive jurisdiction of contempts of its authority, and of disobedience of its orders and processes, and no other court may lawfully admit to bail or relieve or discharge a prisoner fined or committed for disobedience of its orders, writs, or processes by a court which had jurisdiction to make the orders and to issue the commitment.

9. CIVIL CONTEMPTS—COURT WHICH COMMITS MAY MODIFY.

The court which commits or fines to enforce obedience to its orders, for the purpose of securing the rights of suitors, has plenary power to modify, suspend, or relieve from the fine or imprisonment, either in the original case or in a proper auxiliary proceeding.

(Syllabus by the Court.)

On Petitions for a Writ of Habeas Corpus.

George C. Worth, for petitioners.

Before SANBORN, Circuit Judge, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This case comes before the court upon the petition of two of the judges of the county court of St. Clair county, in the state of Missouri, and upon the petition of their counsel for the issue of the writ of habeas corpus to relieve these judges from an imprisonment which they are enduring until such time as they shall comply with a mandamus of the United States circuit court for the Western division of the Western district of Missouri, which directs these judges to levy a tax to make a partial payment upon a judgment which Joseph M. Douglas recovered against the county of St. Clair on February 9, 1894, and to make partial payments upon other judgments of like character based upon certain bonds of the county of St. Clair.

A writ of habeas corpus cannot be made to perform the office of a writ of error. It may not be invoked to review or avoid an erroneous judgment of a court of competent jurisdiction. It challenges the jurisdiction of the court alone, and is available only to relieve a prisoner from the restraint imposed by a judgment or order that is absolutely void on the ground that the court was without the power to make it. *In re Debs*, 158 U. S. 564, 600, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex parte Terry*, 128 U. S. 289, 305, 9 Sup. Ct. 77, 32 L. Ed. 405; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; *U. S. v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *Deming v. McClaghry*, 51 C. C. A. 349, 113 Fed. 639, 649; *In re Reese*, 47 C. C. A. 87, 107 Fed. 942, 948; *Ex parte Buskirk*, 72 Fed. 14, 21, 18 C. C. A. 410, 417, 25 U. S. App. 613, 615; *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Ex parte Fisk*, 113 U. S. 713, 718, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Dynes v. Hoover*, 20 How. 81, 83, 15 L. Ed. 838; *Ex parte Reed*, 100 U. S. 13, 23, 25 L. Ed. 538; *Ex parte*

Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Rose v. Roberts*, 99 Fed. 948, 40 C. C. A. 199. In view of this universal rule, the facts and the law which condition the merits of the controversy over the validity of the bonds which form the bases of the judgments against the county and the foundation of the mandamus and commitments to enforce those judgments are immaterial to the questions which these petitioners present, and it would be useless to recite or review them here. The curious will find a demonstration of the proposition that the circuit court could have rendered no other judgment in this case, and that it could not have done less than to issue the mandamus and the commitments without a defiant disregard of the settled law of the land and of the controlling decisions of the supreme court upon the questions before it in the cases of *In re Copenhagen* (C. C.) 54 Fed. 660; *Henry Co. v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *Scotland Co. v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Trust Co. v. Debolt*, 16 How. 416, 432, 14 L. Ed. 997; *Gelpcke v. City of Dubuque*, 1 Wall. 206, 17 L. Ed. 520; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *Bronson v. Kinzie*, 1 How. 317, 11 L. Ed. 143; *Louisiana v. City of New Orleans*, 102 U. S. 206, 26 L. Ed. 132; *Flagg v. City of Palmyra*, 33 Mo. 440; *Smith v. Clark Co.*, 54 Mo. 71-74; *Macon Co. Case*, 41 Mo. 453; *State v. Sullivan Co. Ct.*, 51 Mo. 522; and *State v. Greene Co.*, 54 Mo. 540.

The only question for our consideration, therefore, is whether or not the petitions state any facts which show, or tend to show, that the circuit court was without jurisdiction to render the judgments or to issue the mandamus or the commitments. The only judgment specified in the petition under which it is alleged that the mandamus issued is a judgment of Joseph M. Douglas against the county of St. Clair, rendered on February 9, 1894, and for the sake of brevity this will be the only judgment mentioned in the discussion of the questions presented in this case. It is not claimed that the court below did not have the general power to render this judgment and to issue the mandamus and the commitments thereunder, nor that the parties to the action or its subject-matter were without the jurisdiction of the circuit court. The only ground upon which it is asserted that the judgment, the mandamus, or the commitments are void is that the judge who presided in the circuit court was disqualified from acting as such when these proceedings were taken. It is conceded that the better rule, supported by the great weight of authority, is that the judgments and orders of courts composed of disqualified judges are void. *Deming v. McClaughry*, 51 C. C. A. 349, 113 Fed. 639, 651; *Case v. Hoffman*, 100 Wis. 314, 356, 75 N. W. 945, 44 L. R. A. 728; *Oakley v. Aspinwall*, 3 N. Y. 547, 552; *Low v. Rice*, 8 Johns. 409; *Clayton v. Per Dun*, 13 Johns. 218; *Edwards v. Russell*, 21 Wend. 63; *People v. Connor*, 142 N. Y. 130, 133, 36 N. E. 807; *Chambers v. Clearwater*, *40 N. Y. 310, 314; *Sigourney v. Sibley*, 21 Pick. 101, 106, 32 Am. Dec. 248; *Gay v. Minot*, 3 Cush. 352; *Hall v. Thayer*, 105 Mass. 219, 224, 7 Am. Rep. 513; *Railway Co. v. Summers*, 113 Ind. 10, 17, 14 N. E. 733, 3 Am. St. Rep. 616; *Ochus v. Sheldon*, 12 Fla. 138; *Chambers v. Hodges*, 23 Tex. 112;

Gains v. Barr, 60 Tex. 676, 678; Templeton v. Giddings (Tex. Sup.) 12 S. W. 851. But what constitutes disqualification? Generally speaking, the answer may be: Interest in the subject-matter of the litigation, relationship to one or more of the parties to it, and statutory prohibitions. For which of these causes do the averments of the petitions charge that the judge who tried this case was disqualified? The judgment in favor of Douglas was rendered in February, 1894. The mandamus and the commitments have issued since that date. The allegations of the petition are that before 1888, when he went on the bench of the federal court, and in the year 1860, one of the judges who presided when this judgment was rendered, and the judge who issued the mandamus and the commitments, was named in the act of the legislature of the state of Missouri as one of fourteen members of the board of directors of the railroad company to which the bonds were subsequently issued; that he qualified as such director; that he was active and instrumental in procuring the issue of the bonds, and in the business of the company, until 1870, when it transferred its franchises to another corporation; that he was one of the legal advisers of the parties to the bonds down to the year 1888; that he was for many years prior to that date counsel for the obligor in the bonds (54 Fed. 660, 662); that since he became a federal judge he has been engaged in a systematic effort to induce the parties to this litigation to compromise it; and that certain taxpayers of St. Clair county have brought a suit in equity in one of the courts of the state of Missouri against him and other parties, in which the only relief that they demand against him is that he answer certain questions and produce certain evidence. These are all the averments of the petition in support of the charge of disqualification.

It is customary, desirable, and proper for every member of the judiciary to be anxious and eager to escape the hearing and decision of every case in which he has either interest or bias, to avoid not only the evil of disqualification, but even the appearance of such evil. But there is nothing in the facts stated in these petitions that discloses a departure by the judge who conducted this case from this exacting rule of propriety, much less from the more liberal rule of the law. There is no allegation in these petitions that he ever at any time owned any of the bonds or any interest in them. There is no averment that at any time after the year 1888 he acted, or was in any way interested, as counsel, attorney, or otherwise, in any of the bonds, or in the success or failure of any of the parties to this litigation. There is no charge that he was ever the attorney, counsel, or adviser of either of the parties in the action of Douglas against the county of St. Clair, in which the proceedings here challenged were taken. Stripped of its verbiage, the averment of disqualification is that prior to 1870 this judge assisted the railroad company to procure the bonds, that prior to 1888 he assisted the county as one of its counsel in its attempt to defeat them in the courts, and that since he went on the bench he has endeavored to persuade the parties to the controversy to compromise the litigation. When the judgment was rendered and when the subsequent proceedings were taken he was not acting as a judge in his own cause, or in any cause in

which he then had or had ever had any interest, direct or indirect. He was not of kin to any of the parties. He was not the attorney or counsel of any of them, and he never had been the attorney or counsel of either of them in the action of Douglas against the county. A judge is not disqualified to hear and determine a lawsuit because in some other action between other parties, in which the same or similar questions of law or of fact were involved, he was of counsel for one of the litigants. If he were, the cases would be few in which a judge, who was an active practitioner before he ascended the bench, would not be disqualified, and the best qualification for judicial position would be idleness and ignorance. The judge who rendered this judgment and issued this mandamus and these commitments was not forbidden by any interest, by the policy of the law, or by any statute from deciding the questions which the cases presented and from issuing the writs to which the plaintiff was entitled. On the other hand, the acts of congress, his oath of office, the decisions of the supreme court to which we have adverted, and the law applicable to the case had imposed upon him the unavoidable duty to render the judgment and to issue the writs at the prayer of the plaintiff. There was nothing in his connection with the old railroad company prior to 1870, nothing in his relation with the county or the parties interested in the bonds prior to 1888, to excuse him from the discharge of this duty, and nothing in his discharge of it incompatible with the ideals of judicial integrity and propriety, while his earnest and systematic endeavors to effect a compromise of this controversy, bespeak for him emphatic commendation. The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation. *Railway Co. v. Wilcox*, 116 Fed. 913. The petitions disclose no disqualification of this judge, no lack of jurisdiction of the circuit court, and no invalidity in the judgment, the mandamus, or the commitments, and hence no ground for the issue of the writ of habeas corpus, or for the admission of the judges of the county court to bail. One who is legally committed for a disobedience of its orders by a court of competent jurisdiction cannot be lawfully discharged or admitted to bail by any other court, because each court has exclusive jurisdiction of its own contempts. *Brass Crosby's Case*, 3 Wils. 188, 198, 199, 204; *In re Debs*, 158 U. S. 564, 594, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Case of Yates*, 4 Johns. 345, 369, 370; *Yates v. Lansing*, 9 Johns. 396, 423, 6 Am. Dec. 290; *State v. Tipton*, 1 Blackf. 166; *Lockwood v. State*, 1 Ind. 161; *Ex parte Bradley*, 7 Wall. 364, 372, 19 L. Ed. 214; *Williamson's Case*, 26 Pa. 9, 15, 67 Am. Dec. 374.

The petition of the counsel for the judges of the county court of St. Clair county prays that the judge of the circuit court which rendered the judgment and issued the writ of mandamus and commitment may be enjoined from the further exercise of his judicial functions in this case on account of the alleged disqualification which has been considered. That prayer must be denied for the same reasons which have compelled the refusal to issue the writ of habeas corpus.

There is another phase of the petition of the counsel for these judges to which he has earnestly invoked our careful consideration. It is this: He alleges that he verily believes that the contempt of which these judges stand convicted is a "distinct and substantive offense against the United States," and that as such it falls clearly within the pardoning power of the president, and he prays that the proceedings may be stayed in the courts and that these judges may have leave to apply to the president for their release. He rests his claim to this relief upon the opinion and action of Judge Blatchford in the Case of Mullee (in the year 1869) 17 Fed. Cas. 968, 7 Blatchf. 23, and upon *Fischer v. Hayes* (C. C.) 6 Fed. 63. In that case Mullee had been fined in the sum of \$2,500, to be paid to the plaintiffs in the suit, for a willful and persistent disobedience of the order and injunction of the court, and had been committed until the fine should be paid. After he had been imprisoned for some time he applied to Judge Blatchford for his discharge on the ground that he was unable to pay the fine, and the judge held that the circuit court had no jurisdiction to relieve him from it, because the order committing him was criminal, and not civil, in its nature, and because his only remedy was an application to the president for his pardon under article 2, § 2, subd. 1, of the constitution, which invests the executive with power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." In *Hayes v. Fischer*, 102 U. S. 121, 26 L. Ed. 95, a writ of error to review a similar order of commitment of another defendant for a like disobedience in the same case, the supreme court expressed a significant doubt whether the order and injunction were not mere interlocutory directions in a civil suit. Mullee applied to the president for his pardon, and his petition was denied. Thereupon Judge Blatchford abandoned his theory that a commitment for a failure to obey the order of a court to pay money or to do any other act to which the court has adjudged the opposite party in the suit entitled was a criminal, and not a civil, proceeding, and admitted the defendant to bail, an act which he could not have done if the order of commitment had been criminal in its nature. *Fischer v. Hayes* (C. C.) 7 Fed. 96; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 811. Since that day there seems to have been no substantial dissent from the rule and practice that an order committing a defendant for contempt in refusing to pay a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the remedies of a party to the action is civil and remedial, and not criminal, in its nature; that it does not fall within the pardoning power of the president, because it is not an execution of the criminal laws of the land; and that it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court alone, either in the original case or in an appropriate auxiliary proceeding. *City of New Orleans v. New York S. S. Co.*, 20 Wall. 387, 392, 393, 22 L. Ed. 354; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *In re Debs*, 158 U. S. 564, 596, 599, 15 Sup. Ct. 900, 39 L. Ed. 1092. In the last case Mr. Justice Brewer, expressing the unanimous opinion of the supreme court, said:

"In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

It is difficult to perceive how any other conclusion can be reached. The petition of the judges of St. Clair county avers that "both of your petitioners are now in prison because they declined to levy a tax in partial payment of said judgment (the judgment of Douglas against the county of St. Clair) and other like judgments." They are then in prison for the purpose of coercing them to comply with a lawful order of the court made in a civil action to enforce the legal right of the plaintiff. A court of competent jurisdiction has decided that Joseph M. Douglas is entitled to recover the amount specified in his judgment from the county of St. Clair. He is entitled to an execution to collect this judgment. The writ of mandamus directed to the members of the county court of that county is the legal substitute for the writ of execution upon judgments against private parties. *Lafayette Co. v. Wonderly*, 92 Fed. 313, 316, 34 C. C. A. 360, 363; *Dempsey v. Oswego Tp.*, 51 Fed. 97, 99, 2 C. C. A. 110, 112. The plaintiff in this judgment has the same legal right to the issue and enforcement of that mandamus that he would have to the issue and levy of a writ of execution on a judgment in his favor against a private individual. That mandamus has been issued, but the members of the county court refuse to obey it. This mandamus is the plaintiff's only remedy. He has the legal right to its execution, to the levy of the taxes it commands, and to the exercise of all the power of the court which issued it to compel its execution. He has invoked that power, and the court has committed the judges of the county court to the jail until they comply with its order for the purpose of securing to the plaintiff, Douglas, the right to which it has adjudged him entitled. Can it be that there is any appeal from the decision of a federal court in a civil action upon the rights of the parties to it, or from the lawful orders it makes to secure those rights to the executive department of the national government? May the president review and reverse or modify the decisions or orders of a court of competent jurisdiction, made in a civil action, to secure or enforce the rights or the legal remedies of the private parties to the suits before it? If, in an action for specific performance, a court orders a defendant to surrender title deeds in his possession, and commits him until he does so, may the executive review the case, relieve the defendant from imprisonment, and thus reverse the effect of the decision of the court, and practically hold that the plaintiff is entitled to no relief? If a defendant in equity or a bankrupt is found to have trust funds in his possession, and is ordered by a court of competent jurisdiction to pay them over to the cestui que trust, and committed until he does so, may the executive department relieve from this commitment, and thus make the order and decree of the court as "idle as a painted ship upon a painted ocean"? If a defendant in a suit in equity is fined for the benefit of the plaintiff, or is imprisoned to coerce him to obey an injunction, may the president relieve from the fine or imprisonment, and thus render the decision and order of the court nugatory, and the complainant remediless? The plaintiff

in this case has a right to the recovery of the amount of his judgment from the county of St. Clair. He has but one remedy to enforce that right,—the compulsory power of the court to enforce obedience to its mandamus. The court whose duty it was to consider and determine this question has decided that he is lawfully entitled to this remedy. May the president review that decision, and relieve the petitioners from the coercive power of the court, and thus deprive the plaintiff of his legal remedy and render his judgment nugatory? These questions seem to us susceptible of but one true answer.

The power of the national courts to enforce obedience, and to punish disobedience, of their orders, is not derived from the acts of congress (Rev. St. § 725), but from the grant to them of all the judicial power of the nation by section 1 of article 3 of the constitution, which declares that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." The grant of the judicial power of the United States to these courts *ex vi termini* vested them with authority to enforce obedience to their orders and to punish disobedience and contempt of their authority by fine and imprisonment, because this authority is an attribute of judicial power as inherent and indispensable as a judge. "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Ex parte Robinson*, 19 Wall. 505, 506, 22 L. Ed. 205. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land within the meaning of Magna Charta and of the twelfth article of our declaration of rights." *Cartwright's Case*, 114 Mass. 230, 238. "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record and co-existing with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recalcitrant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it." *Watson v. Williams*, 36 Miss. 331, 341. "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to

deprive the proceeding of half its efficiency." In re Debs, 158 U. S. 594, 15 Sup. Ct. 900, 39 L. Ed. 1092.

The fact that the circuit courts were created by act of congress, and that the act of March 2, 1831, prescribed the classes of cases in which they may punish for contempt (Rev. St. § 725), is not overlooked, nor is it material to the discussion in this case, because the contempt here under consideration falls far within the last class mentioned in the act of congress, and the power of the court below to compel obedience to its lawful orders and to punish their disobedience by any party to a suit within it was as inherent, essential, and plenary as is that power in the supreme court of the United States. In this state of the law and of the constitutional grant, how can it be said that the question whether obedience to the orders and decrees of the judicial department of the government, made to enforce the rights of litigants before it, is determinable by the decision or subject to the discretion of the executive department? The constitution granted this power to compel obedience to their injunctions, orders, and processes to the federal courts, when it granted to them all the judicial power of the nation. This power is essential to their existence as judicial tribunals. Without it they would be without the means to enforce their orders, without the means to protect themselves against the defiance and the assaults of the reckless and the criminal, without respect, without dignity, and without usefulness.

The contention of counsel for the petitioners and the authorities to which he calls our attention suggest a very interesting question, the answer to which is not essential to the decision of this application,—the question whether or not the president has the power to pardon those committed or fined for criminal contempts; those fined or imprisoned to vindicate the dignity and to preserve the power of the court, or to punish the disobedience of its direction, as distinguished from those fined and imprisoned for civil contempts, as in the case before us; those fined or imprisoned for the purpose of protecting or enforcing the private rights and remedies of parties to civil suits. If the president has the power to pardon those who are committed for criminal contempts of the authority of the courts, and thus to relieve them from fines or imprisonments inflicted to punish them for their disobedience, this immemorial attribute of judicial power is thus practically withdrawn from the courts and transferred to the executive; for he may pardon whom he will, and he would have the power to so exercise this authority as to deprive the courts of all means to punish for disobedience of their orders. Is there any provision of the constitution of the United States which grants this inherent and essential attribute of judicial power, or the authority to control its exercise, to the executive? Congress has undoubted authority to punish recalcitrant witnesses for contempt of its authority. The offenses of such witnesses are as much offenses against the United States as the offenses of witnesses, jurors, or parties who disobey the orders, writs, or processes of the courts. May the president pardon such witnesses who are committed for the purpose of punishing them for the disobedience of such orders and processes, and thus deprive congress and the courts of the ability to punish for

disobedience of their lawful orders and processes? If a court fines or imprisons a juror because he refuses to obey its mandate when summoned, or because he refuses to act when he appears, may the president immediately pardon him, and thus relieve him from all punishment for disobedience of the order of the court? May he pardon all jurors for all disobedience of the mandates of the courts, and thus practically deprive the courts of the power to summon jurors? If riotous persons are fined or imprisoned for disturbing, defying, and preventing the proceedings of a court, may the president pardon them, and thus deprive the court of the power to continue its sessions and to discharge its functions? In other words, has the executive the power, if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which the constitution vested in express terms in the courts, by means of his supreme control of the inherent and essential attribute of that power,—the authority to punish for disobedience of the orders of the courts? These questions seem to suggest their answers. In *re Chadwick* (Mich.) 67 N. W. 1071, 1075, 1076; *Taylor v. Goodrich* (Tex. Civ. App.) 40 S. W. 515, 523. No authoritative decision of any court, excepting only the opinion of Judge Blatchford in *Re Mullee*, which was, as we have shown, subsequently abandoned, has been called to our attention which answers any of these questions in the affirmative. There is an opinion of Attorney General Gilpin, in 3 Op. Attys. Gen., at page 622, that the president has power to relieve a person of a fine of \$400 imposed upon him for an affray in the presence of the court, and an opinion of Attorney General Mason in 4 Op. Attys. Gen., at page 458, that the president may pardon defaulting jurors of fines imposed for a failure to obey the process of the court. But these opinions are neither controlling nor persuasive, because they contain no discussion and give no consideration to the controlling fact which must in the end condition and determine the decision of these questions, the fact that the judicial power of the United States is not derived from the king, as it was in England, or from the president, but is granted by the people by means of the constitution, in its entirety, including the inherent and indispensable attribute of that power, the authority to punish for disobedience of their orders, to the federal courts, free from the control or supervision of the executive department of the government, to the same extent that the entire executive power of the nation is vested in the president, free from the supervision or control of the courts. Const. art. 2, § 1; Id. art. 3, § 1.

The argument that punishment for contempt of court falls within the power of the president to grant pardons for offenses against the United States because the supreme court said in *Ex parte Kearney*, 7 Wheat. 38, 43, 5 L. Ed. 391, a case in which a writ of habeas corpus to relieve a petitioner from punishment for disobeying the order of an inferior court was denied, that the proceeding to punish for that contempt was a criminal case, and in *City of New Orleans v. New York S. S. Co.*, 20 Wall. 387, 392, 22 L. Ed. 354, an appeal from a decree for an injunction, for damages, and for the imposition of a fine for disobedience of a preliminary injunction, that the imposition of the fine was a judgment in a criminal case and without its juris-

diction, is neither cogent nor convincing, for the reason that neither the questions which have been suggested here nor the constitution and the acts of congress which condition their determination were there presented, argued, or considered. For the same reason expressions of the lower courts of like character, made in their deliberation upon and decision of other issues, as in *U. S. v. Atchison, T. & S. F. Ry. Co.* (C. C.) 16 Fed. 853; *U. S. v. Berry* (C. C.) 24 Fed. 780, 781; *In re Ellerbe* (C. C.) 13 Fed. 532; *Kirk v. Manufacturing Co.* (C. C.) 26 Fed. 501, 505; *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374; *Searls v. Worden* (C. C.) 13 Fed. 717; and *Ex parte Gould*, 99 Cal. 362, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57,—are entitled to little, if any, consideration in the determination of these questions. It is not, however, necessary to a decision of the application before us, nor is it our purpose, to here decide whether or not criminal contempts, contempts instituted solely for the purpose of vindicating the dignity of the courts, preserving their power, and punishing disobedience of their orders, fall within the pardoning power of the executive. That question has been presented and pressed upon our consideration by the argument and the authorities of counsel for the petitioners, and it has been adverted to, and some of the considerations which in our opinion must control its ultimate decision have been suggested, that it might be clear that in what is said in this opinion this court neither intimates nor decides that there is or ought to be any authoritative decision that the executive department of the government has been vested with any such power.

The decision of this application rests upon another and upon an impregnable position. This is not a criminal, but a civil, contempt,—a proceeding instituted for the purpose of protecting and enforcing the private rights and administering the legal remedies of the judgment plaintiff, Douglas; and whatever the authority of the president may be to pardon for a criminal contempt, he is, upon principle and upon authority, without the power to relieve from either fine or imprisonment imposed in proceedings for contempts of this character. He has no more power to deprive private citizens of their lawful rights or legal remedies without compensation than have the courts or the congress.

Proceedings for contempts are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson v. Railroad Co.*, 48 N. J. Eq. 105, 108, 21 Atl. 182; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652; *People v. Court of Oyer & Terminer*, 101 N. Y. 245, 247, 4 N. E. 259,

54 Am. Rep. 691; *Phillips v. Welch*, 11 Nev. 187, 190; *State v. Knight*, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; *People v. McKane*, 78 Hun, 154, 160, 28 N. Y. Supp. 981, 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law, 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings. This is the nature of the case under consideration. These petitioners are imprisoned until they comply with the order of the court that they levy the tax to pay in part the judgment of the plaintiff, Douglas, against this county. This plaintiff has the legal right to the enforcement of this order by the coercive power of the court. The power of the president to grant reprieves and pardons of offenses against the United States does not extend to him the authority to release or destroy the civil rights of private individuals, and hence cannot authorize him to deprive this plaintiff of his legal right to the enforcement of his mandamus by the commitment of the prisoners until they comply with the lawful order of the court. 13 Peters. Abr. p. 78; 3 Co. Inst. c. 105, pp. 236, 238; 4 Bl. Comm. 285; *Jones v. Shore's Ex'rs*, 1 Wheat. 471, 474, 4 L. Ed. 136; *Van Ness v. Buel*, 4 Wheat. 74, 4 L. Ed. 516; *U. S. v. Lancaster*, 4 Wash. C. C. 66, 26 Fed. Cas. 859; 5 Op. Attys. Gen. 532, 542.

Petersdorf in his Abridgment (volume 13, at page 78) says:

"The king's pardon cannot be considered a legal discharge of an attachment for nonpayment of costs or nonperformance of an award; for, though such attachment be carried on in the shape of criminal process for a contempt of court, yet it is in effect and substantially a civil remedy or execution for a private remedy."

Blackstone, in reciting the various contempts punishable by the courts, says:

"(6) Those committed by parties to any suit, or proceeding before the court, as by disobedience to any rule or order made in the progress of a cause, by nonpayment of costs awarded by the court upon a motion, or by nonobservance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such arbitration. Indeed the attachment for most of this species of contempts, and especially for nonpayment of costs and nonperformance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court; and therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon." 4 Bl. Comm. 285.

In *Jones v. Shore's Ex'rs*, 1 Wheat. 462, 4 L. Ed. 136, in *U. S. v. Lancaster*, 4 Wash. C. C. 66, 26 Fed. Cas. 859, and in 5 Op. Attys. Gen. 532, it was held that the president had no authority under his pardoning power to release that portion of fines or penalties for violations of law which inured to the benefit of private indi-

viduals. And how can this be otherwise? A pardon is a grant, a deed. But a deed does not and cannot convey that which the grantor has never had. If it were conceded that the president by his pardon could grant to the petitioners all the right and interest of the United States in these proceedings for contempt, that grant would avail nothing here. The right to the enforcement of this mandamus by these proceedings for contempt is not vested in the United States, or in the president, and therefore they cannot grant or release it. It is vested in the plaintiff in this judgment, Joseph M. Douglas. It is the right to the only execution, the only remedy, which the law vouchsafes to him for the collection of his judgment, and no department of the government, executive, legislative, or judicial, can lawfully take, release, or destroy it without paying or securing to him just compensation for his property; for this is his private property.

The questions which these petitions present involve the liberty of the citizen and go to the very foundation of civil government; for justice is the end of all government, and if the courts which are instituted to determine what justice is between man and man may not enforce the private rights to which they find the litigants before them entitled, the great purpose of government will be unattained and our republican system will prove to be a lamentable failure. Time, patience, and deliberation have not been spared in the examination and consideration of these questions and in a faithful endeavor to reach their just and true solution. There are prayers of the petitioners which have not been recited in this opinion, but the conclusions which have been reached upon those to which reference has been made are decisive of every question which the petitions present, and it would be useless to extend an opinion already too long by farther recitals.

The conclusion is that the proceedings for contempt under which the petitioners are held imprisoned until they comply with the mandamus of the court, which directs them to levy taxes to partially pay the judgments of Joseph M. Douglas and others against their county, is not criminal in its nature, but is civil, remedial, and coercive, instituted and maintained for the purpose of enforcing the private rights of these judgment creditors to the collection of their judgments; that the petitioners are enduring imprisonment under a lawful commitment of a court of competent jurisdiction for a failure to obey a legal order which that court had jurisdiction to make; that the president has no power to relieve them from a compliance with that order, or to release them from the commitment issued to coerce them to obey it, because he may not deprive a private citizen of his legal rights and remedies; that this court has no power to review or modify, by means of the writ of habeas corpus, the action of the circuit court, which had plenary jurisdiction of these parties and of the subject-matter; that the circuit court which issued the commitment is the sole judge of, and has exclusive control over, charges for contempts and disobedience of its orders, subject only to reviews by appeals and writs of error prescribed by the acts of congress; and that the circuit court, whose orders the judges of the

county court are disobeying, has ample power to grant to them any relief to which they are or may become entitled under the laws of the land and in view of the rights of the other parties to this litigation. *City of New Orleans v. New York S. S. Co.*, 20 Wall. 387, 393, 22 L. Ed. 354; *In re Debs*, 158 U. S. 564, 566, 599, 15 Sup. Ct. 900, 39 L. Ed. 1092. The result is that the prayers of the judges of the county court of St. Clair county must be denied. But they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets. Governments are founded to administer justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised. The court whose duty it was to hear and determine this case was left no alternative, under the controlling decisions of the supreme court, but to render the judgment and to issue the mandamus which these judges are disobeying, when the plaintiffs in these judgments prayed for that action, because under the law and under those decisions these plaintiffs had the legal right to that relief. It was the duty of the circuit court, and not that of these county judges, to determine whether or not they should levy this tax for the collection of these judgments, and the responsibility for that levy rests upon that court or upon the supreme court of the United States, whose decisions rendered its action imperative, and not upon the judges of this county court. Their duty as citizens and officers will be discharged when they comply with the mandate of the circuit court. Good citizenship demands the subordination of all our wills and acts to the judgments and orders of the courts which we have established to determine and enforce the rights of all our citizens, even though our private judgment does not always coincide with that of the courts which determine our rights and administer our remedies. The remarks of Judge Black in considering the commitment of Passmore Williamson for an indefinite time for a failure to obey the order of a court are not inapplicable to the situation in the case in hand. He said:

"But it is not illegal, nor contrary to the usual rule in such cases. It means commitment until the party shall make proper submission. 3 L. Raym. 1108; 4 Johns. 375. The law will not bargain with anybody to let its courts be defied for a specific term of imprisonment. There are many persons who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory. The petitioner, therefore, carries the key of his prison in his own pocket. He can come out, when he will, by making terms with the court that sent him there. But if he chooses to struggle for a triumph,—if nothing will content him but a clean victory or a clean defeat,—he cannot expect us to aid him. Our duties are of a widely different kind. They consist in discouraging, as much as in us lies, all such contests with the legal authorities of the country."

The prayers of the petitioners must be denied, and their petitions must be dismissed. It is so ordered.

JOHNSON v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Eighth Circuit. August 28, 1902.)

No. 1,722.

1. AUTOMATIC COUPLERS—ACT OF MARCH 2, 1893, DOES NOT REQUIRE LOCOMOTIVES TO BE EQUIPPED WITH.

The act of March 2, 1893 (27 Stat. c. 196, p. 531), does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

2. CONSTRUCTION OF STATUTES—ACT CHANGING COMMON LAW STRICTLY CONSTRUED.

A statute changing the common law modifies or abrogates it no farther than the clear import of its language necessarily requires.

3. SAME—PENAL STATUTE STRICTLY CONSTRUED.

A penal statute may not be so broadened by construction as to make it cover, and authorize the punishment of, otherwise lawful acts, which are not denounced by the usual meaning of its express terms.

4. SAME—ENUMERATION OF SUBJECTS EXCLUDES OTHERS.

A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

5. SAME—WHEN NOT PERMISSIBLE.

When the language of a statute is unambiguous, and its meaning is plain, it must be held to mean, and the legislative body must be held to have intended, what it plainly expresses, and no room is left for construction.

6. INJURY TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK.

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his experience, age, and capacity by the use of ordinary care.

7. SAME—ASSUMPTION OF RISK OF COUPLING CARS WITH DIFFERENT COUPLERS.

A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

8. SAME—AUTOMATIC COUPLERS—ACT OF MARCH 2, 1893—EQUIPMENT OF CAR WITH ONE KIND OF COUPLER SUFFICIENT.

The equipment, under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind or make, is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

9. SAME—WHEN CAR IS USED IN MOVING INTERSTATE TRAFFIC.

Cars loaded with articles shipped to other states, and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move articles of, interstate commerce, do not fall within the terms or meaning of the act of March 2, 1893. A dining car standing empty on a side track at an intermediate station, where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which the owner intended to use in interstate traffic was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track. *Held*, that

¶ 6. See Master and Servant, vol. 34, Cent. Dig. § 554.

the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

Thayer, J., dissenting in part.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

This is an action for damages for a personal injury, in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the state of California, and Ogden, in the state of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the state of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make, and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car, and tried to make the coupling three times, without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

W. L. Maginnis, for plaintiff in error.

Henry G. Herbel (Martin L. Clardy, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join, and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brake-

heads, and deadwoods are the ordinary risks and dangers of a brakeman's service. *Manufacturing Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 343; *Railroad Co. v. Blake*, 27 U. S. App. 190, 194, 11 C. C. A. 93, 95, 63 Fed. 45, 47; *King v. Morgan*, 48 C. C. A. 507, 511, 109 Fed. 446, 450; *Gold Mines v. Hopkins*, 111 Fed. 298, 304, 49 C. C. A. 347, 353; *Railroad Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Railroad Co. v. Seley*, 152 U. S. 145, 152, 14 Sup. Ct. 530, 38 L. Ed. 391; *Kohn v. McNulta*, 147 U. S. 238, 241, 13 Sup. Ct. 298, 37 L. Ed. 150; *Railroad Co. v. Voight*, 176 U. S. 498, 120 Sup. Ct. 385, 44 L. Ed. 560; *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. St. Rep. 722; *Railway Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Hodges v. Kimball*, 44 C. C. A. 193, 104 Fed. 745; *Whitcomb v. Oil Co. (Ind. Sup.)* 55 N. E. 440, 442; *Boland v. Railroad Co. (Ala.)* 18 South. 99.

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk, and of its consequences, by the provisions of the act of congress of March 2, 1893 (27 Stat. c. 196, p. 531). The title of that act, and the parts of it that are material to the consideration of this contention, are these:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes.

"Section 1. That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system. * * *

"Sec. 2. That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation. * * *

"Sec. 8. That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The first thought that suggests itself to the mind upon a perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argues that this is a remedial statute; that laws for the prevention of fraud, the

suppression of a public wrong, and the bestowal of a public good are remedial in their nature, and should be liberally construed, to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation; and that this statute should be so construed as to forbid the use of a locomotive as well as a car which is not equipped with an automatic coupler. In support of this contention he cites *Suth. St. Const.* § 360; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270; *Taylor v. U. S.*, 3 How. 197, 11 L. Ed. 559; and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of congress by construction of an *ex post facto* provision that it is, and ever since January 1, 1898, has been, unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of \$100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established and salutary rules of construction, to commend itself to the judicial reason or conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They cannot lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *Insurance Co. v. Champlin* (C. C. A.) 116 Fed. 858; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. A.) 114 Fed. 77, 81; *Railway Co. v. Bagley*, 60 Kan. 424, 431, 56 Pac. 759; *Woolsey v. Ryan*, 59 Kan. 601, 54 Pac. 664; *Davie v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Turnpike Co. v. Coy*, 13 Ohio St. 84; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205. Construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction. *Swarts v. Siegel* (C. C. A.) 117 Fed. 13; *Knox Co. v. Morton*, 15 C. C. A. 671, 673, 68 Fed. 787, 789; *Railway Co. v. Sage*, 17 C. C. A. 558, 565, 71 Fed. 40, 47; *U. S. v.*

Fisher, 2 Cranch, 358, 399, 2 L. Ed. 304; *Railway Co. v. Phelps*, 137 U. S. 528, 536, 11 Sup. Ct. 168, 24 L. Ed. 767.

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of \$100 for each offense; and it just as plainly omits to forbid, under that or any penalty, the use of any car which is not equipped with a power driving wheel brake, and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act, and enacting provisions to give it effect. The familiar rule that the expression of one thing is the exclusion of others points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car not equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting interstate traffic, was made a misdemeanor by this act. Where the statute enumerates the persons, things, or acts affected by it, there is an implied exclusion of all others. *Suth. St. Const.* § 227. And when the title of this statute and its first section are again read; when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness; that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have, that congress forbade the use of cars alone without automatic couplers; when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic couplers * * * and their locomotives with driving wheel brakes"; that the first section makes it unlawful to use locomotives not equipped with such brakes, and the second section declares it to be illegal to use cars without automatic couplers,—the argument becomes unanswerable and conclusive.

Again, this act of congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employes suffered in the discharge of this duty. Since its passage the employes no longer assume this risk, and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. *Shaw v. Railroad Co.*, 101 U. S. 557, 565, 25 L. Ed. 892; *Fitzgerald v. Quann*, 109 N. Y. 441, 445, 17 N. E. 354; *Brown v. Barry*, 3 Dall. 365, 367, 1 L. Ed. 638. The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute, and recoverable by the government. It is, therefore, under every definition of the term, a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was therefore unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which congress was seeking to remedy, and hence it should be presumed that the legislative body intended to denounce this act as much as that which it forbade by the terms of the law. An *ex post facto* statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An *ex post facto* construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *Sarlls v. U. S.*, 152 U. S. 570, 14 Sup. Ct. 720, 38 L. Ed. 556; *U. S. v. Harris*, 177 U. S. 305, 309, 20 Sup. Ct. 609, 44 L. Ed. 780; *Suth. St. Const.* § 208. The decision and opinion of the supreme court in *U. S. v. Harris*, 177 U. S. 305, 309, 20 Sup. Ct. 609, 44 L. Ed. 780, is persuasive—nay, it is decisive—in the case before us. The question there presented was analogous to that here in issue. It was whether congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than 28 consecutive hours without unloading them for rest, water, and feeding, under “An act to prevent cruelty to animals while in transit by railroad or other

means of transportation," approved March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids the confinement of stock in cars by any railroad company engaged in interstate commerce more than 28 consecutive hours, and prescribes a penalty of \$500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as injurious as their confinement by a railroad company, and the argument for the United States was that, as such acts committed by receivers were plainly within the mischief congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The supreme court conceded that the confinement of stock in transit was within the mischief that congress sought to remedy. But it held that as the act did not, by its terms, forbid such acts when committed by receivers, it could not presume the intention of congress to do so, and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said:

"Giving all proper force to the contention of the counsel for the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

He cited with approval the decision of the supreme court in *Sarlls v. U. S.*, 152 U. S. 570, 575, 14 Sup. Ct. 720, 38 L. Ed. 556, to the effect that lager beer was not included within the meaning of the term "spirituous liquors" in the penal statute found in section 2139 of the Revised Statutes, and closed the discussion with the following quotation from the opinion of Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37:

"The rule, that penal statutes are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature ordinarily used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in depart-

ing from the plain meaning of words,—especially in a penal act,—in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the government. Its terms are plain and free from doubt, and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car," in the second section of this statute, means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers; and (2) because at the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment, it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad com-

panies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the congress when it enacted this statute. It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

Again, the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in intrastate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The defendant drew it to a turntable, turned it, and placed it back upon the side track. The accident occurred during the performance of this act. The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track, or while it was going to and returning from the turntable? If the defendant had drawn it vacant over

every foot of its railroad, it would not have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory, and because it was the intention of the defendant to put it to the same use in a few hours, when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. But this statute must be read not only in the light of the rules of construction to which we have adverted in the earlier part of this opinion, but also in view of the limitations upon the power of congress in this respect. It is by virtue of the power granted to congress to "regulate commerce among the states," and by virtue of that authority alone, that this statute was enacted and has efficacy. Congress had neither the authority nor the purpose to interfere with or to touch by this act anything except commerce among the states. Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the states? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the state of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car, and have impressed it with a use in interstate commerce or intrastate commerce? The only answer to these questions is a negative one, and, if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the ban of the act of March 2, 1893. The opinion and decision of the supreme court in *Coe v. Town of Errol*, 116 U. S. 517, 525, 526, 6 Sup. Ct. 475, 29 L. Ed. 715, lend strong support to this view. In that case the owners of logs were cutting and transporting them for the purpose of exporting them from New Hampshire to Maine. The logs had been cut, drawn to and deposited in and on the banks of Clear stream, to be floated down that stream and down the Androscoggin river to the state of Maine, and the owners intended to transport them in this way to that state. They were lying in the town of Errol, awaiting water sufficient to float them down the stream. The supreme court held that they had not yet become subjects of interstate commerce; that they would not become such until they were "committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state"; and that the fact that their owners intended to export them could not change their situation because the owners might change their intention. If commodities do not become articles of interstate commerce until they start on their final passage to another state, cars and engines cannot be "used in moving interstate traffic" until they receive articles of

interstate traffic, or start to carry them from one state to another, and the act of turning a vacant car at an intermediate station cannot be the use of that car in moving such traffic. This is the effect of the decision of the supreme court of appeals of Virginia in *Norfolk & W. R. Co. v. Com.*, 24 S. E. 838, 34 L. R. A. 105, 57 Am. St. Rep. 827. That court held in that case, upon the authority of *Coe v. Errol*, that a train of empty coal cars on its way to procure a load of coal which the carrier intended to transport with these cars from one state to another was not engaged in interstate commerce, and would not be until it was loaded with the articles of such commerce, to be carried to another state or started on the way. Speaking of the effect of the intention of the carrier to use the cars in moving interstate traffic, that court said:

"The common carrier has the same right to change his mind, and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used. The rule fixed by the supreme court in the one case seems equally applicable to the other." *U. S. v. Boyer* (D. C.) 85 Fed. 425, 432; *Kelley v. Rhoads* (Wyo.) 63 Pac. 935.

The power of congress over this subject was limited to the regulation of commerce among the states. It intended to exercise that power, but not to transgress its bounds. It prohibited the hauling of cars used in moving interstate traffic unless equipped as the act directs. The intention to use cars for that purpose does not constitute such a use because that intention may change. *Coe v. Town of Errol*, 116 U. S. 526, 6 Sup. Ct. 475, 29 L. Ed. 715; *Norfolk & W. R. Co. v. Com.* (Va.) 24 S. E. 838, 34 L. R. A. 105, 57 Am. St. Rep. 827. The fact that such cars have been or will be so used does not constitute their use in moving interstate traffic, because the prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. Cars loaded with articles of interstate commerce, and started toward their ultimate destination, whether in trains, in yards, or on side tracks, may well be held to come within the terms of this statute and the intent of congress. But vacant cars which are not and may never be so used cannot be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time, or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a state and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track, nor the freight engine which was used to turn it at the little station in Utah, was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

The judgment below must accordingly be affirmed, and it is so ordered.

THAYER, Circuit Judge. I am unable to concur in the conclusion, announced by the majority of the court, that the act of con-

gress of March 2, 1893 (27 Stat. 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.

In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life; and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was that the car and engine were equipped with couplers of a different pattern, which would not couple, for that reason, without a link. Janney couplers and Miller couplers are in common use on the leading railroads of the country, and congress did not see fit to command the use of either style of automatic coupler to the

exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that, after a certain date, cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

DENNIS et al. v. SLYFIELD et al.

(Circuit Court of Appeals, Sixth Circuit. August 15, 1902.)

No. 1,047.

1. ADMIRALTY—APPEAL—REVIEW OF INTERLOCUTORY DECREE.

A decree sustaining a demurrer to a libel, but giving the libellant leave to file an amended libel, of which he avails himself, is interlocutory only, and is brought up for review by an appeal from the final decree subsequently entered on the amended libel.

2. CONTRACT—VALIDITY—LACK OF MUTUALITY.

A contract which recited that the second parties were "desirous to ship by vessel certain lots of hardwood lumber," and by which the first party agreed to carry on his vessels "any and all of this lumber as may be desired by the parties of the second part," is void for want of mutuality.

3. EVIDENCE—VARYING TERMS OF WRITTEN CONTRACT BY PAROL.

Evidence that at the time such contract was executed it was understood that the second parties had about a certain quantity of lumber, which it was expected by both parties would be shipped under the contract, or that they orally promised to ship the same on the vessels of the first party, is inadmissible to show that they were bound by the contract, since by its express terms they were given the option to ship "any or all" of it thereunder.

4. CONTRACTS—CONSTRUCTION OF WRITING.

Such writing cannot be construed as a proposition by the first party which might become a binding contract on its subsequent acceptance by the second parties, since it was executed by both parties, and purported to be a completed agreement, the terms of which would be varied by a subsequent agreement by the second parties to ship all their lumber by the vessels of the first party.

5. ADMIRALTY—PLEADING—EXCEPTION TO LIBEL.

A so-called exception to a libel to recover damages for breach of a maritime contract on the ground that it does not "set forth any facts showing wherein this exceptor failed, neglected, or refused to carry out and perform the terms of said alleged contract," is in fact a demurrer, which goes to the whole libel, and which is therefore bad if any breach is well pleaded.

¶ 2. Mutuality in contracts, see note to *Cotton Oil Co. v. Kirk*, 15 C. C. A. 543.

6. SAME—SUFFICIENCY OF LIBEL.

In a libel to recover for breach of a contract, a general allegation that libelants had at all times performed all that was required of them under such contract is sufficiently specific, without enumerating the several acts required to be done by them, and alleging their performance.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This is a libel against the propeller *White Star*, the barge *Eva S. Robinson*, and also against *Luther L. Slyfield*, as owner of said vessels, for a breach of a contract civil and maritime. The libelants, being large dealers in lumber, and anticipating that they would have for shipment during the season of 1899 about 15,000,000 feet of lumber, aver that they entered into an agreement with the respondent *Slyfield*, as owner of the propeller *White Star* and the barge *Eva S. Robinson*, by which *Slyfield* agreed that, for a consideration named, his said vessels should carry all of the said lumber, and that they should diligently and exclusively engage in the carriage of said lumber, and that libelants agreed to ship said lumber by said vessels and pay the rate agreed upon. The libel set out in *hæc verba* so much of said agreement as was reduced to writing, and averred, that upon considerations named in the writing, libelants had orally agreed to ship between twelve and fifteen million feet of lumber by respondent's vessels. The writing was in these words:

"Memorandum of agreement made this 10th day of March, 1899, by and between *Arthur B. Slyfield*, of Port Huron, Michigan, manager, representing *L. L. Slyfield*, who is the owner of the boats known as the steamer *White Star* and the barge *Eva S. Robinson*, party of the first part, and *Dennis Bros.*, of Grand Rapids, Michigan, parties of the second part, as follows: Whereas, said parties of the second part are desirous to ship by vessel certain lots of hardwood lumber, party of the first part agrees to carry on the above-named boats any and all of this lumber as may be desired by the parties of the second part from time to time during the season of navigation of 1899, at the following prices: From all Lake Michigan ports to Detroit, \$1.75 per M ft.; to Ohio ports, Buffalo and Tonawanda ports, \$2.00 per M ft. There will also be some lumber to be shipped from Alpena and other Lake Huron ports, which is to be one shilling per M ft. less than the above prices. From all Lake Michigan ports to Michigan City or Chicago, \$1.75 per M ft. The above prices are to be for all kinds of hardwood lumber except basswood, which is to be 25c. per M ft. less than the above-named prices, and elm one shilling less. The above lumber is to be taken over the rail or from dock according to the usages of the ports where the lumber is loaded, and to be delivered on docks at destination. It is also agreed and understood that excess of insurance which parties of the second part have to pay because of any boat not being classed up to A2 shall be deducted from the freight. Also it is understood that parties of the second part are not obliged to accept any boats classed lower than A2½. This contract is made with the understanding and agreement that *Arthur B. Slyfield* is to manage the above-named boats the season.

"[Signed]

Arthur B. Slyfield.
"L. L. Slyfield.
"Dennis Bros."

The libel then avers the breach of this agreement after its partial execution, and alleges that on September 23, 1899, the respondent gave notice that he would not further perform. It is then averred that libelants instituted suit at once for the breach, and that on September 26, 1899, respondent retracted his refusal to perform on condition that the contract should be modified, and that certain modifications were then agreed upon, and reduced to writing, and signed as of that date. This agreement was in the words and figures following:

"This agreement made at Tonawanda, N. Y., this 26th day of September, 1899, between L. L. Slyfield, sole owner, of Port Huron, Mich., party of the first part, and Dennis Bros., of Grand Rapids, Mich., party of the second part, witnesseth as follows: Whereas, the parties hereto entered into a certain contract in writing, dated March 10, 1899, a copy of which is hereto attached and marked 'Exhibit A,' and are mutually desirous of modifying said agreement, in consideration of the mutual covenants herein contained, the said parties agree as follows: The said Slyfield agrees to send steamer White Star to Muskegon, and there take on cargo of pine and basswood, or other lumber mentioned in Exhibit A, freight on pine, if any, to be at basswood rate,—and agrees to send the Robinson, in tow of White Star, to Manistee; both of said vessels to proceed to said respective ports as expeditiously as possible, and there take on said cargoes and carry same to the port of Erie, Pa., on terms mentioned in said original agreement. It is further agreed that, upon completion of said Erie trip, said barge Robinson shall be released from carrying lumber for the party of the second part for the remainder of the season of navigation, but said White Star may tow the Robinson thereafter, provided the White Star is not materially delayed by such towage, and does not wait for the Robinson more than half a day on the round trip. It is further understood and agreed that the White Star shall not tow any other vessel than the Robinson during the term of the charter, and that neither of said vessels shall load coal for any port where unloading is not usually done with good dispatch, nor for any port beyond the ports where they are ordered from time to time under this contract, nor to other shore of lake. And the said vessels shall not delay more than twenty-four hours to load coal, and shall not go below the port where each cargo is unladen to get an up cargo, and shall not carry any up cargo except coal. It is also understood and agreed that after performance of said Erie trip the White Star shall continue in performance of and under said charter for the remainder of this season of navigation, and shall make as many trips as possible under the said conditions, and carry as much of said lumber as her capacity will permit. On or before arrival at port of discharge with each lumber cargo, the parties of the second part will notify party of the first part, or the master of the White Star, where said vessel shall go for her next cargo, and the parties of the second part agree to provide cargoes at the port or ports so designated. It is further agreed by the party of the first part that the White Star shall not tow the Robinson beyond the port where the White Star is to load lumber on the up trip, nor beyond the White Star's port of discharge on the down trip. One additional barge may be towed whenever written consent of second party is obtained in advance. Parties of the second part agree to deliver lumber on rail at Manistee and Muskegon. Witness our hands the day and year first above written.

"[Signed]

L. L. Slyfield.
"Dennis Bros."

It is then averred that something was done under this modified agreement, but that respondent again breached the contract, and failed and refused to carry out same, greatly to the damage of the libelants, etc.

The learned district judge sustained a demurrer filed to this libel, so far as it sought to recover for damages accruing prior to September 26, 1899, for want of mutuality in the contract set forth, and to so much of the libel as counted upon the contract of September 26, 1899, because the breaches were not sufficiently shown, but gave leave to the libelants to file an amended libel. This they did within the time allowed. To this amended libel an "exception" was filed, based on the grounds that the amended libel was not within the leave granted to amend, but was outside the authority granted. This exception was sustained upon the ground that the libelants stated a contract wholly oral, whereas the original libel had declared upon two written contracts, and that libelants had by this pleading made a new case altogether. The "amended libel" was dismissed without prejudice to the rights of appellants to bring a new suit for the same cause stated in the amended libel. From this decree the libelants have appealed, and assigned error not only upon the action of the court in dismissing the amended libel, but to the action of the court in sustaining the demurrer to the original libel.

G. L. Canfield, for appellants.

Herbert K. Oakes, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

1. The appellees have insisted that we cannot look into the action of the court below in sustaining the demurrer or exception filed to the original libel, because the appeal was not allowed until more than six months thereafter. The transcript does not show that any decree whatever was entered either sustaining or overruling the exceptions to the original libel. But assuming the decree to have been entered in accordance with the opinion filed February 1, 1901, it was not a final decree, for it gave libelants leave to file an amended libel, of which they availed themselves. Subsequently an exception was filed to this amended libel, and the libel dismissed. This was the only final decree, and an appeal from it brings up for review all interlocutory decrees in the cause.

2. The objection to the written contract of March 10, 1899, is that it is lacking in mutuality. The only part thereof which bears upon the question of mutuality is in these words:

"Whereas, said parties of the second part are desirous to ship by vessel certain lots of hardwood lumber, party of the first part agrees to carry on the above-named boats any or all of this lumber, as may be desired by the parties of the second part from time to time during the season of navigation of 1899, at the following prices, etc."

It is not contended by the learned proctors who represent the libelants that this writing of and by itself obligates the libelants to ship even a single cargo of lumber by the vessels named. The respondent thereby agreed to carry at a price named all the lumber which the libelants might from time to time during the season deliver to him for carriage, but it does not oblige the opposite party to do more—even by implication—than to pay him the prices named for the carriage of all lumber delivered for carriage during the season. The writing is therefore void for want of mutuality. *Dorsey v. Packwood*, 12 How. 126, 13 L. Ed. 921; *Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791; *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145. It is only when the contract has been executed, and the defendant thereby benefited, that he can be held bound by such a unilateral contract. This want of mutuality on the face of the writing libelants have endeavored to cure by averring in their libel that the respondent was advised before the making of said contract that they "had and expected to have a large quantity of lumber, to wit, about fifteen million feet, which they desired to have transported by vessel during the season of 1899," etc., and that, knowing this fact, the respondent applied to them for a contract to carry their lumber during said season, and that thereupon the parties entered into the agreement of March 10, 1899. It is then further averred "that at the time of making said contract, and in consideration of the agreements therein contained, they promised said Slyfield to ship said lumber by said vessels, and to pay him the freight

in said contract mentioned for the carriage thereof," etc. Without this promise the writing was not obligatory upon either party. Can this term be added to or interpolated in the contract? It is doubtless true that libelants expected to ship their entire season's lumber by respondent's vessels, and that they expected to have for shipment during the season about 15,000,000 of feet. The respondent doubtless shared in these expectations, and expected to carry for the libelant the amount of lumber named. But it is well said in *Knox v. Lee*, 12 Wall. 457, 20 L. Ed. 287, and quoted with approval in *Maryland v. Railroad Co.*, 22 Wall. 105, 112, 22 L. Ed. 713, that:

"There is a well-recognized distinction between the expectation of the parties to a contract, and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow."

The plain construction of the writing which the parties mutually signed left it wholly optional with the libelant whether they would ship "any or all" of the certain lots of lumber referred to by the vessels of the respondent. Evidence of an oral agreement made at the time this writing was made, by which this option is converted into an obligation to ship all of the said lumber by the respondent's vessels, is to vary and contradict the writing, and is on this ground incompetent. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Forsythe v. Kimball*, 91 U. S. 291, 23 L. Ed. 352; *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 7 C. C. A. 660, 59 Fed. 49, 57. The meaning of the writing signed by the parties is not in doubt. The optional character of the agreement, so far as it affects the libelant, is indisputable. The contention that the surrounding circumstances may be looked to in aid of the interpretation of a writing does not apply. We may read a contract in the light of surrounding circumstances for the purpose of arriving at the meaning and intent of the writing. It is as an aid to interpretation that we may look to surrounding circumstances, but never for the purpose of adding a new term, or contradicting or varying the writing. *Maryland v. Railroad Co.*, 20 Wall. 105, 22 L. Ed. 713; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Greenfield, Ev.* § 277; *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 7 C. C. A. 660, 59 Fed. 49, 57. In the case last cited, Judge Jenkins, speaking for the Seventh circuit court of appeals, said:

"But resort to surrounding circumstances is not allowed for the purpose of adding a new and distinct undertaking. *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713. The circumstances surrounding the making of a contract is one thing. The parol negotiations leading up to the written agreement is another and a different thing. Parol evidence may be received of the existence of an independent oral agreement, not inconsistent with the stipulations of the written contract, in respect to a matter to which the writing does not speak, but not to contradict the contract."

There may be instances in which a contract is partly in writing and partly oral, and the two together constitute the contract; so there may be a question of fact as to whether the written agreement is or is not the entire agreement. Illustrations of such cases are

afforded by the cases of *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, and *Bank v. Cooper*, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759, where the question was whether a bill of lading constituted the entire contract. But here both parties have signed the contract of March 10, 1899. It purports to be the agreement between the parties, and speaks conclusively the conclusion to which the parties to it have arrived. The oral promise related to a subject upon which the written contract spoke, and varied the terms of the writing in a most important particular. It was therefore, upon a very elementary principle, not competent to contradict the writing by an oral agreement contemporaneous with or antecedent to it. All of the negotiations prior to the execution of the writing are, in the absence of fraud, accident, or mistake, merged into the written agreement, and it is not competent to prove such negotiations for the purpose of adding a term which would vary or contradict the conclusion arrived at as shown by the writing. Neither can the writing of March 10, 1899, be regarded as a proposition made by the respondent to the libelant which might become a binding agreement upon both parties by acceptance by the libel. The agreement in question was that of both parties, and it was not a proposition for a contract. Its validity must be determined by the stipulations contained when it was signed. A subsequent agreement by the libelants to ship all of their season's purchases of lumber by the vessels of the respondents would be at variance with the agreement as written. The conclusion we reach is that there was no error in sustaining the demurrer to the original libel so far as that libel sought to recover for any breach of the agreement between the parties prior to September 26, 1899.

3. A different case is presented by the libel so far as it seeks to recover for the breach of the agreement made September 26, 1899. That agreement was in itself a new contract, and operated in futuro. It did not pretend to operate retroactively, so as to give to the libelants a right to hold respondent for his refusal to carry out the agreement of March 10, 1899. True, it is spoken of as a modification of the previous agreement. But if the previous agreement would not support an action for a breach, it is clear that the modification thereof by the agreement of September 26th would not make a breach actionable which had not been so theretofore. Neither is the want of mutuality in the agreement of March 10th of any importance as a defense for a breach after the new agreement became effective. The contract of September 26th must be regarded as an agreement operative from its date, and affected by the prior contract only so far as the terms of the former are affirmatively or by necessary implication made a part of the new agreement. One of the grounds of the so-called exception to the original libel was that the libel did not "set forth any facts showing wherein this exceptor failed, neglected, or refused to carry out and perform the terms of said alleged contract." The exception is in fact a demurrer. It goes to the whole libel, and is therefore bad if any breach is well pleaded. A demurrer is an entirety. It cannot be bad in part and good in part. If any part of this libel is good, the demurrer, improperly called an "ex-

ception," which challenges the particularity with which the breaches have been alleged, is bad, as going to the whole libel. Bates, Fed. Eq. Prac. § 206. It is very distinctly averred that the respondent laid up his vessels on November 15th, and refused to further perform. This is a very plain and explicit statement of one breach, and we need go no further. The demurrer was improperly sustained.

The objection chiefly urged against the libel so far as it counts upon this new contract was that the contract makes it the duty of the libelants to notify the owner of the White Star, or her master, where to go for her next cargo, and that it is not sufficiently averred that such notice was given. The libel does aver "that they have at all times performed all that was required of them under the foregoing" contract. This, we think, is sufficient. If it is true, they gave the notice required.

Whether the libelant was sufficiently explicit in stating the breaches of the contract of September 26th, we need not consider. If not, it was amendable, and leave was given to amend in these matters. The libelants, instead of amending by averring the breach of the contract of September 26th, filed an amended libel counting upon an alleged contract of March 10th, amended September 26th, according to its supposed legal effect and meaning, and without averring whether same was in writing or oral. As the contract was one which was not required to be in writing, this was perfectly legitimate as a matter of pleading. But the leave given to amend was intended to permit amendments setting out more fully the breaches of the contract of September 26th, and the amended libel was an abuse of the leave given. The amended libel was a clear effort to avoid the effect of the previous ruling that the contract of March 10th was void for want of mutuality, and could not be enlarged by proof of an oral agreement by the libelants to ship all of their lumber by the vessels of respondent, and in this was beyond the leave granted to amend.

The error of the court below was in dismissing the entire original libel. The libel was maintainable so far as it counted upon the breaches of the agreement of September 26, 1899. Some, at least, of these breaches were sufficiently pleaded, and the demurrer or exception for want of definiteness was too broad. The decree dismissing the libel must be reversed, and the cause will be remanded; and the district court may, if it see fit, direct the libelant to reform his libel so as to declare only for damages sustained after September 26, 1899, and to particularize the several breaches. If the libel be thus reformed or recast, the respondent should have leave to plead, demur, or answer as he may be advised. The costs of this appeal will be divided.

UNITED STATES V. HOMESTAKE MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. August 25, 1902.)

No. 1,710.

1. TRESPASS—CUTTING TIMBER—MEASURE OF DAMAGES—WILLFUL AND INNOCENT TRESPASSERS.

The measure of damages for the willful or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees.

2. WILLFUL TRESPASS—ELEMENTS.

The test which determines whether one was a willful or an innocent trespasser is not his violation of or compliance with the law, but his honest belief and actual intention at the time he committed the trespass, and neither a justification of his acts nor any other complete defense to them is essential to establish the fact that he was not a willful trespasser.

3. GOOD FAITH—ADVICE OF REPUTABLE COUNSEL—EVIDENCE.

The fact that one acted on the advice of reputable counsel is persuasive evidence of his good faith. And one who honestly follows the erroneous advice of such counsel upon questions of legal right concerning which a layman would hardly have actual knowledge is not chargeable with bad faith, or with the willful intent to commit a wrongful act, because his counsel was mistaken in his view of the law.

4. EVIDENCE—FORMS OF TAKING AND CERTIFYING—WAIVER.

Parties may by stipulation, or by silent acquiescence in the introduction of evidence of the statement or affidavit of a person, waive the right and opportunity to cross-examine him, and the prescribed forms for taking and certifying his testimony; and when this is done his statement or affidavit becomes as competent evidence of the facts it details as it would be if every formality had been observed.

5. PLEADING—GENERAL DENIAL—MITIGATION OF UNLIQUIDATED DAMAGES—ADMISSIBILITY OF EVIDENCE.

Evidence to reduce or mitigate the damages is generally admissible under the general denial in actions for unliquidated damages for torts. In an action for a willful trespass for cutting and converting timber a defendant may prove, under the general denial in its answer, that the trespass was not willful, but was committed in the honest belief that it was exercising its legal right.

6. EVIDENCE—PRESUMPTION—REBUTTAL—INSTRUCTION.

A disputable presumption may be so completely overcome by subsequent evidence in a case that it will become the duty of the court to instruct the jury that it cannot prevail.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of South Dakota.

This was an action for the conversion of lumber and cord wood cut and removed from the Black Hills forest reserve of the United States, and used by the Homestake Mining Company, a corporation, in conducting its mining operations. In its complaint the United States alleged that between September 18, 1898, and May 1, 1899, the defendant, "without any permit or authority from the secretary of the interior, or without any authority at all," willfully cut and removed from the Black Hills forest reserve in South

Dakota pine trees and wood, which it manufactured into lumber and cord wood, and then converted to its own use; that at the time and place of the conversion the lumber and cord wood were worth \$10,451.06, and prayed for damages in this amount and interest. The answer of the Homestake Company consisted of a general denial of the willful cutting and removal of the trees and wood and of the alleged value of the manufactured lumber and cord wood, and an averment that whatever timber or wood was taken by it from the Black Hills forest reserve was taken by permission and authority of the secretary of the interior. At the trial there was a stipulation that the value of the wood and timber taken in the tree was \$1,757.75, while the evidence was that the manufactured lumber and cord wood were worth \$10,451.06 when the defendant used them. Thereupon the court instructed the jury to return a verdict against the defendant for \$1,757.75, and the judgment upon this verdict is assailed by the United States on the ground that the legal measure of the government's damages was the value of the manufactured lumber and cord wood, and not the value of the wood and timber in the trees.

James D. Elliott (William G. Porter, on the brief), for the United States.

G. C. Moody and Chambers Kellar (James C. Moody, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The measure of damages for the reckless, willful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another without right through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees. *Bolles Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 434, 27 L. Ed. 230; *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Durant Min. Co. v. Percy Consol. Min. Co.*, 35 C. C. A. 252, 254, 93 Fed. 166, 168; *Gentry v. U. S.*, 101 Fed. 51, 54, 41 C. C. A. 185, 188. The court below instructed the jury to apply to this case the measure for the damages resulting from an innocent trespass. Counsel for the government assail this ruling on the ground that the court should either have instructed the jury to apply the measure of the damages for a willful trespass or should have left to the jury the question whether the trespass was willful or innocent. There are many specifications of error, but the only actual question which this case presents is whether or not a verdict of a jury that in the taking of this wood and timber the defendant was a willful trespasser could have been lawfully sustained under the undisputed facts which the record presents. These are the facts: The Homestake Mining Company has been engaged in mining upon a large scale in the Black Hills of South Dakota for many years. It is necessary for it to use large quantities of wood and lumber to carry on its work in its mines. Prior to 1898 it had obtained this wood

and timber from the public mineral lands of the United States under the provisions granting such corporations permission to do so found in the act of congress of June 3, 1878 (20 Stat. 88, c. 150). By the act of congress of March 3, 1891, the president had been authorized to set apart by proclamation public lands as forest reserves (26 Stat. 1091, 1093). Pursuant to this act, President Cleveland had set apart as a forest reserve certain tracts of land in the Black Hills of South Dakota in the vicinity of the mines of the defendant by a proclamation dated February 22, 1897 (29 Stat. 902). The effect of this proclamation had been suspended by the act of congress of June 4, 1897, until March 1, 1898 (30 Stat. 34), and that act had provided that the secretary of the interior might make rules and regulations for the sale for use in the states where they were situated, but not for export, of so much of the dead, matured, or large growth of trees upon forest reserves as might be compatible with the utilization of the forests; and that the secretary might permit, under regulations to be prescribed by him, the use within any state where any reservation was situated of timber and stone found upon such reservation free of charge by bona fide settlers, miners, and residents for their wood, fencing, building, mining, and other purposes (30 Stat. 35). The Homestake Company was actively engaged in operating its mines, and was employing many hundred men. It could not carry on its work without timber. The public mineral lands from which it expected to obtain this timber were about to be included within the Black Hills forest reserve, and, while rules for the purchase of land within those reserves had been promulgated on June 30, 1897 (24 Land Dec. Dep. Int. 589), these rules and regulations were inapplicable to the lands which were not yet included within the reserves, and it was certain that some time would be required to perfect the official machinery so that timber could be purchased under these rules from the lands about to be placed within the reserves. In this condition of affairs the attorney and the manager of the Homestake Company in South Dakota went to the city of Washington, and presented this state of the law and of the facts to the secretary of the interior and to the commissioner of the general land office in the month of January, 1898. The secretary of the interior said to the attorney for the defendant that his company might continue to cut and remove the timber on the forest reserve for its use in the operation of its mines after the suspension of the effect of the proclamation of the president ceased in the same way that it had cut and removed timber from the public mineral lands under the act of June 3, 1878, and the rules and regulations thereunder, until rules and regulations for the sale of the timber on the Black Hills forest reserve under the act of February 22, 1897, should be adopted or made applicable to that reserve, and the price of timber thereon should be fixed; that the company might keep an accurate account of the wood and timber it should take, and that when, under the rules of the department, the price of like timber taken from the Black Hills forest reserve was fixed, the company should pay to the government for the wood and timber it took meanwhile at the same rate which that price fixed. The attorney for the defendant accepted these terms,

instructed his client to comply with them, and advised the defendant that it had the right to cut wood and timber on the Black Hills forest reserve pursuant to this agreement until the rules for the purchase of timber thereon should be promulgated and made applicable thereto, and the price of wood and timber thereunder should be fixed. The superintendent and manager of the defendant in South Dakota testified that the attorney for the company advised him that the defendant had the right to cut and take timber on this reserve under the agreement of January, 1898, with the secretary; that he caused the employes of the defendant to take the wood and timber in controversy in perfect good faith, under the advice of the counsel of the company, without any idea whatever that this taking was a trespass, or an unlawful cutting; and caused an accurate account to be kept of the wood and timber that was taken. The attorney for the company testified that he gave his advice in good faith; that he believed that the secretary had full authority to make rules and regulations for the sale of the timber; that he could make such rules for the whole public, or for one corporation, or for one man; and that he believed that the company had the right to cut and remove the wood and timber in controversy under his agreement with the secretary. This wood and timber was not cut and removed for export or sale, but was used by the defendant in operating its mines, under this arrangement of January, 1898. In the month of August, 1898, revised rules and regulations for the sale of timber on the forest reserves were adopted by the secretary of the interior. Between August, 1898, and May, 1899, this wood and timber was cut and removed. The amount of the judgment is its value at the price since fixed by the department for the sale of like wood and timber taken from adjoining lands on the Black Hills forest reserve. This price was fixed in this way: In April, 1898, the Homestake Company sent to the secretary of the interior an application to purchase wood and timber upon the Black Hills forest reserve. This application did not cover the wood and timber here in controversy. A bid of \$15,000 made by the Homestake Company on October 20, 1899, under its application of April, 1898, was finally accepted by the government in November, 1899, and paid by the company, and it is at the price fixed by that bid that this judgment requires the defendant to pay for the wood and timber which it took under the agreement with the secretary of January, 1898. The land from which this wood and timber was taken was not within the Black Hills forest reserve on April 8, 1898, when the application to purchase was made, but it was subsequently included therein by an amendment of the order of reservation made in the latter part of September in that year. In October, 1900, the defendant made a written proposition to the government to pay for the wood and timber here in controversy at the same price which it had paid for the wood and timber it purchased with the \$15,000. This proposition set forth the facts which have been detailed in this opinion, and is verified by the superintendent of the mining company. This concludes the statement of the facts which condition the determination of this case, all of which are practically undisputed.

Now, the question is whether any reasonable man who reads these

facts without bias or prejudice, and who exercises a fair and impartial judgment upon them, can fail to reach the conclusion that the defendant took and used the wood and timber for which this judgment has been rendered in the honest belief that it was lawfully exercising a right which it had acquired to purchase this property under the verbal agreement with the secretary of January, 1898. Counsel for the government do not dispute any of the facts which have been recited, but their chief contention is that the secretary of the interior had no power to make the verbal agreement of January, 1898; that the United States cannot be estopped from recovering the full value of the manufactured lumber and wood, or in any way affected by the misfeasance, negligence, or laches of its officers; that the application for the purchase of this timber and the application for the purchase of the other timber, which was bought for \$15,000 by the defendant from the Black Hills forest reserve, were not made in accordance with the established rules of the interior department for the purchase of such property; that the defendant knew all this, because it was charged with knowledge of the law; and that it was, therefore, a willful and intentional trespasser. It is unnecessary to a determination of this case to discuss or decide the questions which the propositions which form the premises for this conclusion present, and for the purposes of this discussion the soundness of those propositions will be conceded, but not decided. The conclusion, however, which counsel deduce does not necessarily follow from their premises. Concede that the attempted sale of this timber to the defendant by the secretary in January, 1898, was not only unauthorized, but in violation of the acts of congress and of the rules promulgated thereunder, and that the presumption is that every man knows the law. This presumption prevails everywhere, and, like the similar presumption that every man intends the natural and ordinary effect of his acts, applies to every trespasser. If either or both of these presumptions make every trespasser a willful and intentional wrongdoer, because he is chargeable with knowledge of the law, then there never has been, and never can be, a trespasser through inadvertence or mistake, or one who violates the law in the honest belief that he is acting within his legal rights; and the rule that the damages caused by such a trespasser shall be limited to the value of the wood or timber in the trees or of the ore in its bed, which was announced in *Bolles Wooden-Ware Co. v. U. S.*, 106 U. S. 433, 434, 27 L. Ed. 230, and which has been reiterated and applied in numerous cases since, is *functus officio*, and useless, because no class or party to which it is applicable can ever be. The truth is, however, that this rule, and every other rule which measures the damages caused by trespassers, does not call the righteous, but sinners, to restitution. None of these rules have any application to those who do not violate the law. Every trespasser breaks the law, and to every trespasser the maxim applies that every man knows the law. Notwithstanding all this, the law, in its wisdom, perceives the marked difference in the heinousness of the offenses of those who recklessly, or with actual intention to rob others of their rights, trespass upon their property, and of those who trespass by mistake, and with no evil purpose,

no actual, willful intent to commit a wrong; and it declares that the former class shall pay to their victims the full value of the lumber or the ore they take at the time they sell or use it, while the latter class shall be relieved from liability upon restitution of the value of the timber in the trees or of the value of the ore in the mine. The maxim that every man knows the law applies to all the members of both classes alike. It neither differentiates the classes nor their members, and it has no more relevancy to the real question which cases of this character present than the proposition that three and three are six. That question is always based on the conceded propositions that the defendant has violated the law and that every man knows the law. The question, then, is, did the trespasser violate the law, which he constructively knew, recklessly, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally, or in the honest belief that he was exercising his own right? If the former, he was a willful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the wood in the tree or of the ore in the mine is the limit of his indebtedness. The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a willful trespasser. *Durant Min. Co. v. Percy Consol. Min. Co.*, 93 Fed. 166, 168, 169, 35 C. C. A. 252, 254; *Gentry v. U. S.*, 101 Fed. 51, 54, 41 C. C. A. 185, 188; *U. S. v. Van Winkle*, 51 C. C. A. 533, 113 Fed. 903, 905.

It is conceded that the taking of the timber from the land of the United States raised the presumption of fact that it was willfully and intentionally taken. But this is only a disputable presumption of fact, which the evidence may so completely overcome that it becomes the duty of the court to instruct the jury that it cannot prevail. *Lawson, Presump. Ev.*, p. 661; *Railway Co. v. Bryant*, 13 C. C. A. 249, 256, 65 Fed. 969, 975, 976; *Smith v. Railroad Co.*, 3 N. D. 17, 22, 53 N. W. 173; *Spaulding v. Railway Co.*, 30 Wis. 110, 123, 11 Am. Rep. 550; *Id.*, 33 Wis. 582; *Huber v. Railway Co.*, 6 Dak. 392, 43 N. W. 819; *Koontz v. Navigation Co. (Or.)* 23 Pac. 820; *Railroad Co. v. Talbot*, 78 Ky. 621; *Railroad Co. v. Packwood (Miss.)* 7 Am. & Eng. R. Cas. 584; *Railroad Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *Karsen v. Railway Co.*, 29 Minn. 14, 15, 11 N. W. 122. In the jurisdiction in which this action was tried "good faith consists in an honest intention to abstain from taking an unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." *Comp. Laws Dak.* 1887, § 4739; *Thompson v. Bank*, 150 U. S. 231, 240, 14 Sup. Ct. 94, 37 L. Ed. 1063. Where is the evidence of any attempt on the part of this defendant to obtain any unconscientious advantage of the United States by the taking and use of this timber?

There was no attempt to take it secretly, furtively, or forcibly. Willful trespassers rarely go to their victims, ask their permission to take their property, agree to pay for it, notify them that they intend to take it under their assumed permission, and then openly proceed for months to carry out their supposed agreement. The mere fact that the attorney of this corporation notified the secretary of the interior that it was necessary to the prosecution of the business of his client that it should take timber from the forest reserve, and that he sought to buy and pay for it in behalf of the defendant, is very persuasive evidence of an honest purpose and a right intent. If the defendant sought an unconscientious advantage, why did it give notice beforehand of its intention to cut and remove this timber to a nation able to prohibit in advance or to stop it at any time?

Where is the evidence that this defendant believed that it had no right to take this timber when it removed it, or that it had any actual intention to obtain an unconscientious advantage of the government when it committed the trespass? It is said that this timber was cut and removed long after the temporary agreement with the secretary had expired, that this arrangement was to continue only until the rules were promulgated so that the price of the timber could be fixed, that the revised rules were announced in August, 1898, that this trespass did not commence until September, 1898, that it continued for six months, that no attempt was made to fix the price by any application to purchase this timber under the rules which the secretary had promulgated, and that these facts constitute substantial evidence of bad faith and of a willful trespass. But in January, and again in April, 1898, this defendant applied to purchase wood and timber upon the lands which now constitute the Black Hills forest reserve. The application which it made in April, 1898, seems to have remained pending until November, 1899, when for the first time the defendant succeeded in getting a price fixed for wood and timber upon this reserve. Thereupon it paid to the government \$15,000 for wood and timber upon land contiguous to that from which this was removed, and offered to pay at the same rate for that which is now in controversy. The facts upon which the government relies to prove the bad faith and evil intent of the defendant lose all their persuasiveness in that direction when the further facts to which we have adverted are considered. It could have served no good purpose for the defendant to have filed other applications to purchase other timber when it was unable to get any price fixed by means of the application which it had already made. When this trespass was committed counsel for the defendant had applied to the secretary of the interior, who had power to make rules and regulations for the sale of and authority to sell this wood and timber, for permission to cut, remove, and pay for it. He had obtained that permission. It is conceded that the secretary had no power to grant this license, and that his action and that of counsel for the defendant were in violation of the acts of congress and of the rules of the department. But counsel for the defendant believed, and he advised his client, that this action of the secretary gave it the right to cut and use this wood and timber. The superintendent of the company believed, accepted, and acted on

this advice of its counsel, caused the defendant to cut and use the timber, as he says, "in perfect good faith, without any idea whatever of its being a trespass or an unlawful cutting." The counsel of the defendant was reputable and eminent. The error in his advice, if there was one, was not so plain that a layman could be fairly charged with knowledge of its existence, and the fact that the defendant committed this trespass under the advice of reputable counsel that it was acting within its legal rights goes far to establish its good faith, and to disprove the claim of the government that it ever intended or was attempting to secure an unconscientious advantage by cutting and using the timber. One who acts in good faith upon the erroneous advice of reputable counsel upon questions of legal right concerning which a layman could hardly have actual knowledge, is not chargeable with bad faith, or with a willful intent to commit a wrongful act because his counsel was mistaken in his view of the law. *Selden v. Cashman*, 20 Cal. 57, 81 Am. Dec. 93; *Abbott v. Water Co.* (Cal.) 37 Pac. 527.

The state of the law and of the facts when the verbal agreement of January, 1898, was made between the secretary of the interior and the counsel for the defendant, the fact that the defendant had for years been taking timber from the public lands under the rules promulgated by the secretary, the unsettled condition of the Black Hills forest reserve, the publicity which the defendant gave to its intention to take timber from it months before this timber was cut, and the undisputed facts that counsel for the defendant believed and advised his client that it had the right to take this property, and that the client believed and acted on this advice without any idea that its taking constituted any trespass or unlawful cutting, leave no room for the argument that any reasonable man could fairly draw from the facts in this record the conclusion that this was a willful trespass, and no doubt that the charge of the court that the government was limited to a recovery of the value of the wood and timber in the trees was right.

The other questions raised by this record relate to the admission of evidence, and are of a minor character. All the evidence which the defendant offered was received over the objections of the plaintiff that it did not justify the trespass because the agreement with the secretary was unauthorized, and violative of the law, and that the fact that the defendant had taken the wood and timber in good faith in the honest belief that it had the right to do so was not pleaded in the answer. A justification of the taking of the timber or ore is requisite to a complete defense of the act. But, as we have seen, it is not essential to that good faith and innocence of intentional wrong which will limit the damages to the value of the property taken in its original place, so that the objection that the evidence did not disclose a legal right in the defendant to take the timber was properly overruled.

The objection to the evidence of innocence and good faith that they were not pleaded by the defendant raises an interesting question. But there are two reasons why this judgment ought not to be reversed because that objection was overruled. In the first place, proof

of every fact essential to establish the good faith of the defendant and its honest belief that it had the legal right to take and use this wood and timber was made without objection while the government was introducing its evidence in chief, and this proof stands uncontradicted. In proving its case the United States offered in evidence that part of the affidavit of the superintendent of the defendant which stated the amount and character of the timber cut. The defendant at the same time offered the remainder of this affidavit, and it was admitted in evidence without objection. The affidavit set forth the agreement with the secretary of January, 1898, the advice of counsel for the defendant, the cutting and use of the wood and timber under that advice, the belief of the defendant that it had the right to take and use this timber under the agreement of January, 1898, and every fact material to establish the innocence and good faith of the company. An insuperable objection might have been made to the introduction of this affidavit on the ground that no opportunity had been given to the plaintiff to cross-examine the person who verified it, and on the ground that his testimony had not been so taken and returned as to make it competent evidence. But no such objection was interposed, and the affidavit thus admitted in evidence without objection became uncontradicted evidence of the facts which it detailed. Forms and rules are prescribed by statutes, courts, and decisions for the taking and production of testimony which give to the opposing party the right and the opportunity of cross-examination and the security of an oath. But this right, this opportunity, and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony; and when this is done the statement or affidavit admitted becomes as competent evidence of the facts it details as though every formality had been complied with. *Walton v. Railway Co.*, 12 U. S. App. 511, 513, 6 C. C. A. 223, 225, 56 Fed. 1006, 1008; *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335, 337, 36 C. C. A. 370, 372. The plaintiff had alleged in its complaint that the defendant had "willfully, knowingly, and without any permit or authority from the secretary of the interior, and without any authority or permit whatsoever or at all," cut the timber and converted the lumber. Proof of a willful trespass was essential to its recovery of the value of the manufactured lumber and wood, even in the absence of an answer, for this was an action of tort for unliquidated damages. When the government rested its case, the legal presumption of a willful trespass which might have arisen from the unexplained cutting and removal of the timber by the defendant was completely overcome by the uncontradicted statements of the affidavit of the superintendent of the defendant, and the damages which the government was entitled to receive were as conclusively limited to the value of the wood and timber in the trees as they were at the conclusion of the trial. In other words, the proof of the fact that the trespass was not willful, that it was not committed with an intention to do a wrong or to take an unconscientious advantage of the government, but that the defendant took and used the timber in operating its mines in the honest belief that it had a legal right to do so under its agreement with the secretary,

was plenary when the government rested its case, and before the defendant offered any of the testimony to the introduction of which exceptions have been taken. It necessarily follows that, even if the testimony which was received over objections was erroneously admitted because the answer failed to plead the good faith of the defendant, the plaintiff was not prejudiced by its reception, and this judgment should not be reversed on account of its introduction because the court would have been compelled to have directed the same verdict and judgment in the absence of this testimony, and error without prejudice is no ground for reversal.

In the second place, inasmuch as in actions for unliquidated damages for torts the plaintiff is required to prove his damages in the absence of any answer or denial, and the defendant generally has the right to cross-examine the plaintiff's witnesses, and to introduce evidence to mitigate or reduce the damages claimed (10 Enc. Pl. & Prac. p. 1156; *Parker v. Smith*, 64 N. C. 291, 292; *Bridges v. Stephenson*, 10 Ill. App. 369, 371; *Railroad Co. v. Holbrook*, 72 Ill. 419, 422; *Briggs v. Sneghan*, 45 Ind. 14, 24; *Lane v. Gilbert*, 9 How. Prac. 150, 152), the interposition of an answer which contains a general denial or a justification does not deprive the defendant of this right. A defendant in an action to recover unliquidated damages for a tort may generally introduce evidence in mitigation of damages, except in actions for slander or libel, under a general denial in his answer; and there was no error in the admission of the defendant's evidence of innocence and good faith to mitigate the damages claimed by the government under the general denial and the justification pleaded in the answer of this defendant. *U. S. v. Van Winkle*, 51 C. C. A. 533, 113 Fed. 903, 905; *Booth v. Powers*, 56 N. Y. 22, 33; *Harter v. Crill*, 33 Barb. 283, 285; *Thompson v. Halbert* (N. Y.) 16 N. E. 675; *Gentry v. U. S.*, 101 Fed. 51, 54, 41 C. C. A. 185, 188.

Numerous errors are assigned to the rulings of the court admitting various items of the defendant's evidence, such as the application to purchase the timber. But these alleged errors are not separately argued, and have lost all their materiality in view of the conclusions which have already been reached. Moreover, the only objection to these various items of evidence which has not been already considered is that they did not tend to show the good faith of the defendant, and that objection is not tenable. Where the good faith or the intent of a party in a given transaction is open to investigation, considerable latitude should be permitted in the introduction of evidence of the acts and sayings of the person whose intent is in question relative to the transaction in issue. The application of the defendant to purchase other wood and timber upon land in this reservation contiguous to that from which this was taken and the other items of evidence to which objection has been made all tended to establish the purpose and intent of the defendant in pursuing the course of action which it adopted and in taking the wood and timber here in controversy. There was no material error in the rulings of the court in the admission of this evidence; and, if there had been, it would not have been prejudicial to the government, because the fact that the

trespass was not willful was conclusively established without this evidence.

There is no substantial ground upon which this judgment can be reversed, and it is affirmed.

CHICAGO, ST. P., M. & O. R. CO. v. ROSSOW.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1902.)

No. 1,661.

1. RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A farmer, after unloading a load of grain at an elevator, drove directly to and upon a railroad crossing 330 feet distant, with which he was well acquainted, where he was struck by a passing train and killed. He wore a fur coat, with the collar turned up over his ears and extending forward beyond his face. The ground was frozen, and he drove the entire distance at a trot, without stopping or looking in the direction from which the train was approaching. If he had looked, he could have seen it, and if he had listened he could have heard it, in time to have stopped before reaching the crossing. *Held*, such facts appearing by undisputed testimony, that he was guilty of contributory negligence as a matter of law, which precluded a recovery for his death, though the railroad company may have also been negligent.

In Error to the Circuit Court of the United States for the District of Minnesota.

Pierce Butler (Thomas Wilson, on brief), for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Rossow, as administrator, brought this action in the court below to recover damages from the railroad company for causing the death of William Rossow, at Wilder, state of Minnesota, on December 14, 1899. The acts of negligence are stated in the complaint filed herein as follows:

"That at said village of Wilder, during all the time herein alleged, there was, and still is, a public highway crossing the defendant's line of railway in said village, and upon the 14th day of December, 1899, said William Rossow was riding in a wagon drawn by a team of horses driven by himself along and upon said highway, and over and across defendant's said line of railway where said highway and said railway intersected in said village, and while said William Rossow was in said wagon upon said highway and upon said defendant's railway track said defendant, through its agents and servants, carelessly, wrongfully, negligently, and unlawfully ran and propelled one of its trains of cars at a high and dangerous rate of speed, and without the ringing of bell, or blowing of whistle, or the giving of signal in any manner of the running of said train, to, against, and upon said team and wagon and said William Rossow; and thereby personal injuries were inflicted upon said William Rossow, from the effects whereof he immediately died."

The answer of the railroad company denied the acts of negligence alleged, and also alleged that the death of Rossow was caused by his own negligence or want of ordinary care. At the close of all

the evidence counsel for the railroad company moved the court to direct the jury to return a verdict in favor of the railroad company, for the reasons: (1) That the evidence failed to show any negligence on the part of the railroad company; (2) that the evidence conclusively established that the negligence of William Rossow caused his death, or directly contributed thereto. This motion was overruled, and exception taken. The railroad company assigns this ruling of the court as error.

Section 6637, 2 Gen. St. Minn. 1894, reads as follows:

"The person acting as engineer drawing a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle upon said locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street, of the same level, except in cities, or to continue the ringing such bell or sounding such whistle at intervals, until such locomotive and the train to which such locomotive is attached, shall have completely crossed such road or street, is guilty of a misdemeanor."

The trial court instructed the jury that at the time of the collision which resulted in the death of William Rossow the railway company had complied with the statute above quoted, so far as the sounding of the whistle was concerned, but submitted the issue as to whether or not the bell had been rung in accordance with the requirements of said statute. Upon this issue the jury found in favor of the defendant in error, and returned a general verdict in accordance with said finding. The trial court also instructed the jury that there was no evidence to warrant them in finding that the railway company was running its train at a high or dangerous rate of speed. The following special question was, among others, submitted to the jury, and answered in the affirmative: "Was the whistle sounded when reasonably near, but more distant than a point eighty rods distant from the crossing?" The trial court, upon the issue of contributory negligence, charged the jury as follows:

"The theory of the defendant is that the deceased was guilty of negligence in approaching that crossing which caused or contributed to the collision; that when he drove out of the west end of the elevator, and around to the crossing, he drove his team upon a trot, with his wagon rattling over the frozen ground, without attempting to observe, by the use of his sight or hearing, whether a train was approaching or not; that he had pulled his fur collar over his ears in such a way that his hearing would be diminished, and did not turn his head to observe what might come within the range of his vision. You have heard his acts and conduct described by the two witnesses who stood in the elevator door, and by other witnesses called by defendant, who stood near the blacksmith shop and elsewhere. If from this evidence you are satisfied that the deceased did in fact drive upon the crossing in such manner, on a trot, without using his senses to inform himself as to whether or not a train was approaching, then I charge upon that he was guilty of contributory negligence, which will bar any recovery in this case."

As Rossow did just what is stated in the above excerpt from the charge, the court ought to have directed a verdict for the railway company upon that issue, as there was no dispute as to what Rossow did immediately prior to his death. The principles of law governing

this case are stated in the unanimous opinion of this court in *Pyle v. Clark*, 25 C. C. A. 190, 79 Fed. 746, as follows:

"One whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it. The question in such a case is not whose negligence was the more proximate cause of the injury, but it is, did the negligence of the complainant directly contribute to it? If it did, that negligence is fatal to his recovery, and the negligence of the defendant does not excuse it. *Railway Co. v. Hoedling's Adm'r*, 10 U. S. App. 422, 426, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Railway Co. v. Moseley*, 12 U. S. App. 601, 604, 608, 6 C. C. A. 641, 643, 646, 57 Fed. 921, 923, 925; *Reynolds v. Railway Co.*, 32 U. S. App. 577, 16 C. C. A. 435, 69 Fed. 808, 811; *Motey v. Granite Co.*, 36 U. S. App. 682, 20 C. C. A. 366, 74 Fed. 156; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Hayden v. Railway Co.*, 124 Mo. 566, 573, 28 S. W. 74; *Wilcox v. Railroad Co.*, 39 N. Y. 358, 100 Am. Dec. 440. Every railroad is a menace of danger. It is the duty of every one who approaches it to look both ways, and to listen, before crossing its track; and, when a diligent use of the senses would have avoided the injury, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court. Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff cannot recover. See the cases cited *supra*, and *Railroad Co. v. Whittle*, 40 U. S. App. 23, 20 C. C. A. 196, 74 Fed. 296, 301; *Donaldson v. Railway Co.*, 21 Minn. 293; *Brown v. Railway Co.*, 22 Minn. 165; *Smith v. Railway Co.*, 26 Minn. 419, 4 N. W. 782; *Lenix v. Railway Co.*, 76 Mo. 86; *Railroad Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Aerkfetz v. Humphreys*, 145 U. S. 418, 420, 12 Sup. Ct. 835, 36 L. Ed. 758; *Powell v. Railway Co.*, 76 Mo. 80; *Diauhi v. Railway Co.*, 105 Mo. 645, 654, 658, 16 S. W. 281. But it is only where the undisputed facts are such that reasonable men can fairly draw but one conclusion from them that the question of negligence is considered one of law for the court. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 451, 3 C. C. A. 433, 53 Fed. 65; *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 277."

This being the law, let us examine the undisputed facts. They appear in the record as follows: William Rossow was a farmer, 32 years of age, living in the vicinity of the village of Wilder, state of Minnesota. He had lived there many years, and was acquainted with the railroad crossing described in the evidence. On December 14, 1899, which was a bright, clear day, he hauled to the elevator at Wilder, on the line of plaintiff in error's road, a load of flax. The railroad at Wilder extends nearly in an easterly and westerly direction. In hauling the load of flax to the elevator, Rossow crossed the railroad from the south to the north. After Rossow had unloaded his flax, and at about 2:30 p. m., he drove out of the elevator at its westerly end, over the unbroken and frozen ground, to the north and south highway over which he had come to the elevator, and, proceeding along this highway with his team at a middling trot, collided with a regular passenger train running on schedule time going north on the plaintiff in error's road, and was killed. The distance from the west end of the driveway alongside of the elevator to the crossing, measured along the route which Rossow traveled, was 330 feet. Rossow had an ordinary farm wagon, and sat thereon upon a spring seat near the forward end of the wagon box. He had a fur coat on,

with the collar turned up over his ears as high as the top of his head, and extending forward beyond his face. He wore a cap. While Rossow approached the crossing on his return from the elevator his team traveled at substantially a uniform rate of speed of seven miles per hour. From the time Rossow left the elevator until the collision he neither stopped, looked, nor listened. The engine and train were visible for a time sufficient to have enabled him to stop or turn his horses if he had seen them. The engine whistled about 90 rods before it came to the crossing, and the rumble and roar of the train could have been heard if he had listened. Nine witnesses were at different places around this crossing when the collision occurred. No one of them was so near the crossing that the duty of exercising care to hear and see the train was imposed upon him, yet every one of these nine witnesses was aware of the approach of the train before it reached the crossing. Every one of these nine witnesses received this knowledge in ample time to stop and turn the horses he was driving if he had been in Rossow's place. Every one of them heard the roar and rumble of the train in time to have avoided the collision. Many of them heard the whistle; many heard the bell ring. The two witnesses who were most disadvantageously situated—Malchow and Swanson, who were on the east side of the elevator, so that the train came from past the elevator behind them—heard the bell ring, heard the roar of the train, knew of its approach, and called to Rossow in time to have enabled him to keep off the railroad track if he had been listening. The fact that all witnesses who observed Rossow from the time he left the elevator till his team was struck by the engine saw him do nothing but trot his team down to and upon the railroad track, taken in connection with the fact that every other person about the crossing learned of the approach of the train in time to have avoided the collision, is conclusive either that Rossow did not look or listen, or that, if he did, he utterly ignored what he saw or heard. This state of the evidence also proves that, if Rossow had exercised the care which those who were not approaching the railroad track did exercise,—the mere care inspired by idle curiosity,—he would not have been injured. Greater care was required of him. The railroad itself was a notice of danger. It was his duty to stop if he could not see or hear. It was his duty to put himself in a position where he could clearly see and hear, and thus be assured that there was no approaching train. He did not stop. He covered his ears with the collar of the fur coat, so that he could not hear. He did not look,—for, if he had looked, he would have seen,—but drove blindly, carelessly, upon the train. The evidence in regard to the shying of the off horse has been considered, and we are unable to find any evidence that this fact in any way caused the collision. It was but natural that a horse which was being driven upon a locomotive engine should make some effort to get away from it. There is no evidence that the team was not at all times under the perfect control of Rossow. It is suggested, in opposition to the views herein expressed, that the court ignores the fact that the railroad company was also negligent in not ringing the bell

as required by the statute. This suggestion is without force. The question is, as hereinbefore stated, did the negligence of Rossow directly contribute to his death? If it did, defendant in error cannot recover, even though plaintiff in error was also negligent. To say that contributory negligence cannot be invoked to defeat a recovery only in cases where the defendant is not negligent, would eliminate the defense of contributory negligence from all cases, for, if there is no negligence on the part of the defendant, then there can be no recovery in any event. The facts, as disclosed by the evidence in this case, bring it clearly within the rule announced in the cases hereinbefore cited, and also the recent case of *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014.

For refusing to direct a verdict for the plaintiff in error upon the second ground of the motion made by it, the judgment below must be reversed, and a new trial ordered.

WESTINGHOUSE ELECTRIC & MFG. CO. v. UNION CARBIDE CO.

THOMSON-HOUSTON ELECTRIC CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 29, 1902.)

Nos. 135, 136.

1. PATENTS—INVENTION—ELECTRICAL CONVERTERS.

The Westinghouse patent, No. 366,362, claim 4, which covers an electric converter constructed with open spaces in its core, and an inclosing case containing oil or paraffin, adapted to circulate through such spaces and about the converter, for the purpose of cooling the same, discloses invention, was not anticipated, and is valid.

2. SAME—ANTICIPATION

The Thomson patent, No. 508,654, for a device for cooling electric transformers, which are surrounded by oil or like insulating fluid, by passing a pipe containing running water through the case inclosing the transformer and such fluid, is void for lack of novelty in view of the prior art, and especially of the Pyke & Barnett British patent of 1890.

Appeals from the Circuit Court of the United States for the Western District of New York.

In Equity. Suits for infringement of letters patent No. 366,362, issued July 12, 1887, to George Westinghouse, Jr., and No. 508,654, issued to Elihu Thomson November 14, 1893, both for cooling transformers. On appeals from decrees for complainants.

For opinion below, see 112 Fed. 417.

A. C. Fowler, for appellant.

Thos. B. Kerr, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The specification of the Westinghouse patent in suit states its subject-matter as follows:

"The invention relates to the construction of a class of apparatus employed for transforming alternating or intermittent electric currents of any

required character into currents differing therefrom in certain characteristics. Such apparatus are usually termed 'induction coils' or 'converters.'"

This apparatus comprises a core of soft iron wound with two coils of insulated copper wire,—the one a primary coil, which receives and transmits the magnetic current; the other, a secondary coil, which transforms the pressure and quantity of the current according to the purpose for which it is required. The type of transformer here under consideration is known as the "step-down transformer." A current of high pressure and small volume transmitted from a distance may, by its use, be transformed to a current of low pressure and large volume, and then adapted for ordinary household uses. The object of the Westinghouse improvement is stated by the patentee as follows:

"The object of this invention is to provide a simple and efficient converter, which will not become overheated when employed for a long time in transforming currents of high electro-motive force, and which will be thoroughly ventilated."

The patentee primarily proposed to obviate the serious objection of loss of energy by overheating involved in such transformation by separating the plates of the core and the primary and secondary coils from each other, so as to permit of ventilation. This construction adapted for ventilating purposes is covered by the other claims not in suit, and is not involved herein. The particular construction which is the subject of the fourth claim,—the only one involved herein,—is suggested as follows:

"It may be preferred in some instances to surround the converter with some oil or paraffin or other suitable material, which will assist in preserving insulation, and will not be injured by heating. This material, when in a liquid form, circulates through the tubes and the intervening spaces of the coils and plates, and preserves the insulation, excludes the moisture, and cools the converter. The entire converter may be sealed into an inclosing case, H, which may or may not contain a nonconducting fluid or a gas."

Said claim is as follows:

"(4) The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case, adapted to circulate through said spaces and about the converter."

Complainant contends that this claim covers a transformer whose surfaces are cooled by means of oil circulating through said open spaces in said core and confined in said inclosing case. The first objection raised to this contention is estoppel by reason of proceedings in the patent office. There the patentee, it is true, erased a claim for a combination of a converter and inclosing air-tight case, and a fluid therein, which was identical with the claim in another pending application, and modified his claims for ventilating spaces between the core and the coils. But the claim here in suit was filed with his original application, and it was never canceled or modified. That other combinations originally claimed by him were old appears from the prior art. Converters having open spaces in the core to avoid heat-

ing were old. In the Hindley & Buffham patent of 1882 (No. 266,290), for a generator, is disclosed the arrangement of wires "whereby openings or spaces are provided for the free circulation of air," in order "to overcome in a great degree the generation of heat"; and the patentees describe the winding of the coils "in separate groups, so that air can freely circulate through them." And in this patentee's earlier patent, No. 342,553 of 1886, he stated that its object was to "construct the converter in such manner that there shall be but little loss of energy through heating the iron," and described a core composed of thin plates "separated from each other by intervening washers or plates of nonmagnetic material,—such as vulcanized fiber,—and an air space may be left, if desirable, between each two plates." The use of oil or other nonconducting fluid to reduce the conductivity of the wire coils of a dynamo when driven at a high speed and thus reduce the heat is described in the Millar patent, No. 270,457, of 1883.

Defendant's counsel chiefly rely on the Stanley patent, No. 349,612 of 1886, for an induction coil, in which, they say, they "have the identical combination of the fourth claim of the Westinghouse patent." This patent is for a converter. The plates of the core are so stamped as to form interior and exterior teeth. Of the plates the specification says:

"They are placed upon each other, the positions of the teeth coinciding; but they are insulated or separated from each other by paper, cloth, asbestos, oil silk, air, or other well-known insulating material, and they are firmly bolted or otherwise secured together."

The specification further says:

"The coil is preferably protected by being placed within a suitable case consisting of a base, F, to which there is secured a removable cover, F'. In the cover there are preferably formed perforations, f,f."

Although the drawings do not show open spaces in the core, and defendant's expert assumes that there are no such spaces, yet it appears from the foregoing description that the patentee conceived the idea of a separation of the plates either so as to admit air or to provide for the insertion of some fabric for purposes of insulation. The description and drawings of the Stanley patent show a base plate and perforated cover adapted to ventilate the converter and to protect it from physical injury. We have, then, in the prior art every element of the combination claimed, and a physical combination of the same elements, except that the separations in Stanley are not adapted to, and the construction of the inclosing case is prohibitive of, the purposes of the claim in suit. This claim covers such an inclosing case as will confine the nonconducting fluid, and such open spaces in the core as will permit the circulation of the liquid through them. Westinghouse, then, was the first to patent such an air-tight, closed converter. Does the combination covered by the claim in suit show patentable invention? If the idea of ventilation be rejected, and the patent be confined to the statement of and claim for the inclosed construction, it embodies at least a combination radically

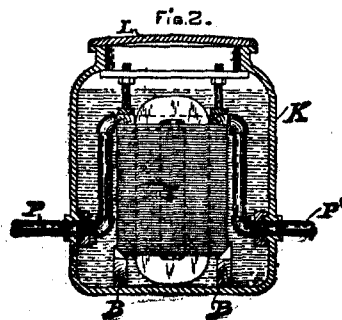
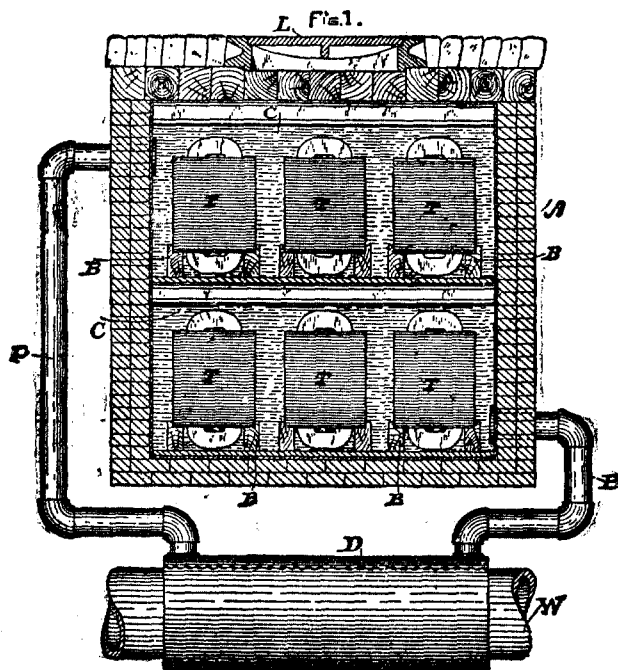
modified from those of the prior art, in order to adapt it to a novel purpose. The primitive telegraph coils of the Brooks patent of 1878 were immersed in oil "to protect them from the influence of the damp atmosphere"; and the Miller dynamo, without open spaces in its core, had its coils suspended in a tank of oil. But the construction of these devices excluded the novel idea of oil which would "circulate through the tubes and intervening spaces of the coils and plates." And while the assumed or suggested separations between the plates of the Stanley patent would be sufficient for insulation only, and not for circulation, its inclosing case is not sealed so as to contain the circulating oil, and the use of oil is not suggested. In these circumstances, the patentee seems to be entitled to claim the means by which the external and internal surfaces of the heat-producing parts of a converter were cooled by such an arrangement and separation of parts as would permit the circulation about them of oil, and the means for the retention of said oil within and about said surfaces, whereby the heat from the oil radiated to the surrounding air. If there is any doubt upon the question of patentability, the practical and commercial results of this improvement must resolve such doubt in its favor.

It appears that in the early history of the art only small converters were used, and the heat generated in them was dissipated by radiation into the surrounding air. But when the art began to call for converters exceeding 10 kilowatts in capacity, it was found, as stated by the expert for complainant, "that the capacity of the transformer increased as the cube of the linear dimensions, and the heat, if the amount of loss was held stationary, would increase in like proportion, while the radiating surface would increase only as the square of the linear dimensions." Further difficulties were encountered, resulting from the inequality of the conductivity of iron and copper. The testimony herein shows that these difficulties were so serious that for some time it was feared that the practical limit of such transformers had been reached; that experiments were made by grouping, by the use of lower current densities, by filling the cases with oil, and by subdividing the iron and copper parts of the converters by large ducts, and using forced drafts. It was only when, as the result of these experiments, it was found that the oil would circulate through the ducts that any practical progress was made. Then, as complainant's expert says, "the problem of making large units became greatly simplified. It became only necessary to so subdivide the coils and iron so as to expose a uniform surface as compared with the losses in the transformer in all sizes, and to provide a case having sufficient external surface to enable the oil again to give up its heat to the surrounding air, to make transformers of any desired capacity." The practical result of the invention in suit, as testified to by complainant's experts, was to so increase the capacity of converters that, while a dry converter, cooled by the natural circulation of air, is limited to 10 kilowatts, the oil-insulated converters of the patent in suit are commercially serviceable up to 500 kilowatts.

The evidence of increased utility and resultant commercial success is

developed and forcibly argued in support of the Thomson patent. It is contended that by the use of the improvement therein claimed converters with a capacity of about 2,000 kilowatts have been constructed, and the limit has not yet been reached. The Thomson patent is for cooling transformers, designed "to preserve the transformer comparatively cool by exposing oil or other insulating fluid in which the transformer is immersed to some special artificial cooling medium which may be passed through the oil, or through which the oil may be circulated."

The means by which this object is accomplished, as shown by Fig. 1 of the drawings, comprises the external pipe, P, and P', filled with oil, and so connected with the transformer chamber, which is also



filled with oil, as to permit of continuous circulation. The patentee says:

"A pipe, W, which may be part of a city water system, contains the cooling medium, and the pipe, P, is expanded into a casing surrounding it as shown. In actual practice it would be better to arrange the cylinder, D, at a higher level than is illustrated,—say around the pipe, P,—so that the oil or other fluid cooled in the cylinder may fall therefrom through the pipe P', being replaced by heated oil coming through pipe P."

In Fig. 2 the water pipe is shown within the chamber. The claims are as follows:

"(1) The combination of a receptacle or chamber containing one or more transformers surrounded by oil or like insulating fluid, with a cooling medium circulating in a pipe passing through a greater or less portion of the fluid, as set forth. (2) The combination, with a receptacle containing one or more transformers surrounded by an insulating fluid, of a pipe passing through said chamber and fluid, and means for causing a cooling medium to flow through said pipe, substantially as described."

The contention of counsel for complainant is that:

"Thomson combined, for the first time in the history of the electrical art: (a) An inclosing receptacle, containing (b) an electrical device liable to destruction from its own heat; and also (c) an insulating (moisture repelling) fluid carrier of the heat from the surface of the device to (d) a pipe passing through and presenting to the fluid carrier a heat-absorbing surface kept cool by (e) a refrigerating medium flowing in the pipe under pressure from an outside source."

That is, Thomson was the first to cool the oil in the Westinghouse converter by exposing it to a pipe of running water. That he was not the first to show how to accomplish this result is shown by the Pyke & Barnett British patent of 1890, on which all the claims of his original application were rejected. These patentees say:

"It is obvious that the external substances into which the heat is finally dissipated may be air, water, etc., and that the cooling vessel may be internal or external to the apparatus container."

Claim 5 is as follows:

"(5) In an electric coil or inductional apparatus cooled by means of a circulating fluid insulator, the extension of the container surface by means of corrugations, projections, or a coupled vessel for the purpose of cooling the circulating insulator."

Counsel for complainant is forced to admit that the difference between the two structures is that Thomson has limited himself to a pipe. This he was obliged to do in order to secure his patent. Counsel for complainant says:

"The said pipe characterizes the physical difference between the Thomson improvement and the Pyke & Barnett, while its function is wholly lacking in the Pyke & Barnett."

The functional difference relates to other objects sought to be accomplished by Pyke & Barnett. In the discussion of this construction counsel and experts for complainants are forced to rely on the Thomson pipe and the commercial results of the Thomson improve-

ment. The argument that the Pyke & Barnett patent does not show that the water circulates either inside or outside the case is met by the drawings, which show, and the statement in the specification which describes, "a pair of flexible pipes which connect the vessel, F, with the cooler, H, both at the top and the bottom, in order to establish a continuous circulation of the insulating liquid." In view of this patent, and of the judicial notice taken by the courts of matters of common knowledge, and illustrated in cooling apparatus in *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200, and in *Solvay Process Co. v. Michigan Alkali Co.*, 33 C. C. A. 285, 90 Fed. 818, it is difficult to see how any claim of novelty in this patent can be sustained. An attempt has been made to show that "the introduction of water into the converter was an idea wholly inconsistent with the teachings and practice of the art." In support of this contention one of the experts for complainant testifies as follows:

"Moisture was, at the date of the Westinghouse patent in suit, recognized as the deadliest enemy of the operator of electric light and power apparatus; not only because of the fact that it constantly tended to render that apparatus unreliable, but because it assisted in setting up leakages and arcs which were usually destructive, and often deadly."

But it does not appear that any such objection would exist when the moisture is confined in a "cooling vessel," as in Pyke & Barnett. The patentee makes no reference to the existence of any such danger or difficulty, or to any object of his invention, except "to provide an artificial cooling medium." The improvement is manifestly within the knowledge and scope of the general field of the arts. It is at most merely the use of an old device for a new and analogous purpose, without the necessity of any adaptation in order to discharge the old function in the new device. Its confessed commercial success, therefore, cannot be accepted as evidence of invention.

The decree is affirmed as to patent No. 366,362, and reversed as to patent No. 508,654.

SAUNDERS v. HANNUM et al

(Circuit Court, D. Massachusetts. July 18, 1902.)

No. 1,502.

1. PATENTS—NOVELTY—BED FRAME.

The Burton patent, No. 366,566, for a spring bed frame, claim 2, covering "a metallic bed frame having its ends upturned, and also curved or arched outward, as described," construed in connection with the specification, does not include as one of its elements the making of the end rails elastic or resilient, nor disclose any new feature, and is void for lack of patentable novelty.

In Equity. Suit for infringement of letters patent No. 366,566, granted to Burton, July 12, 1887, for a metallic spring bed frame. On final hearing.

Causten Browne and Alex. P. Browne, for complainant.
Milton E. Robinson, for defendants.

COLT, Circuit Judge. This suit relates to the Burton patent, No. 366,566, dated July 12, 1887, for improvements in metallic spring bed frames. The defendants are charged with infringement of the second claim, which reads as follows: "A metallic bed frame, having its ends upturned and also curved or arched outward, as described."

All the elements of this claim are found in the prior art,—metallic bed frames, upturned ends, and outwardly curved ends. If there is any patentable novelty in the claim, it must be by reason of some novel feature set forth in the specification. The complainant contends that the specification does disclose a new and important improvement not found in any prior patents, namely, an "outwardly bowed elastic or resilient end rail which both supports the fabric [bed bottom] and automatically takes up the slack." It is upon this feature of the patent the complainant relies to meet the defense of noninvention and anticipation; and it is not seriously questioned, if this feature is not disclosed in the patent, that claim 2 must be held void for want of patentable novelty.

We are met, then, at the threshold of this case with the important question of the proper interpretation of the Burton patent. The specification is short, and, in my opinion, its meaning is clear and unmistakable. The patentee says:

"The objects in part of my invention are not only to provide a very strong metal frame for holding and supporting the fabric or springs which constitute the bed bottom, but one in which such fabric or springs shall be raised above the sides of the frame. Other advantages of my new construction will hereinafter more fully appear."

So far, at least, the language of the specification is plain. "The objects in part of the invention" are a strong metal frame, and one in which the bed bottom is raised above the sides of the frame. After reference to the five figures of the drawings, the specification proceeds:

"Usually metal bed frames are all in the same plane from end to end, such frames not being, as in my invention, in a plane materially below that of the ends of the frame."

This is another reference to one of the objects of the invention already mentioned.

"In my improvement [the patentee continues] the frame A, which is preferably cylindrical and solid, or tubular in cross-section, though it may be made of bars of any other desired form in its cross-section,—such, for instance, as shown in Fig. 4,—may be in one or more connected pieces; but for greater strength and durability I prefer it in one piece, bent substantially to the shape shown in Fig. 1, the extremities being united by coupling-nuts or welding, or in any preferred way. The ends, b, of this frame are then turned upward, as shown at c in Fig. 2, the object of these upturned ends being to raise the fabric, sacking, springs, or other material composing the bed bottom above or away from the sides, d, and this bed bottom being attached, as desired, to the ends and sides of the frame, or to the ends, b, only, such ends and the sides, if desired, being provided with holes, e, or equivalent means—such as hooks, buttons, or knobs—for attaching the bottom to the frame. This feature of raised ends leaves the space beneath the side edges of the bed bottom clear and free, offering no obstacle to the proper play of the bottom or to getting in or out of the bed."

Having thus stated the advantages of the raised or upturned ends, the patentee proceeds to describe the advantages of having the ends curved or arched; and it is in this part of the specification the complainant finds disclosed and described an outwardly curved resilient end rail, which automatically takes up the slack:

"Each of these upturned ends has also an outward curve or arch, as seen at f, and which not only affords great strength to resist the lengthwise strain of the bed bottom, caused by the weight of the person or persons lying thereon, but they perform another duty, that of preventing the ends from being pulled and bent inward."

End rails are either curved or straight, and what the patentee here evidently means is that straight end rails are weak, and their ends liable to be pulled and bent inward, and that, by making them with an outward curve or arch, not only is strength added, but any pull or bend inward is prevented. There is no hint, suggestion, or intimation of any spring or resilient action in the end rails for automatically taking up the slack or for any other purpose. The specification proceeds:

"Furthermore, by reason of the described form given to the ends, when the end pressure or lengthwise strain is very great the tendency is to spread the sides somewhat farther apart, and when the fabric or bottom is fastened or moored to these sides they are held solid and firmly, and their further separation prevented, thus making it impossible for the ends to pass the 'center' and bend inward. This enables me to use much lighter material in the construction of the frame than would otherwise be necessary, and at the same time giving great strength."

This paragraph refers to the advantages which result from mooring the bed bottom to the sides of the frame. When the end pressure or lengthwise strain is the greatest, there is a tendency, by reason of the form given the ends, to spread the sides further apart, but by fastening the sides to the bottom in the manner previously described in the specification the sides are held firm and solid; the effect of this also being to hold the ends firm, and thus render it impossible for them to "pass the 'center' and bend inward."

Whatever merit there may be (a point I do not decide) in a metallic spring bed frame having outwardly curved resilient end rails for automatically taking up the slack, I am unable to find any such concep-

tion or disclosure either described or suggested in the Burton patent, or any language from which it can be reasonably inferred that the patentee ever had any such conception, much less intended his patent to include this feature of novelty. From a very careful study of the instrument, I cannot resist the conclusion that the purpose of the outwardly curved arch was strength and inflexibility, and not resilience. It was the unyielding resistance of the arch, and not any springing or rebounding resistance, which the patentee plainly had in mind.

In the spring bed frame art, any spring or resiliency in the end rails seems to have been regarded as a defect to be guarded against; and, if Burton discovered that this feature was an advantage of such importance that he wished to cover it by a patent, it is incredible that he should not have referred to it specifically in the specification and claims. If such were the fact, the discovery of this new and important feature would not have been left to the ingenious interpretation of the specification by the complainant.

As the court cannot accept the complainant's construction of the Burton patent, it follows that claim 2 must be held void for want of patentable novelty.

Bill to be dismissed, with costs.

SLOAN FILTER CO. v. EL PASO REDUCTION CO.

(Circuit Court, D. Colorado. July 10, 1902.)

No. 3,746.

1. PATENTS—SUIT FOR INFRINGEMENT—RIGHT OF OTHER USERS TO INSPECT RECORD.

A user of machines claimed to infringe a patent has such an interest in the subject-matter of a suit between other parties in which the validity of such patent is in issue as entitles him, on proper application, to inspect and to have a copy of the record in such suit, including the evidence on file; and the parties will not be permitted by a collusive stipulation, made on a settlement and dismissal of the suit, to withdraw the evidence from the record for the purpose of defeating such right of inspection.

In Equity. Suit for infringement of patent. On motion for dismissal by stipulation and for leave to withdraw evidence from record.

C. M. Bliss and Edward Kent, for complainants.

W. L. Hartman, for respondents.

Thomas, Bryant & Lee, for petitioner.

HALLETT, District Judge. This suit was brought May 3, 1898, to restrain infringement of patent No. 587,874, for an improvement in barrel filters. The cause was ripe for hearing in April last, when the parties filed in the cause a stipulation for dismissing it, which contained, among other provisions, the following:

"(3) That the testimony and exhibits taken and on file in the office of the clerk of this court may be withdrawn from the files and record by the complainant."

¶ 1. Access to public records, see note to *Bell v. Trust Co.*, 49 U. C. A. 210.

At or before the filing of the stipulation the Portland Gold Mining Company, through its solicitor, applied to a judge of the court for a copy of the testimony taken in the cause, and all consideration of the stipulation was postponed to the May term, then approaching, in order to give an opportunity for full hearing of the subject. May 13th last the Portland Company filed a petition of some length, in which it asks for a copy of the testimony. The petition can be briefly stated as follows: Petitioner owns and operates mines in Cripple Creek mining district, and it has become expedient and necessary to erect a mill for treating the ores obtained from its mines by the "process of chlorination." Construction of the mill was begun in the year 1901, and it would be completed in June, 1902, and would have a capacity of 300 tons of ore per day. Twelve barrel filters of specified dimensions would be put in the mill, and they are of the class described in the bill of complaint in this cause, and in the patent No. 587,874, which complainant claims to own.

The issues raised in the cause relate to the novelty of the invention and the validity of the patent. When this suit was begun, and at the time of taking testimony therein, "a considerable number of firms and corporations" were engaged in treating ores "by the said process of chlorination, and also by the use of cyanides," and there was a good market for low-grade gold-bearing ores in the Cripple Creek district. The persons, firms, and corporations so engaged in reducing ores have formed an organization called the United States Reduction & Refining Company, with the purpose to create a monopoly and control the price of ores in Cripple Creek district. Petitioner will be compelled to sell its ores for such price as the United States Reduction & Refining Company may be willing to pay, if hindered or prevented from building its mill. A large volume of testimony for and against the patent has been taken in the suit, and is or ought to be now on file in the cause. The parties mentioned in the petition, including the parties to this suit, have combined and confederated—

"To secure the settlement and dismissal of this suit, and the withdrawal and the suppression of the testimony against the said patent, to the end that when your petitioner is ready to operate its said mill they may apply to this honorable court and other courts to enjoin your petitioner from the use of the said alleged patent, to sue it for alleged damages for infringement, etc., and thereby embarrass, interfere with, and, if possible, wholly prevent, the operation of its said mill, compelling it to send its product of low-grade ore to the said reduction company, and making its investment in and for said mill a profitless expense, if not an entire loss, to your petitioner and its stockholders.

"(14) That, pursuant to said purpose and intention of the said parties hereinbefore mentioned, they did, after the filing of said report, in so far as your petitioner is informed and believes, secure, by purchase or otherwise, the capital stock of the said Sloan Filter Company, and made a settlement or adjustment of said controversy of some sort, the details whereof are to your petitioner unknown, whereby the papers in said cause are to be withdrawn, together with the master's report of the testimony aforesaid.

"(15) That in furtherance of the said plan, purpose, and intention of the parties aforesaid they, the said MacNeill, Penrose, Tutt, Hawkins, and Hartman, did, within the past two weeks, organize a certain corporation under the laws of the state of Colorado, with themselves as incorporators, and called the Chlorination & Patents Company, the alleged purpose whereof is to deal in and operate patented processes for the treatment of ores by chlorination,

etc.; and that the said company so organized, as your petitioner is informed and believes, and consisting of the persons aforesaid, is now the reputed and alleged owner of the said pretended Sloan filter, and all patents of said Sloan relating thereto, the validity of which depends largely upon the suppression of the testimony heretofore given in this cause of the said MacNeill, J. D. Hawkins, and others, given in behalf of the defendant above named under the examination of the said Hartman, and against the validity of the said patent.

"(16) Your petitioner further alleges that the said Chlorination & Patents Company, so called, is a pretext only, and was created and organized for the sole purpose, as your petitioner believes, of being used as a medium for the said United States Reduction & Refining Company, to secure the control of patented processes, and particularly of the said Sloan filter process, that it might be utilized to endanger or destroy the mill of your petitioner, and to crush opposition, and discourage and prevent the building or erection of other mills coming into competition with its monopoly, notwithstanding the fact that many of the mills now belong to said United States Reduction & Refining Company, but formerly operated as independent concerns, used said filtrating process from time to time, and for a long time prior to the organization of the United States Company, without interference, hindrance, or protest from any source."

May 13th last complainant filed a motion to dismiss and strike off the petition upon 13 grounds, which need not be recited at length. The most plausible reasons assigned are that the Portland Company is a stranger to the suit, and the testimony taken in the cause belongs to and is entirely under the control of the parties. Of course, the motion, like a demurrer, admits the facts alleged in the petition to show the interest of the Portland Company in the subject-matter of the suit. So understood, the interest of the Portland Company in the result of the suit and the testimony taken therein is fully shown. A machine in general use in the art of treating ores is said to be the subject of a patent from the government, and the validity of that patent is denied. No argument is needed to show that every one engaged in the business is interested in a controversy of that kind.

Another consideration seems to support the petitioner's position. In administering patent law, courts constantly refuse to re-examine questions which have been fully and fairly investigated in other suits. A patent right once established upon full inquiry is thereafter impregnable to the assaults of others who claim in the same way and to the same extent as the defendant in the first suit affecting such right. Under this rule all persons using a device are in some sense parties to a suit in which the validity of such device may be challenged or denied. If strangers to the suit can be in any manner or to any extent bound by the result, they ought to be at liberty to inquire how the controversy is carried on. At the bar it was said that this petition is without precedent. This may be true in respect to the circumstances of this case, but the matter of inspecting and taking copies of public records is as old in the law as the records are old. In English law, tenants of a manor could always inspect the court rolls and books of the manor in order to ascertain their titles. *Rex v. Shelley*, 3 Term R. 141. So, also, where the authority of a mayor was in question, citizens could inspect the books and papers of the borough in order to determine the fact. *Rex v. Babb*, 3 Term R. 579. These cases and others support the common-law rule that a party may have inspection of any docu-

ment or paper in which he may be interested. 1 Whart. Ev. par. 745. In American reports cases may be found to the same effect. *Ferry v. Williams*, 41 N. J. Law, 333, 32 Am. Rep. 219. A federal statute (Rev. St. § 828) on this subject seems to be applicable only to the judgments and decrees of federal courts. In *re Chambers* (C. C.) 44 Fed. 786; *Trust Co. v. Bell* (C. C.) 87 Fed. 19. Similar statutes are found in some of the states. *State v. Rachac*, 37 Minn. 372, 35 N. W. 7; *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30; *Lum v. McCarty*, 39 N. J. Law, 287; *Newton v. Fisher*, 98 N. C. 20, 3 S. E. 822. No statute is required, however, to support the petitioner's application. He is fairly within the common-law rule as one who has an interest in the subject, and therefore a right to inspect public documents affecting his interest. The petitioner is not an intermeddler in other people's affairs, nor is its application against public policy, as was the case in *Re Caswell* (R. I.) 29 Atl. 259, 27 L. R. A. 82, 49 Am. St. Rep. 814. The petitioner seeks only to protect itself in respect to the matter in controversy in this cause, and for that purpose it may rightfully invoke the aid of the law to obtain a copy of the testimony and documents on file.

The stipulation to dismiss will be recognized, but the application of complainant to withdraw from the files the testimony taken in the case is denied.

In re STAUNTON.

(District Court, E. D. Pennsylvania. October 11, 1902.)

No. 1,119.

1. BANKRUPTCY—EXEMPTIONS.

Exemptions in bankruptcy can only be allowed under the provisions of the various statutes of the states on the subject.

2. SAME—EXEMPTIONS FROM PROCEEDS OF PROPERTY.

Since, under the law of Pennsylvania, exemptions can be allowed to a debtor only from specific articles of personal property, including cash or valuable securities, a bankrupt, having elected to take a part of his exemption in personal property, was not entitled to take the balance from the proceeds of other property sold by his assignee for the benefit of creditors before bankruptcy proceedings were instituted.

In Bankruptcy.

William C. Wilson, for bankrupt.

C. Wilfred Conrad, for creditors.

J. B. McPHERSON, District Judge. When this case was argued I was inclined to believe that the bankrupt's claim for exemption should be allowed in full, on the ground that whatever he might have done, or have failed to do, in the assignment proceeding before the state court, he was nevertheless entitled to renew the claim in the bankruptcy proceeding before this court; and that the situation of affairs as it actually existed when the claim was made to the trustee

might justify allowance in full. At that time the bankrupt had in his possession certain household and personal effects that had been set aside for his exemption in the state court, and these were properly awarded to him by the trustee. They were only worth \$95.25, however, and for the remainder of the exemption he claimed to be paid \$204.75 in cash out of a fund that was handed over to the trustee by the assignee under the insolvent law of the state. This fund was the proceeds of personal property that had been sold by the assignee, and I was disposed at first to think that, as the fund was actually in existence when the petition in bankruptcy was filed, the bankrupt might have a valid claim to a part of it in cash. But further reflection has convinced me that such conclusion would not be sound. Exemptions in bankruptcy can only be allowed under the provisions of the various statutes of the states upon this subject, and it is a fundamental rule of the exemption law of Pennsylvania that (with certain exceptions not now material) a debtor must confine his claim to specific articles of personal property, including cash or valuable securities, that were owned by him when the assignment was made or the execution process issued. If he then owned \$300, or less, in cash, it may be set apart for his use; but, if the cash does not exist in specie, he cannot assert a valid claim upon a fund subsequently produced by the sale of personal property. In *re Haskin* (D. C.) 109 Fed. 789, 6 Am. Bankr. R. 485; In *re Manning* (D. C.) 112 Fed. 948, 7 Am. Bankr. R. 571. I repeat, he must be the owner of the specific articles, either cash or chattels, which are to be set apart for his use, for his ownership merely continues, and is not created by his claim and the proceedings thereunder. The application of this rule forbids the allowance of the item that is now contested. He did not own the cash in question when the petition in bankruptcy was filed, and he never had owned it. It belonged to his creditors, the legal title being in the assignee or trustee; and for this reason it was beyond his reach.

The conclusion of the referee is therefore approved, but I do not wish to be understood as adopting the reasoning by which he supports it. It is, I think, open to question whether a failure to claim the whole or a part of the exemption in the state court bars the debtor from claiming it afterwards in a court of bankruptcy, and for the present I prefer to leave that point undecided.

PENNSYLVANIA CONSOL. MIN. CO. v. GRASS VALLEY
EXPLORATION CO.

GRASS VALLEY EXPLORATION CO. v. PENNSYLVANIA
CONSOL. MIN. CO.

(Circuit Court, N. D. California. July 28, 1902.)

Nos. 12,973, 12,894.

1. MINES AND MINING—LODE CLAIMS—EXTRALATERAL RIGHTS.

Evidence considered, and *held* to establish the existence of a vein or lode apexing within the surface boundaries of a mining claim, and having continuity lengthwise of the claim to the extent and in the direction necessary to carry extralateral rights therein between the extended end line planes of the claim, and also to show the continuity and persistence of such vein, in its dip or downward course, extending to the lowest point to which the workings had been carried.

2. SAME—CONTINUITY OF VEIN IN ITS DIP—"COMPLICATIONS."

In a lode or vein having its apex in the surface of a mining claim and a westward dip, after it was followed down several hundred feet, and beyond the side line planes of the claim, through which distance it was a comparatively simple fissure vein, there occurred at some points what were technically termed "complications." The fissure would flatten and pinch out, but before reaching that point there would fall from it a series of small mineralized fissures having an eastward dip, and connecting, at a depth downward of six or eight feet, with another underlapping west dip fissure. This latter pinched out in a short distance on its upward course, but on its downward course it strengthened, and became again a strong ore-bearing vein. Wherever these complications occurred, the miners, in the practical working of the mine, dropped to the underlapping fissure, and followed it as the continuation of the main vein in its downward course. The east dip fissures did not appear to cut across either of those having a west dip, but merely connected them. At other points both north and south of the places where these complications occurred the vein was continuous and unbroken down to the lowest level of the workings. *Held*, that such complications did not break the continuity of the vein, the overlapping and underlapping fissures being portions of the same vein, and that the owner of the claim in which it apexed was entitled to follow it beyond them.

Action in Ejectment and Cross-Action in Trespass. Tried together by the court without a jury by stipulation.

Lindley & Eickhoff, Fred Searls, and C. W. Kitts, for Pennsylvania Consol. Min. Co.

Garber, Creswell & Garber and A. A. Moore (P. F. Simonds, of counsel), for Grass Valley Exploration Co.

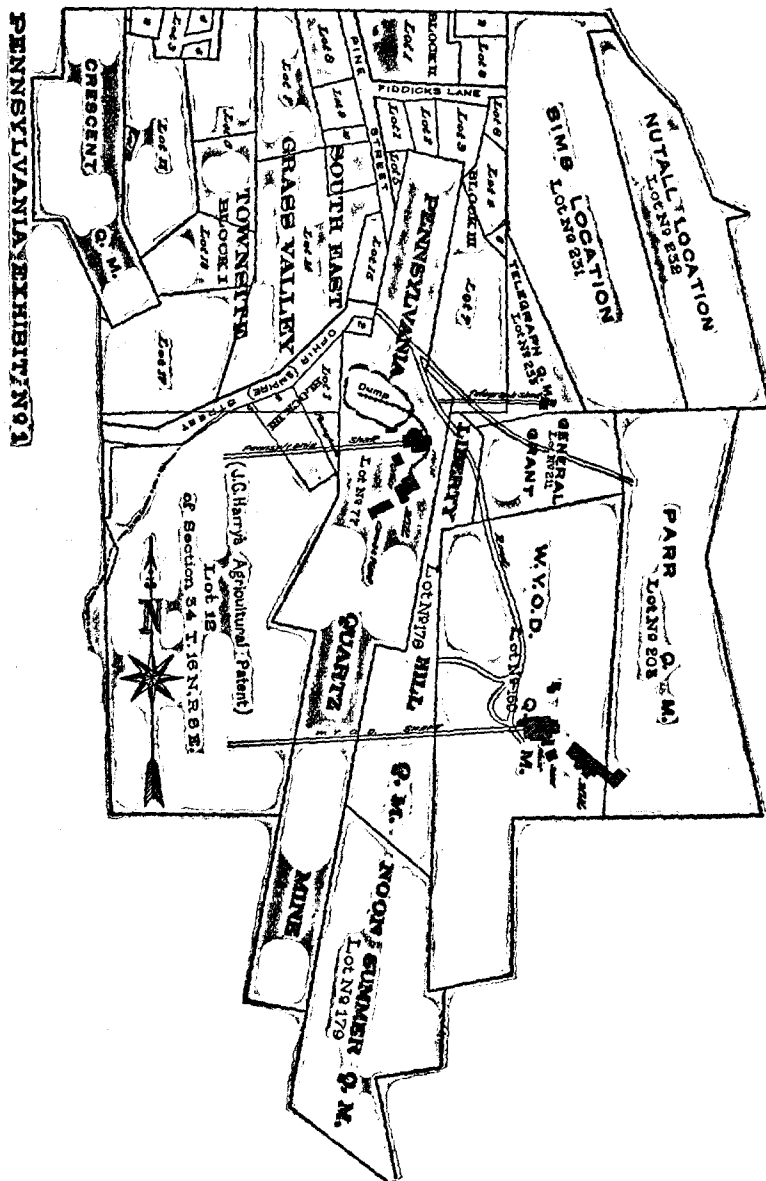
MORROW, Circuit Judge. The first-named action is in trespass, and was instituted in the superior court of Nevada county of this state on August 6, 1900, by the Pennsylvania Consolidated Mining Company, a corporation organized and existing under the laws of the state of California, against the Grass Valley Exploration Company, a corporation organized and existing under the laws of the state of West Virginia, to recover the value of ore extracted by the Grass Valley Exploration Company from certain underground work-

† 2. See Mines and Minerals, vol. 34, Cent. Dig. §§ 75, 77.

ings alleged by the Pennsylvania Company to be in and upon the Pennsylvania quartz vein or lode. The case was transferred to this court upon the petition of the defendant showing that the matter and amount in dispute in the cause exceeds \$2,000, exclusive of interest and costs, and that the controversy is between citizens of different states. The second-named action is in ejectment, and was commenced in this court by the Grass Valley Exploration Company on February 16, 1900, against the Pennsylvania Consolidated Mining Company, to recover possession of the quartz vein or lode described in the first action, and embraced within the Pennsylvania underground works underneath the surface properties belonging to the Grass Valley Exploration Company. By stipulation the two cases were tried together by the court without the intervention of a jury. By further stipulation, dated April 17, 1901, it was agreed between the parties to the actions that until the court should have tried the issues as to the title, ownership, and right of possession, neither party should be called upon to offer or introduce evidence as to any damage which they or either of them might have sustained by reason of the alleged wrongful acts of the other; and that when the court should announce its decision upon said issues, and should determine what, as matter of law, were the respective rights of the parties in and to the properties in controversy, and should determine by said decree the ownership of the portions of said properties in dispute, the causes should be referred to a referee or commissioner to be designated by the court, for the purpose of taking testimony upon the question of damages to which the respective parties might be entitled. It was further agreed that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. In referring hereafter to the parties to these actions, the Pennsylvania Consolidated Mining Company will be designated as the "Pennsylvania Company," and the Grass Valley Exploration Company as the "Grass Valley Company."

The mining ground in controversy in these two actions is located in Grass Valley, in this state. The Pennsylvania Company claims the right to carry on the mining operations in which it is engaged underneath certain surface rights owned by the Grass Valley Company upon the alleged fact that all of its underground workings were made in the orderly pursuit of mining operations in developing, following, and extracting ore from a vein or lode the apex of which is within the surface boundary of the claims of the Pennsylvania Company; that such vein or lode is continuous and persistent from its apex at the surface, within the boundary of the claims of the Pennsylvania Company, to the lowest workings in the mine; and, by reason of this fact, that the title to the claim or lode is in the Pennsylvania Company. The surface boundaries of the properties owned by the parties to these actions are shown by the annexed diagram.

The claims designated on the diagram as the "Pennsylvania," "Liberty Hill," and "Noon Summer," belong to the Pennsylvania Company. The title of the company to the Pennsylvania claim is derived from the United States by a patent dated December 16, 1879,

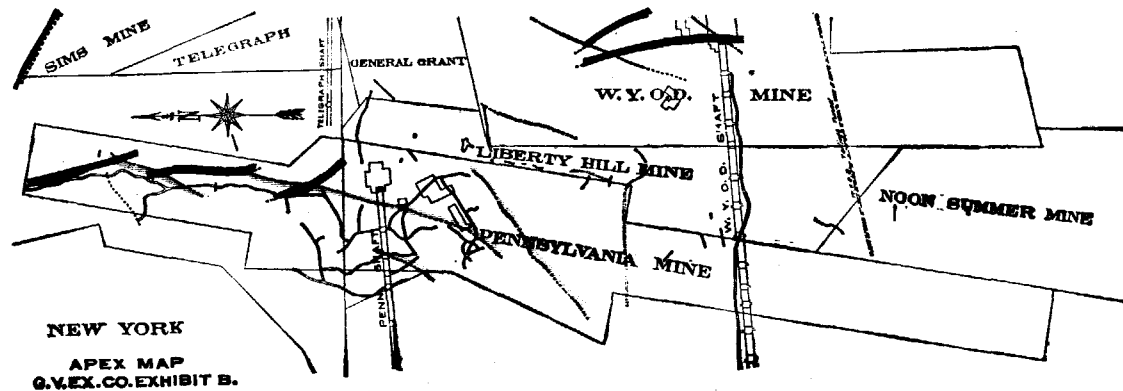


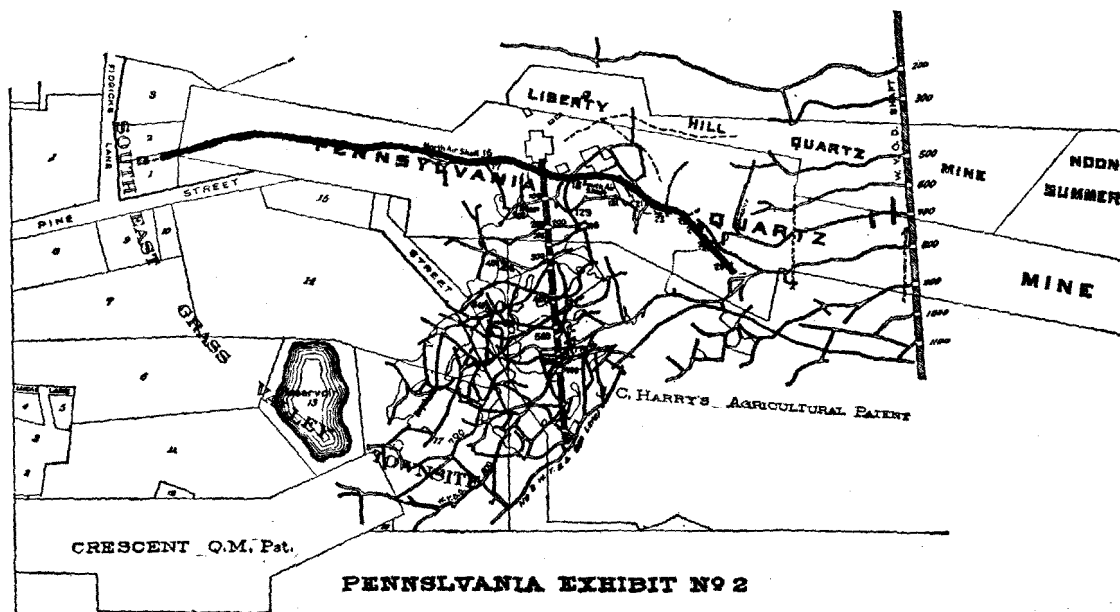
based upon three mining locations, the earliest of which appears to have been made on August 10, 1870. The Pennsylvania Company is also in possession of the Liberty Hill and Noon Summer mining claims under a contract existing at the time of the commencement of these actions to purchase from parties who derive their title from the United States under a patent dated February 6, 1892. The mining claims designated on the diagram as the "W. Y. O. D.," "Parr,"

"Grant," "Telegraph," "Sims," "Nuttall," and "Crescent" belong to the Grass Valley Company. This company is also the owner of the tract designated as the "J. C. Harry Agricultural Patent," to the west of the Pennsylvania claim. It is also the owner of a number of town-site lots in Southeast Grass Valley and the land underlying Empire street, as shown upon the diagram. The title of the Grass Valley Company to the claim designated as the "W. Y. O. D." is derived from the United States by a patent dated February 6, 1893, based upon a mining location dated January 2, 1875. The title of this company to the claim designated on the diagram as the "J. C. Harry Agricultural Patent" is also derived from the United States through a homestead patent issued June 4, 1894, based upon a final homestead entry made by Harry on May 20, 1890. This entry was in turn based upon a settlement on the land made by Harry in 1882. The title of this company to the claim designated on the diagram as the "Crescent" is derived from the United States by a patent dated March 8, 1876, based upon a mining location made on the 21st day of August, 1860. For the purpose of this opinion, the title to the remaining claims, lots, and rights owned by this company need not be here further identified or described. It will be sufficient to say that the location of the Pennsylvania claim holds priority over all the claims, lots, and rights shown on the diagram except the Crescent, and that substantially the claims, lots, and rights of the Grass Valley Company surround the claims of the Pennsylvania Company on all sides.

In determining the rights of the parties to the underground veins and lodes in controversy, we shall have to deal mainly with the surface location of the Pennsylvania claim and its underground or extralateral rights. That claim is described in the patent as being "twenty-eight hundred and thirty-eight (2,838) linear feet of the said Pennsylvania quartz mine, vein, lode, ledge, or deposit." The direction of the length of the claim or location containing this vein or lode is described as N., $10^{\circ} 45'$ E., and correspondingly in the reverse direction as S., $10^{\circ} 45'$ W. The end lines of the location across the vein or lode are parallel, having a common direction of N., $79^{\circ} 15'$ W., or correspondingly in the reverse direction S., $79^{\circ} 15'$ E. The surface area of the location is 16.44 acres. The extralateral rights of the veins or lodes of this location under section 2322 of the Revised Statutes of the United States are described as "for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the top or apex of which lies inside the exterior lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey." The survey referred to in this description is the survey made by or under the direction of the United States surveyor general, in accordance with the requirements of section 2325 of the Revised Statutes of the United States.

The questions presented for determination are mainly of fact, and





relate: First, to the existence of a vein or lode apexing within the surface boundaries of the mining claims owned by the Pennsylvania Company; second, the continuity of the apex of such vein or lode to the extent and in the direction necessary to embrace within extended end line planes the vein or lode in controversy; third, the continuity and persistence of such vein or lode on its dip or downward course from its apex to the lowest point of the vein or lode as developed or worked by either party, and including the ore deposits in dispute.

The existence of a vein or lode apexing within the surface boundaries of the mining claims owned by the Pennsylvania Company is not denied by the Grass Valley Company. The controversy commences with the question as to the continuity of such vein or lode dipping to the west to the extent and in the direction necessary to embrace within extended end-line planes the vein or lode in controversy outside the west side line of the Pennsylvania claim. The Pennsylvania Company claims that it has a vein apexing at or near the surface, and within the boundaries of the Pennsylvania claim, dipping to the west, substantially to the extent and in the direction along the length of the claim as shown by the red line in the annexed diagram. [See diagram entitled "Pennsylvania Exhibit No. 2," printed in colors.]

The Grass Valley Company contends that the Pennsylvania Company never had an apex vein running continuously or approximately so lengthwise within its location across either end line; that it never had an apex vein that did not cross both side lines of the location; that the so-called apex vein, where it did exist, was made up of a series of apexes of veins whose projections would cross the side lines of the Pennsylvania claim. The contention of the Grass Valley Company is illustrated by the annexed diagram. [See diagram entitled "Apex Map G. V. Ex. Co. Exhibit B," printed in colors.]

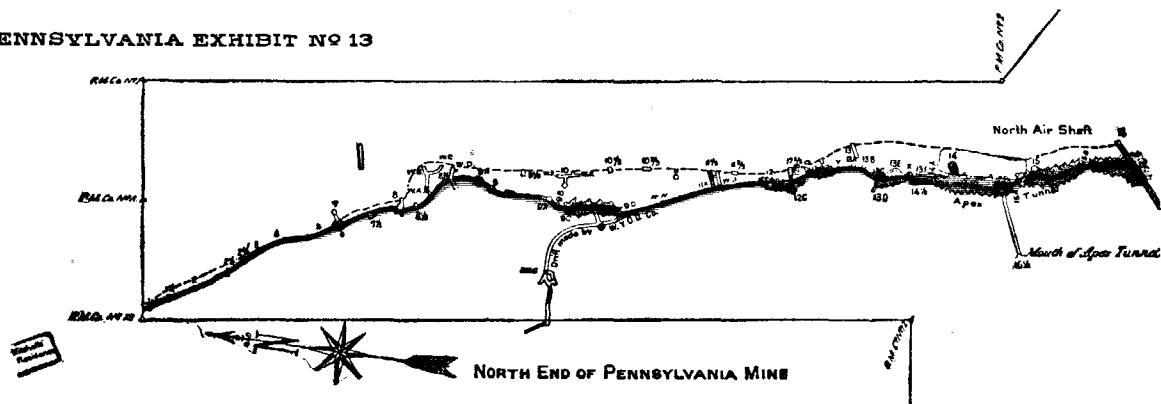
The Pennsylvania quartz claim appears to have been discovered by John Cadden at or prior to August 10, 1870, when the first location was made by him. This location, together with two others, one north and the other south of the original discovery claim, were incorporated into the Pennsylvania quartz claim, for which a patent was issued by the United States to the Pennsylvania Company on December 16, 1879, for 2,838 linear feet. The north end of the claim for a distance of 627 feet south from the north end line and the south end of the claim for a distance of 1,221 feet north from the south end line is 198 feet wide. The middle section of the claim, 990 feet in length, is 320 feet wide at its narrowest point, and 445 feet at its widest point. The surface opening of the present working shaft of the Pennsylvania Company is approximately 1,000 feet south from the north end line of the claim. The shaft descends into the earth following substantially the dip of the vein at an incline of about 30° to the west. The point of discovery and the first work of any consequence done upon the vein was at a point about 100 feet north of the present shaft. This work was along the vein for a distance of about 200 feet north, the vein dipping to the west. The shaft of the Grass Valley Company is located in the W. Y. O. D. claim, patented Feb-

ruary 6, 1893. This claim is east of the Pennsylvania claim, and is approximately 1,500 feet in length, running nearly north and south along the W. Y. O. D. quartz vein or lode, and contains 16.24 acres. The elevation of the collar of the Pennsylvania shaft is 2,550.39 feet, and that of the Grass Valley shaft 2,545 feet, above sea level. The bearing of the collar of the Pennsylvania shaft from the collar of the Grass Valley shaft is N., $22^{\circ} 45'$ W., and the distance between the two shafts at the surface is 1,005 feet. James Burke, a witness called on behalf of the Grass Valley Company, testified upon the trial that he had known the Pennsylvania location since 1871, and had worked from the surface down to the 300-foot level. He testified that the vein had croppings on the surface, that these croppings were exposed for a distance of from 15 to 20 feet, and that the direction of this apex vein was supposed to be north and south. He also testified that a shaft was run by Cadden about 100 feet north of the present incline shaft of the Pennsylvania Company. Recent explorations by the Pennsylvania Company north of the shaft and in the direction of the north end line of the claim have disclosed continuous old workings near the surface, commencing at a point about 100 feet north of the present shaft, and running thence northerly for a distance of about 200 feet, indicating the existence of a vein at one time apexing at or near the surface, and conforming substantially to the line between the point marked "14A" and a point about 50 feet south of the point marked "17," as shown by the Pennsylvania Exhibit No. 13. [See diagram printed in colors.]

These recent explorations by the Pennsylvania Company have also been extended in a northerly direction by cuts and shafts at intervals following the strike of the vein running a little west of north to the north end line of the claim, where the vein passes out of the claim on its strike a little west of north. At several points in these explorations old workings upon the vein were encountered, indicating that at an early date this vein had been found and explored near the surface. These old workings, together with those first named, extended along about 40 per cent. of the explored distance. The vein thus exposed has a general strike in a northerly direction and a dip to the west. Returning to the point about 100 feet north of the shaft of the Pennsylvania Company, and proceeding south in front of or to the west of the Pennsylvania Company's hoisting works, we find no surface explorations of a recent date until we reach a point about 80 feet south of the shaft, where we find what is called the "south air shaft." For this distance of about 180 feet the Pennsylvania Company has endeavored to establish the continuity of the apex vein by showing the existence of old stopes and drifts upon the vein underground running north and south.

Ross E. Bröwne, an expert mining engineer, called by the Pennsylvania Company, testified that he was employed by that company in March, 1900, to make an investigation and direct exploration work at the mine. He had been employed off and on for a little over a year, and had expended probably 90 days on the ground. After testifying that he had by such work traced the Pennsylvania vein from the northerly end line of the claim at point No. 1 to point No. 16,

PENNSYLVANIA EXHIBIT NO 13



as shown on the map "Pennsylvania Exhibit No. 13," he testified as follows, referring to "Pennsylvania Exhibit No. 2":

"From point 16, which then becomes a point of the Pennsylvania apex, on to the south, I was unable to do any work conveniently on the surface for the purpose of establishing the apex, owing to the fact that that ground is covered by old dumps, and is mostly made ground. The original ground is not there near to the surface, but by going from point 16 down the north air shaft towards the 100 level we encounter in a short distance the apex of the vein at a point between 16 and 17. I thence follow old stopes down this shaft for a considerable distance. Then pass through a short space of ground in place, showing the vein in place, with considerable quartz in it. Thence again along the edge of old stopes all the way down to the 100-foot level. From the 100-foot level, a point that we strike the 100-foot level going to the south, we follow continuous vein, partly stoped, practically all the way to the Pennsylvania shaft. At a point opposite to the east crosscut, which is shown on the model, and is marked 'Station 111,' I passed downward through the old stopes, along the edge of the old stopes [referring to stations marked on model Pennsylvania Co. Exhibit No. 4], through 201, 202, 203, to 204, on the 200 level, following the vein all the way; from 204 to the south, passing through the shaft, follow the vein all the way, to 216. From 216 the vein is followed by the south air shaft all the way out to the surface at station 18. Station 18 then makes a second point of the apex, and from station 16 to station 18 the apex is constructive. Mr. Lindley: Q. That is, at the surface? A. At the surface. That shows—this tracing that I made down the north air shaft through the 200 level to the south and up the south air shaft—shows that the point 18 is a point of the apex of the same individual vein that the point 16 represents. Q. In other words, instead of tracing on the surface, on account of the existence of artificial ground and the dumps, you passed underneath the surface, and followed around the 100 level to the south air shaft, and thence to the surface again in 18? A. Yes, sir. I did not make the tracing on the 100, because there is a small gap in it, but I went down to the 200 to make the tracings, so as to leave no gap in the continuity of the vein development."

The surface having been worked out many years ago, and the ground covered by dumps of rock and other refuse accumulations usual in the vicinity of hoisting works, it was clearly impracticable in the recent explorations to establish the apex of the vein as a physical fact upon the surface along the line between the points mentioned. It was, however, unnecessary. The underground stoping between the 100 and 300 foot levels running north and south furnishes satisfactory, and, indeed, the best, evidence of the existence of a vein reaching near the surface of the line of the projected apex. From the south air shaft further explorations south were continued by Mr. Browne underground. He says:

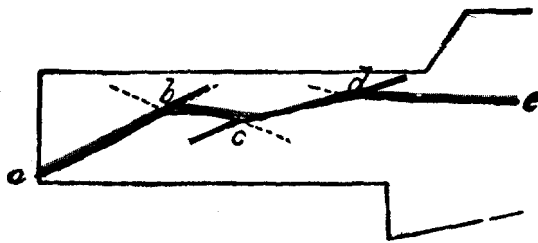
"Now, from the point 129 on the 100 level [referring to station marked on model Pennsylvania Co. Exhibit No. 4], extending to the south from point 18, the tracing on the surface cannot be made, owing again to artificial ground; that is, the original ground in place has been covered over by old dumps, so that the tracing cannot be well made. There are buildings there as well, the foundations of which cannot be interfered with. Consequently, attempting to follow the vein or establish approximately the apex of the vein from that point to the south, I followed the 100 level to the south from station 129, through station 130, to a point marked on the surface map (Pennsylvania Exhibit 3) about 30 or 40 feet south of station 20. There is no number there. Q. On Exhibit No. 3? A. On Exhibit No. 3. That is as far south as I traced the vein continuously. Mr. Moore: Q. What is that number? A. That number is not given. It is a point immediately east of the sand plant, and about 30 or 40 feet south of station 131 on Exhibit No. 3."

The distance underground was about 150 feet, establishing a projected apex upon the surface for the same distance. From the end of this projected apex upon the surface Mr. Browne traced a vein on the surface from point 21 through 22, 23, 25, 27, 28, and 29, by means of shallow pits and open cuts showing a fairly good vein, which he assumed was the Pennsylvania vein. The distance on the surface from point 21 to 29 is about 300 feet. This apex vein as thus traced has a length of about 1,450 feet, 1,120 feet traced upon the surface and 330 feet traced under ground, all within the boundaries of the Pennsylvania claim, running in a direction corresponding generally to the length of the claim. The Grass Valley Company contends that no such continuous vein apexing within the boundary of the Pennsylvania claim has been found, but that what has been found may be termed a series of intersecting veins, which may be approximately illustrated by the annexed diagram. [See "Diagram AA," printed in colors.]

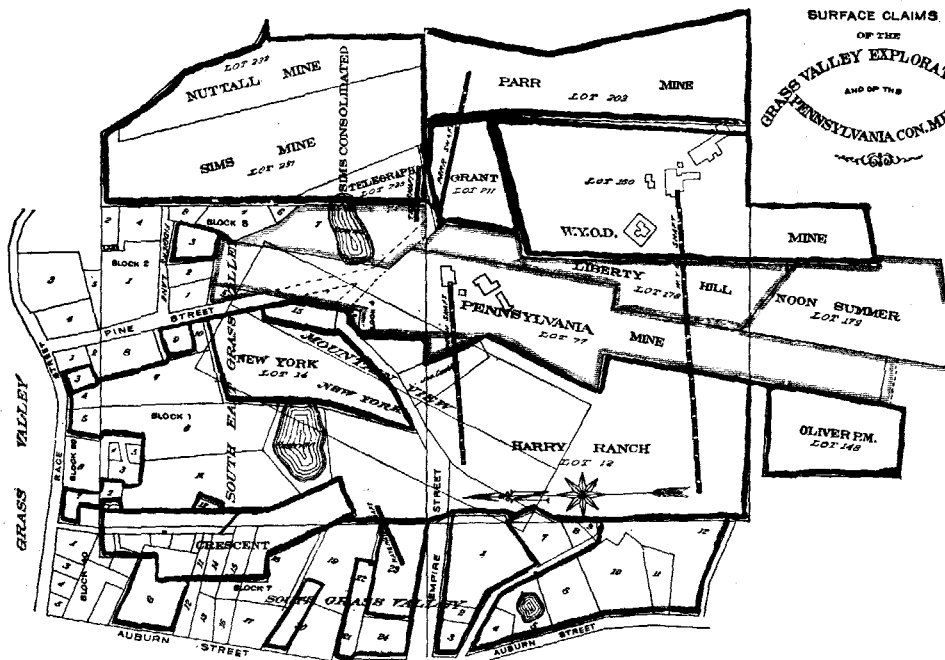
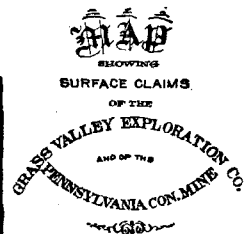
If this contention of the Grass Valley Company is correct, then the Pennsylvania Company has no extralateral right to the ore deposit in controversy to the west of the Pennsylvania west side line, but the same belongs to the Grass Valley Company under its common-law right to everything beneath the surface covered by its agricultural patent granted to Harry. The claim of the Pennsylvania Company to this extralateral right does not appear to have been questioned until the year 1900, when the underground works of the Pennsylvania Company had been extended some distance beyond the west side line of the Pennsylvania claim and under the Harry ranch. But even in this aspect of the case the burden rests upon the Pennsylvania Company to establish its right to the vein under the surface of the adjoining proprietor. The history of this controversy between these two companies was told upon the trial by W. S. Keyes, the well-known mining engineer. After giving an account of his different employments and experiences as a mining man, mining engineer, and mining manager, he said:

"I am also at present consulting engineer and a director in the Grass Valley Exploration Company. Some year and a half ago, or I think a year ago February, or something like that, we came to the conclusion that the Pennsylvania Company were trenching upon our premises, and we started a suit. When I first was employed as consulting engineer for this company, I made a study of the underground formation. I arrived there in the early days of the month of December, 1898. I spent some two weeks there in a careful study of the maps and underground works of the company, as careful as was possible in that time, and discovered that our principal fissures were making off to the northwest. We were already outside of our territory. I was perfectly well aware that, if projected up in their own directions, the principal fissures, after leaving the W. Y. O. D. proper, would certainly, some of them, go across our side lines, if projected in their own directions. I therefore advised my fellow directors to buy up all the surrounding territory. It took much time and money to acquire the property which you now see there outlined to the west in blue. We were in mortal terror that the Pennsylvania Company would find out what we were about,—would suspect that we were afraid that our mine was going outside of our limits, which it would certainly do if our principal fissures would continue in the same direction. Mr. Moore: Q. What properties do you refer to? A. All these surrounded by blue there, the exterior limits of

DIAGRAM AA.



G. V. EX. CO., EXHIBIT A.



which are marked on the map Exhibit A. [See diagram entitled "G. V. Ex. Co. Exhibit A," printed in colors.] You will observe that there is a large space in the middle, which is the Harry ranch. You will observe that both shafts,—the bottom of both shafts,—are beneath that surface. We bought that Harry ranch. After we had bought it, we found out to our dismay that the owner of the ranch had already sold the mineral rights, so we had to go and buy it over again. We then gradually purchased the Crescent, and the New York, and various mineral rights underneath the surface, as indicated upon the map Exhibit A. After we acquired sufficient property to the west, I advised my fellow associates that it was time to begin with the Pennsylvania, and we began. We have worked upon these developments from that time continuously ever since. At the time of the inauguration of this litigation I was retained in four different mining suits. In view of the fact that it was unlikely that I should be able to attend to the details of this litigation, Mr. Janin was selected to dig out the details, which, with his assistants, you see what has been accomplished to-day. I was not aware at that time, nor until Mr. Janin and his assistants had dug it out, that there was any such thing as a northeasterly series of fissures. Q. What did you believe them to be? A. I believed that there was one vein there. Q. Well, with what course or direction or strike? A. I believed that the principal vein then was northwest and southeast, as the developments have since shown. Without anticipating, I will simply, in answer to the question, state that to the eye it is plain enough that, if this be but one fissure, as I then supposed it to be, it certainly, as it goes down in depth, warps off to the northwest, and that brings me down to the position where we are at present."

In this connection it is pertinent to state that the first suit in this litigation was brought by the Grass Valley Company against the Pennsylvania Company on February 16, 1900. Upon cross-examination Mr. Keyes testified as follows:

"Mr. Lindley: Q. I understood you to say in your direct examination that your original understanding of this formation was that there was a single fissure in the W. Y. O. D.? A. Yes, sir. Q. When did you get your revelation that there was more than one? A. After Mr. Janin and his assistants had dug out the facts. Q. How long was that after you became consulting engineer of this mine? A. It was probably within a year. Q. During all that time you had been through the mine as the consulting engineer of the company? A. Yes, sir. Q. As far as its workings northerly have been projected? A. I had. Q. Had you ever been in the Pennsylvania mine up to that time? A. I had not. Q. Did you ever ask permission to go in? A. I did not. I went in with our party under the understanding we were permitted to go. Q. I mean prior to this litigation. A. I did not. Q. Prior to your discovery that there was more than one vein? A. I did not. Q. How many veins do you now say there are in the W. Y. O. D.? A. Two systems. Q. Well, how many distinct veins? A. I should say that there were—in the Pennsylvania? Q. In the W. Y. O. D. A. In the W. Y. O. D. I would say that there are two or three, perhaps four, parallel sheetings to the northwest series, and parallel to the northeast series. Q. Have the joint planes anything to do with those veins? A. I don't think they have. Q. While you agree with Mr. Janin's results as to being more than one vein, you disagree with him as to the joint plane business? A. Allow me to explain. Mr. Janin has evolved a theory to account for these fissures. He has spent a great deal of time upon it, and it may serve to account for the fissures. I have a great respect for any theory enunciated by Mr. Janin. I have not had time enough to prove or to disprove, reject or to accept, his conclusions. Q. You do accept his conclusions, because you say you originally were a one-vein man, and that you were converted by Mr. Janin's investigation of the facts? A. I was converted by the result of Mr. Janin and his assistants' examination of the facts as apparent in the ground. Q. Then you are testifying as an expert here upon the examination of Mr. Janin and his assistants? A. I am testifying upon the facts as dug out by these gentlemen. Q. You were the consulting engineer of the company for over a year before Mr. Janin came there? A. Yes, sir. Q. And you did not dig out any? A. Not till these facts were finally determined. Q.

These facts you speak of, are they facts that would come to the observation of an ordinary miner? A. Perhaps yes, and perhaps no. Q. What is your candid judgment about that? You did not discover it for a year, and you are no ordinary miner. A. I am much obliged. I don't think he would. Q. Is it not a matter of fact that the miner in these two mines has gone on regardless of all ideas of intersection,—he has followed the ore body? A. Unquestionably he has. The fact is, the superstition has existed that the fissures were north and south. As a matter of fact, the miner follows his ore where he finds it, and as a matter of fact in this mine the miners have followed off on one at least or more of these northeasterly fissures. He followed where the ore was, and, although the belief has existed for many years that there was but one there, we find to-day that there are two."

We have here in this testimony of an expert engineer and a practical mining man, who is familiar with the district in which these mines are located, the statement of four important facts to be considered in determining the course and direction of the Pennsylvania apex vein upon the surface: First, that prior to the year 1899 it was the belief of practical miners that but two veins existed in the W. Y. O. D. and Pennsylvania claims, one in the W. Y. O. D. and one in the Pennsylvania; second, that these two veins or fissures ran in a general direction north and south, or, to be more accurate, northwest and southeast; third, that in the year 1899 a discovery is claimed to have been made by Mr. Janin, the expert engineer, that there was another series of veins in these claims, running northeast and southwest; fourth, that prior to this supposed discovery of the second series of veins the right of the Pennsylvania Company to follow the Pennsylvania vein on its dip to the west or to the south of west had not been questioned. The testimony of the witnesses who had traced this apex vein by means of cuts and shafts at intervals along the surface is too much in detail to be repeated here. It is sufficient to say that, in my judgment, it establishes the course and direction of a single vein, as shown by the diagram "Pennsylvania Exhibit No. 2." The claim made by the Grass Valley Company that there were other veins apexing within the side lines of the Pennsylvania claim running in substantially the same direction, and that these veins were crossed by still other veins at more or less obtuse angles, giving the general appearance of a single vein for the entire distance, was met by explorations made during the trial by the Pennsylvania Company by means of box trenches at points claimed to be crossings. In my judgment, this evidence demonstrated the existence of nothing more than a main vein with projected seams or spurs at these points. These seams or spurs were not traced for any distance, and were not found crossing any side line of the Pennsylvania claim. Whatever these seams or spurs may be called, or to whatever extent they may have been found, they did not destroy the continuity of the main vein. These crossing seams were called by the Grass Valley Company "transverse veins," and were described by Mr. Kerr, a mining engineer, and general superintendent of the Grass Valley Company, who was called as a witness for that company. He said that the veins intersecting the main vein were transverse veins. "Any vein," he said, "that has a dip opposite the regular west dipping veins, are transverse veins. It makes no difference whether they dip to the east, to the southeast, or to the south; so long as they

dip in an opposite direction from the regular vein which we have in this vicinity, which are the west dip veins, we call them the transverse veins." This witness endeavored to establish at least three of these transverse veins at the surface of the Pennsylvania claim by projections from the strike of the stopes in the workings of the mine below, but in every instance these projections failed to conform to anything claimed as a transverse vein upon the surface. It will be further observed that Mr. Kerr admits that the west dipping vein in this vicinity is the "regular" or "main" vein. This, in my opinion, is an important fact, which of itself tends most strongly to establish the continuity of the Pennsylvania vein.

But what was the nature of the discovery made in the year 1899 that in the judgment of Mr. Keyes established the fact that there is a second series of fissures in these two mining claims? The discovery is attributed to Mr. Louis Janin, the expert mining engineer and mining geologist. He was called as a witness by the Grass Valley Company, and testified fully upon the subject. In brief, his statement was that he had found in these two mines and in other places a rhombohedral structure of the granite and grano-diorite, and that the dislocations in the joint planes of such structure would open transverse fissures. Mr. Janin illustrated his views of this character of rock structure by models, pictures, and diagrams, and by an elaborate geological exposition that was exceedingly interesting; but his theory of rhombohedral rock structure did not necessarily establish the persistence and continuity of any or any number of transverse fissures in the Pennsylvania claim. In other words, his theory might be true, but in a given mass of granite or grano-diorite there might be only one continuous opening of successive joint planes, or there might be one continuous opening through disjointed planes. In either case a vein filling the fissure and reaching the surface would expose but one apex. This fact was well stated by Mr. Janin himself in the course of his examination, as follows:

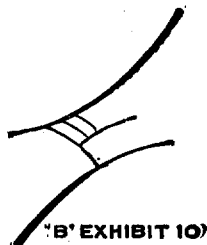
"Q. The formation of the structure of rock into the rhombohedron form does not necessarily determine that there will be a number of veins? A. No, sir; far from it. Q. The pressure may make the line of least resistance simply one vein to the surface? A. It might be to one vein. Q. But it would follow the lines of the rhombohedron structure? A. Yes. It would follow on the face of the rhombohedron."

The court is of the opinion that the evidence establishes the existence of a vein or lode apexing within the surface boundaries of the Pennsylvania claim, and that there is a continuity of this vein or lode lengthwise of the claim to the extent and in the direction necessary to embrace within extended end line planes the vein or lode in controversy.

The remaining question is, has this vein or lode such a continuity and persistence in its dip or downward course as to include the ore deposit in dispute? For the purpose of illustrating the position, extent, and direction of the Pennsylvania vein and its relation to the W. Y. O. D. vein, together with the shafts, levels, drifts, winzes, upraises, stopes, and other works of these two mines, and their relation to each other underground, two models were introduced in evidence, one provided by the Pennsylvania Company, and marked "Exhibit 4"; the other by the Grass Valley Company, in two sections,

the first representing the W. Y. O. D. mine and its works, marked "Exhibit P," and the other representing the Pennsylvania mine and its works, marked "Exhibit Q." The two models represent in reduced form the spaces from which ore has been taken, the ore deposit in dispute, and the works in the two mines in such necessary detail, designated by numbers, as to inform the court, in connection with the maps, charts, diagrams, and evidence of engineers, experts, and practical miners, concerning the available facts in the case. Taking the Pennsylvania shaft for an initial point, as shown on the model Exhibit No. 4, and as explained by the evidence, we find from the surface down to the 100-foot level but one shaft. At the 100-foot level the shaft is divided into two shafts, designated as the upper and lower shafts. Between the 300 and 400 foot levels the upper shaft is divided into two shafts, designated as the upper and middle shafts. The vein between the 100 and 300 foot levels maintains practically a uniform and regular dip and strike, and the present stopes indicate that the ore shoot was from 200 to 300 feet wide. As the vein descends from the 200-foot level, it passes through the perpendicular side lines of the Pennsylvania claim, and at the 300-foot level it is wholly to the west of such side lines. Between the 300 and 400 foot levels, just above the point of division between the upper and middle shafts, the shaft passes through the vein at a point designated as the "Chicken Coop," where the Grass Valley Company contends the continuity of the Pennsylvania vein is broken, or at least that it passes upward, and has not been followed. But to the north of the shaft, and on the same horizontal plane, the continuity of the vein is unbroken, and the vein followed down through stopes to the 400 and 500 foot levels. At this last level stopes are found returning north, and across the middle shaft, descending to the 600-foot level. The stopes at the 500-foot level extend north and south about 250 feet, indicating that the vein preserved its continuity to the north as it descended through the 600 south stope and the 600 stope to the 600-foot level. Still further to the north we find a stope designated as the "600 Underlap Stope." This stope is connected with the 600 stope, and in turn it is connected with the 600 north stope. Following down this latter stope, we come to the intermediate north stope, and following this stope around and over a stope designated as the "Hogsback," we reach the intermediate stope, and descend by the 700 north stope to the 700-foot level. Returning to the 600-foot level, we may descend by the stope designated as the "Intermediate Stope" directly to the 700 north stope and the 700-foot level. Down to this point we have descended by continuous stopes, indicating the original continuity of the vein from the surface to the 700-foot level by the course indicated. But at three or four other points this continuity has not been found, and connections between the upper and lower portions of the same vein, as claimed by the Pennsylvania Company, or between different veins, as claimed by the Grass Valley Company, had been made by stepping down at different places a distance of from 6 to 8 feet through country rock. These disconnected sections were designated on the trial as "complications," and the use of this term will be continued in this opinion. One of these complications was shown on the model

Exhibit 4 just below the 300-foot level, between the stations marked "401" and "402," where the vertical distance between the seams was 6 to 7 feet. Another was shown below the 400-foot level at station 640½, where there were two drops of 7 or 8 feet each. South of the shaft another route is found from the surface to the 700-foot level, descending through continuous veins and stopes, except at one point marked on the model as "Station 770½," where there is a vertical drop of 7 or 8 feet. These complications disclose east-dipping seams, which the Grass Valley Company claims belong to independent transverse fissures, but which the Pennsylvania Company claims are vein connections between overlying and underlying sections of west-dipping fissures. The following figure will illustrate the claim of the Pennsylvania Company as to these connections:



The testimony of Ross E. Browne explains these connections as follows:

"In the case of the Pennsylvania vein we have the complexity of fissuring. There is also some ore in the included masses of country rock, due to impregnation. These masses have been altered and softened by percolating waters, and are traversed by many small fissures filled with ore-bearing material, constituting irregular ore bodies. There are no complications in the Pennsylvania vein in other respects. There is no complication due to displacement or faulting. The original continuity of the fissuring is still maintained. There are no complications due to the intersection of veins. All branches are apparently contemporaneous in origin, and when they come together they form junctions like the confluence of the forks of a river. A possible exception to this rule may be noted in connection with the so-called crossings. They constitute a series of small, almost vertical fissures crossing and cutting through the east and west dip fissures on entirely contrary courses. They are small and barren as a rule, carrying frequently a little clay, and rarely a little quartz. In no case that I know has one of them been mined for ore in the Pennsylvania mine. Their effect on the vein is somewhat obscure. They do not fault the vein, but frequently the vein bends and steepens a little in passing through them. I shall not attempt to attach any significance to these crossings. The country rock of the ground in dispute is wholly grano-diorite,—a rock very similar to granite. For all practical purposes we may call it granite, as the miner does. We may then add that there are no complications due to changes of formation. The Pennsylvania vein may now be defined as the filling of a complex of interconnected fissures in a homogeneous mass of country rock; the various parts being of contemporaneous origin, and culminating in a common apex. This vein apexes and continues downward several hundred feet as a comparatively simple fissure vein. Thence downward it grows more complex, but persistently maintains its identity. It is apparently more simple again on the bottom level. The term 'common apex' requires explanation in connection with my designation of this complex mass as a single vein or lode. Referring to the red color on the model, representing the Pennsylvania vein, I am strongly of the opinion that, starting from any important point of development on the lower levels, a branch of the vein is traceable upward

along a continuous line of mineralization, or of vein matter, through underlaps, east dippers, and overlaps, to the Pennsylvania apex. It is not always possible to make such tracing through the present openings. There would be required a ruinous amount of deadwork to enable such a thing; but the continuity is pretty generally indicated where the development is wanting. There are many fissures or seams departing from the main line of ore bodies on divergent courses. These weaken and pinch out, or, if not sufficiently developed to exhibit this as a fact, the indications are definitely that way. These departing seams most commonly dip downward; or, if they start upward, they are apt to turn over, and ultimately dip downward. Still there are doubtless some of these seams which persist in an upward course, and, dying out in the country rock, have blind apices of their own. I must therefore explain that in speaking of the apex of the vein I treat these as insignificant offshoots or spurs, and not as separate branch veins. These east dippers or east droppers have about the same strike as the west dip fissures, but a contrary dip. They characteristically connect two west dip fissures without cutting across either. They flow from one to the other. In no case that I have seen, do these east dippers cut through a strong overlap or underlap west dip fissure. A striking feature of this mine is the part these east dippers take in leading to a stepping down from an overlapping to an underlapping west dip fissure. It is an unusual occurrence, so far as my experience goes; but there is nothing strange about it, any more than in many other cases. It is the natural result of the lines of weakness and the lines of strain; hence the lines of fissuring in this particular section. There are certain sections of the mine where, if we follow the main fissure downward on its westerly dip, we find it flattening, weakening, and pinching out; but before pinching there fall from it a series of east dip fissures which connect below with an underlapping west dip fissure. This underlap flattens, weakens and pinches out on its upward course, but on its downward course it strengthens, and becomes a strong ore-bearing vein."

The witness here illustrated his statement by a drawing, "B, Exhibit 10," set out on the preceding page, and continued:

"This overlapping west dip fissure on its downward course flattens, weakens, and ultimately pinches out, but before pinching out there fall from it a series of east dip fissures, which connect below with an underlapping west dip fissure. This underlapping west dip fissure, if we follow it on its upward course, flattens, weakens, and pinches out. If we follow it on its downward course, it strengthens, and becomes again a strong ore-bearing fissure. That is characteristic of the Pennsylvania mine,—some of the sections of the Pennsylvania mine. This, as I have stated, is an unusual occurrence,—this stepping down by such a system as that. There is a method of stepping down that is very well known in connection with veins, and that is by a system of step faulting. But the case we have in hand, although perhaps somewhat similar in effect, is very different structurally. There is no faulting in the Pennsylvania section, no displacement of the country rock. The channel through which the mineralizing solutions passed is simply complicated by this network of fissures. Its continuity as a channel is not disturbed. The continuity of the vein is definitely maintained. Regarding the theory of the formation of these veins, the country rock was first fissured and fractured. Some of the fissures reached to great depth, and tapped a deep-seated source of mineralization, from which solutions arose, circulated through the fissures, deposited the quartz with its gold contents, and finally escaped to the surface. Once conceive the mineralization to be due to the circulation of solutions through the open channel prepared by the complex fissuring, and there is no more difficulty in recognizing the complex than the simple parts of the vein as a unit. Concerning this unity, it seems to me the only legitimate question is, do these interconnected parts apex separately or together? I have already expressed my opinion in the matter: they join and apex together."

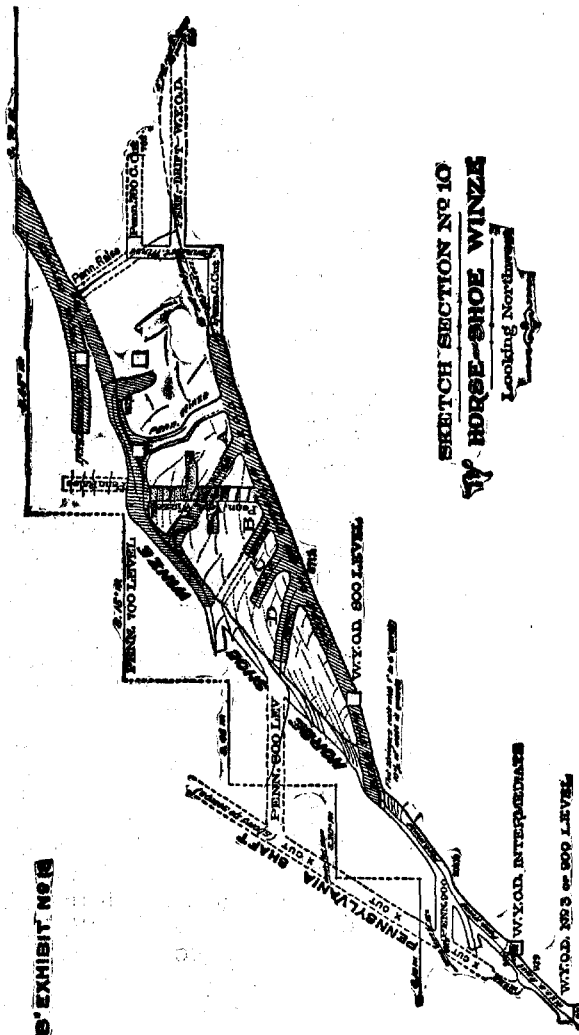
This vein connection described by Mr. Browne between the west dipping fissures through east dipping seams or fissures, is confirmed

by a number of other witnesses. But against the sufficiency of this evidence to establish the continuity of the Pennsylvania vein the Grass Valley Company contends that the east dipping fissures pass on, and constitute an independent series of transverse fissures, breaking the continuity of the Pennsylvania vein on its dip to the west. The answer to this contention is found in the fact that the continuation of the east dipping fissures has not been satisfactorily established at any point where the two veins have come together; while, on the other hand, the Pennsylvania Company has prosecuted its work on the main west dipping vein, finding the continuity of this vein beyond the point of the east-dipping connections, and this has been the work of the practical miner following the main vein in its downward course. To my mind, the most conclusive fact establishing the continuity of the Pennsylvania vein is this fact that the vein can be followed as a dominant persistent vein from the surface through continuous stopes down to the lower workings of the mine.

When suit was commenced by the Grass Valley Company against the Pennsylvania Company in February, 1900, the Pennsylvania Company had reached the 700-foot level of the mine. As has already been stated, this suit was based upon the discovery made by the Grass Valley Company that the principal fissures of the W. Y. O. D. mine were making off to the northwest. The W. Y. O. D. vein apexes about 500 feet east of the Pennsylvania vein, and the W. Y. O. D. shaft is about 900 feet south of the Pennsylvania shaft. The discovery as to the direction of the principal fissures of the W. Y. O. D. vein appears to have been made in driving north and northwest the 800-foot level of the W. Y. O. D. mine. In time that level reached a point beneath the Pennsylvania works, and the Grass Valley Company proceeded to take ore from that section. The workings of the two companies eventually came together at a number of different points below the Pennsylvania 700-foot level. Below this level other complications occur in the vein, and the Grass Valley Company again contends that the Pennsylvania vein has been cut off by east dipping fissures, and that the vein no longer retains its continuity, whatever may have been its fate above.

We have now reached the most important feature in this case, namely, the vein structure below the Pennsylvania 700-foot level, where a number of east dipping fissures have been developed, and where the stopes show that the strike of the vein has changed more to the west. The continuity of the Pennsylvania vein down to the lowest workings of the mine is, however, supported by features that, in my judgment, have not been overcome. South of the Pennsylvania Middle shaft the Pennsylvania Company has sunk a winze from the Pennsylvania 700-foot level, following the vein down to the 900 W. Y. O. D. level; and north of the shaft another winze has been sunk from the same Pennsylvania level, which, together with the W. Y. O. D. upraise, follows the vein also down to the 900-foot W. Y. O. D. level. Here, at two points in the mine, about 400 feet apart, the Pennsylvania vein continues down without a break or complication to the lowest workings of the mine. This is a fact that cannot be ignored, and has not, in my judgment, been overcome by evidence of complications elsewhere. One of these complications is found in what is

known as the "Horseshoe" winze north of the Pennsylvania shaft. The winze starts from the bottom of the slope of the 700-foot level, and descends to the 800-foot level, a distance of about 120 feet. The claim of the Pennsylvania Company that this vein is continuous at this point has been vigorously contested by the Grass Valley Company, and much interesting testimony has been introduced concerning this section. The Pennsylvania Company claims that the entire section is mineralized, and, in addition, that the vein descends through connecting east dipping fissures in the same manner as at other points in the mine, to which reference has heretofore been made. The following diagram illustrates the character of the Horseshoe winze, as shown by the evidence:



Considering the testimony relating to this winze in connection with the testimony showing the continuity of the vein at the other points mentioned on the same horizontal plane, the complications found here are certainly not beyond explanation, and under the circumstances the explanation given appears to be satisfactory. The theory of Mr. Janin that the massive country rock of this district has the rhombohedral structure, and that the joint planes along which the fissures were formed were the faces of the rhombohedral sections of rock, does not, in my opinion, conflict with the claim that the main west dipping vein maintains its continuity through the complications found in the Pennsylvania mine. On the contrary, it may explain such complications, and account for the segments of transverse fissures found connecting the upper and lower parts of the west dipping vein. The contractions and tiltings of the earth's surface would necessarily open zigzag fissures along the planes of rhombohedral sections, and circulating currents, either ascending or descending, following the lines of least resistance, would form a vein in a zigzag channel through the fissured rock, in the changing courses of which would naturally be found the deposits developed in this mine. In other words, the transverse fissures claimed by Mr. Janin for his rhombohedral sections may explain the form and extent of the east dippers found in the Pennsylvania mine.

The strike of the vein at and below the 700-foot level has also been urged by the Grass Valley Company as a fact of great significance. It is contended that the strike of the vein at this point is such that it cannot be the same vein as the one found at or near the surface. This fact would be of some importance if the vein was an ideal one, maintaining a uniform strike and dip throughout its entire course. But it is not an ideal vein, and there are very few such to be found. Mr. Keyes has found but one in his long and varied experience, and the extent of litigation based upon extraordinary departures from the ideal vein indicates that they are rarely found. In the North Star Case¹ in this court the vein in controversy was in the Grass Valley district. It was there found that the strike of the vein below was at many places almost at right angles to the strike of the vein at the surface. This twisting or turning of the vein is accounted for there, as here, by the folding of the rock under pressure and contraction, such as we find demonstrated by geological investigation throughout this region. This objection to the Pennsylvania vein is, in my judgment, without any force, and requires no further discussion.

The relation of the Crescent claim to this controversy may be disposed of in a few words. It is an old claim, running north and south, with a vein apparently dipping to the east; but no development has been made on the surface or elsewhere showing any connection whatever between the vein found on the surface and the vein in dispute. In the absence of such a showing, the evidence in favor of the continuity of the Pennsylvania vein must prevail.

It follows from these considerations that I am of the opinion that

¹ 73 Fed. 597.

the Pennsylvania Company has established its right to all the ore bodies and sections of the mine in dispute. The evidence as to how far south this right extends on the so-called underlap is not very clear, but a trough line or depression has been found in the vein extending from the 900-foot W. Y. O. D. level in a direction a little north of east up to near the 800-foot W. Y. O. D. level. This trough line starts from the 900-foot W. Y. O. D. level at a point about 150 feet south of the Pennsylvania shaft projected to that level. In the absence of evidence showing a clearer division between the Pennsylvania and W. Y. O. D. veins, this line will be adopted by the court as the dividing line between the two veins in this particular section.

The first case will be referred to a referee or commissioner to be appointed by the court, to take testimony and report as to the damage sustained by the Pennsylvania Company by reason of the wrongful acts of the Grass Valley Company, and such further proceedings will thereupon be had as are provided for in the stipulation of the parties dated April 17, 1901. In the second case a finding will be prepared and a judgment entered in favor of the defendant.

EDWARDS v. BATES COUNTY.

(Circuit Court, W. D. Missouri, W. D. July 12, 1902.)

1. MUNICIPAL BONDS—INNOCENT HOLDER—BURDEN OF PROOF.

To entitle a holder of municipal bonds who purchased after maturity to protection as an innocent purchaser for value, where it is shown that the bonds were issued illegally or without consideration, he must prove that he acquired title through a prior holder, who took them before maturity for value and without notice of their invalidity.

2. SAME—REQUISITES AND VALIDITY—CONDITIONS PRECEDENT TO ISSUANCE.

Under a statute authorizing a county court to call an election in a township to vote on the issuance of railroad bonds on a petition of 25 "taxpayers and residents" of the township, and to issue bonds on behalf of the township in case of a two-thirds vote in favor thereof, an affirmative finding by the court that the petitioners were taxpayers and residents of the township is a condition precedent essential to confer jurisdiction upon the court to take further action; and the failure to make such a finding is not cured by a mere recital in an order made at a subsequent term that the action then taken was in pursuance of the petition of taxpayers and residents of the township theretofore filed.

3. SAME.

Under a statute which made the certificate of the county clerk the only evidence of the result of an election in a township to vote on a proposition to subscribe for stock in a railroad company and to issue bonds in payment therefor, and where the county court was authorized to make the subscription and issue the bonds in case of a favorable vote, the clerk's certificate was a jurisdictional fact; and a recital in the record of the court of the filing of a certificate showing the result of an election by "the qualified voters of the county" is insufficient to support a finding by the court that two-thirds of the voters of the township voted in favor of the subscription.

¶ 1. Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 O. C. A. 6.

4. SAME—MISSOURI STATUTE.

Laws Mo. 1868, p. 92, authorized townships to subscribe to the stock of a railroad company, and provided that, in case of the performance of the required conditions precedent, "it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the court shall issue such bonds in the name of the county * * * and the same shall be delivered to the railroad company." *Held*, that under such statute the power of the county court, as agent of the township, was limited to the issuance and delivery of the bonds to the railroad company, and that bonds issued thereunder and sold at a discount by a commissioner appointed by the court, who was also paid a commission out of the proceeds, were invalid.

5. SAME—ACTION—BURDEN OF PROOF.

The burden rests upon a plaintiff in an action on municipal bonds, where a part of the issue were sold without authority, of which fact he was chargeable with notice, to show that those sued on were not affected by such invalidity.

6. SAME—DEFENSES—CONDITIONS PRECEDENT TO DELIVERY.

Where a statute authorizing townships to subscribe for the stock of railroad companies requires the proposition voted on to state the terms and conditions on which the subscription shall be made, a condition requiring the company to construct its road through the township, and to establish a station at a town therein, before receiving the bonds to be issued in payment for the stock, must have been complied with to render the bonds valid and binding in the hands of one not entitled to protection as an innocent purchaser.

7. RAILROADS—MUNICIPAL SUBSCRIPTION TO STOCK—REVOCATION OF AUTHORITY.

Authority delegated by vote of a township to subscribe in its behalf for stock of a certain railroad company is revoked by operation of law where the company ceases to exist, by reason of its consolidation with another company, before the subscription has actually been made.

8. EVIDENCE—RECORDS—SELF-SERVING ENTRIES.

An entry in the minute book of a railroad company, purporting to be a copy of a certified copy of the record of a county court, is not evidence against a third party of the contents of such record.

9. RAILROADS—MUNICIPAL SUBSCRIPTION TO STOCK—EVIDENCE OF AGENT'S AUTHORITY.

Where a proposition adopted by the voters of a township to subscribe to the stock of a railroad company provided that the county court should appoint a commissioner, who should be a citizen of the county, to make the subscription and to dispose of the bonds to be issued in payment for the stock, it is essential that the authority of a person who is claimed to have made the subscription should be shown by the records of the court.

10. FEDERAL COURTS—COLLUSION TO INVOKE JURISDICTION.

Evidence considered, and *held* to show that plaintiff, in an action in a federal court on municipal bonds, was not the owner of such bonds, but that the same were owned when the action was commenced by a citizen of the state, and that the bringing of the action in plaintiff's name was a fraud on the jurisdiction of the court.

Action at Law on Municipal Bonds.

Thomas K. Skinker, for plaintiff.

Wallace & Wallace, for defendant.

PHILIPS, District Judge. If it were conceded that the plaintiff, Edwards, at the institution of this suit, was in fact the owner of the bonds in question, yet, as he did not acquire them until after their

maturity, he took them subject to all the equities and defenses which the county could make against the railroad company. The taker of overdue paper "takes it as a holder with notice that it is subject to some defenses, if he takes it at a time when in due course it should have been paid. He is, therefore, subject to the defense (1) that it was affected in its inception with some inherent vice, as, for instance, fraud, illegality, or duress; (2) or that the consideration failed, or that payment had been made, or that there had been accord and satisfaction at the time of the indorsement, or that there was some equitable defense arising out of the transaction in which the paper was given which disabled his indorser in whole or in part to recover. And these defenses are called an equity attaching to the instrument." Daniel, Neg. Inst. (3d Ed.) § 725a. It is true he might be protected as an innocent purchaser if he took from a holder for value who purchased before maturity, without notice of any equities in favor of the obligor. But the rule is well established that when the obligor shows that the bonds were illegally issued, or are without consideration, the burden then shifts to the taker after maturity to show that the party from whom he took purchased before maturity, for value, without notice. The mere possession of the paper by the plaintiff is not enough. *Smith v. Sac Co.*, 11 Wall. 148, 20 L. Ed. 102; *Commissioners v. Clark*, 94 U. S. 285, 286, 24 L. Ed. 59; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

There being a total absence of any proof that the party from whom Edwards claims to have bought, or any other prior holder, took before maturity for value paid, the plaintiff does not sustain the relation of an innocent purchaser for value, and therefore occupies no better position than the railroad company, if it were attempting to enforce the collection of these bonds. As the act of 1868 (Laws Mo. 1868, p. 92) is the source of authority under which the bonds in question were issued, it is axiomatic that no authority ever vested in the county court to issue the bonds until all of the acts precedent to the exercise thereof were substantially and definitely complied with. The first section of this act provides as follows:

"Section 1. Whenever twenty-five persons, tax payers and residents in any municipal township, for election purposes, in any county in this state, shall petition the county court of such county, setting forth their desire, as a township, to subscribe to the capital stock of any railroad company in this state, building or proposing to build a railroad into, through or near such township, and stating the amount of such subscription, and the terms and conditions on which they desire such subscription shall be made, it shall be the duty of the county court, as soon as may be thereafter, to order an election to be held in such township to determine if such subscription shall be made; which election shall be conducted and returns made in accordance with the law controlling general and special elections; and if it shall appear from the returns of such election, that not less than two-thirds of the qualified voters of such township, voting at such election, are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds, in the name of the county, with coupons for interest attached; but the rate of interest shall not exceed ten per cent per annum; and the same shall be delivered to the railroad company."

The petition to the county court, which was the inception and basis of its action, did not recite that the petitioners were "taxpayers and residents" of Mt. Pleasant township. Its recitation is, "The undersigned, your petitioners, citizens of Mt. Pleasant township, in said county," etc. The existence of this fact is a jurisdictional fact. And the county court, for the purposes of such action, being a court of special and limited jurisdiction, the requisite fact of a petition by "twenty-five persons, taxpayers and residents of the township," should have been affirmatively found by the court and expressed upon its record before the court could acquire jurisdiction to order an election. Without this fact previously asserted and found by the court affirmatively, the whole subsequent proceedings of the county court were *coram non judice*. *Galpin v. Page*, 18 Wall. 371, 21 L. Ed. 959; *Ells v. Pacific R. R.*, 51 Mo. 203; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *State v. Woodson*, 41 Mo. 230, 231; *McCoy v. Zane*, 65 Mo. 11-16; *Corrigan v. Morris*, 43 Mo. App. 461; *City of Kansas v. Ford*, 99 Mo. 91-94, 12 S. W. 346; *Kansas City, St. J. & C. B. R. Co. v. Campbell*, 62 Mo. 588; *Zeibold v. Foster*, 118 Mo. 354, 24 S. W. 155; *Hansberger v. Pacific R. Co.*, 43 Mo. 196-200; *Peacock v. Bell*, 1 Saund. 74b.

If it should be conceded to the plaintiff that, notwithstanding the petition (which is the initial and essential step to confer jurisdiction on the county court) might not express on its face the fact that the subscribers were taxpayers and residents of the township, it would not defeat the jurisdiction, provided the county court had, prior to the making of the order calling the election, found and affirmatively adjudged that the petitioners were taxpayers and residents, yet the order made by the county court of April 1, 1870, on the presentation of said petition, did not find and adjudge that the 111 names to the petition, or any number of them, were taxpayers and residents of Mt. Pleasant township. It simply ordered that a special election be held in Mt. Pleasant township "in accordance with the petition of 111 citizens of said township filed herein." All of which could have been true and yet not a single petitioner have been a resident taxpayer of the township. Nowhere, and at no time prior to ordering and holding the election, did the court find and declare that twenty-five taxpayers and residents of Mt. Pleasant township had petitioned the court for such election. To meet this glaring defect and fatal omission in the record, counsel for plaintiff has recourse to an entry made by the county court on its records on the first Monday of June, 1870, which simply recites the return of the clerk of the court showing that an election had been held on the 3d day of May, 1870, the date the sense of the citizens was taken on the question of the subscription to the railroad and the issue of bonds; whereupon it is ordered by the court "that the sum of ninety thousand dollars (\$90,000) be and the same is hereby subscribed, etc., in the name and behalf of Mt. Pleasant township, in said county, subject to and in pursuance of all the terms, restrictions, and limitations of the petition of taxpayers and residents of said township heretofore filed, and the order of this court thereunder so made as aforesaid on said 5th day of April, 1870."

By no possibility of any known permissible intendment of law can this be held to be a judicial finding and ascertainment of the prerequisite fact, essential before an election was ordered, that the petitioners were taxpayers and residents of the township. There are several insuperable objections to accepting this as a finding by the court of the required fact. It was a statement simply by way of recitation referring to the petition that had been filed. It did not undertake to make any finding that the parties were taxpayers and residents of Mt. Pleasant township. It would be bad even as a pleading undertaking to plead an essential fact by way of recitation. The county court could not, at the June term, 1870, have undertaken to amend its record made in April, 1870, which was during the February term of the court. Under the statute, as it then existed, the term of the county court extended from the first Monday in February to the first Monday in June, when a new term of court supervened. The record entry made at the April term had then passed out of the breast of the court, and must stand or fall just as it was then made. It would be a practice most vicious and fraught with danger to establish a rule for this case that the court, having ordered an election without having before it a petition from the taxpayers of the township reciting the jurisdictional facts, and without having ascertained and entered of record the fact that the petitioners were qualified signers of the petition,—to permit such a court, of limited jurisdiction, at a subsequent term, even to undertake to amend its record prior to the calling of the election so as to show its jurisdiction, and much more for a court to hold that in another order, having in mind something else, and by way of mere recitation, it was sufficient to supply the omission in the order calling the election.

The reported cases teem with instances where parties have undertaken to supply omissions of courts of limited jurisdiction to show affirmatively the jurisdictional fact of record before process issued, or some right thereunder is asserted, by way of amendment at a subsequent term. 1 Black, Judgm. § 158, lays down the fundamental proposition that "the allowance of an amendment should never be used by the court as a means of reviewing its judgments on the merits, or correcting its own judicial mistakes, or substituting a judgment which it neither in fact rendered or intended to render. When the defect consists in the failure of the court to render the proper judgment, or arises from want of judicial action, the record cannot be corrected after the term has closed, the cause being no longer sub judice. * * * The power to amend *nunc pro tunc* is not revisory in its nature, and is not intended to correct judicial errors. Such amendments ought never to be the means of modifying or enlarging the judgment, or the judgment record, so that it shall express something which the court did not pronounce. However erroneous, the express judgment of the court cannot be corrected at a subsequent term." This principle is very aptly illustrated by the case of *Corrigan v. Morris*, 43 Mo. App. 456. There it was essential that the record should show that a justice of the peace was a justice in the city of Kansas. After motion to quash an execution on a judgment rendered by him, an amended transcript from his court

was filed, undertaking to supply the omission in the original judgment. The court said:

"An avoidance of this rule is attempted by getting an amended transcript from the justice which does show him to be a justice of the peace in the city of Kansas. This amended transcript does not show any mistake in the foregoing, but does show that the justice altered his docket after the rule served upon him, so as to make it show jurisdiction where, at the time the proceedings were had, it did not appear. We are of the opinion that this cannot be done. For jurisdiction in cases like this may be said not to depend on the fact, but on such fact appearing in the proceedings. If such fact does not appear, the proceedings are *coram non iudice*."

Adjudications relied upon by plaintiff to support the proposition that, "if the signers of the petition had been only citizens, and not taxpayers, this would have been but an irregularity which would not have affected the validity of the bonds," will be found, upon proper analysis, to be predicated of estoppel created by the recitals in the bonds that the conditions precedent had been complied with, and the like; and this doctrine is applied with respect of bona fide purchasers before maturity.

The act of 1868 in question provides that upon presentation of the required petition the court shall "order an election to be held in such township to determine if such subscription shall be made, which election shall be conducted and returns made in accordance with the law controlling general and special elections; and if it shall appear from the returns of such election that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof," etc. As this election was held in 1870, it was subject to the provisions of chapter 2, "Elections," St. 1865, there being then no special statute for special elections except such as might be ordered to be held at other times than general election days. Under the statute, elections were conducted by judges and clerks. At the close of the polls, the poll books should be signed by the judges and attested by the clerks. The judges, at the close of the election, were to transmit one of the poll books by one of their clerks to the clerk of the county court within two days thereafter, the other poll book to be retained in the possession of the judges of election. By section 25—

"The clerk of each county court shall, within eight days after the close of each election, take to his assistance two justices of the peace of his county, or two justices of the county court, and examine and cast up the vote given to each candidate, and give to those having the highest number of votes a certificate of election."

Sec. 26. "The clerks, in comparing the returns from the several townships, shall do it publicly in the court house of their counties, first giving notice of the same, by public proclamation at the court house door."

Sec. 28. "The clerk of the county to which such returns shall be made, after examining the same, shall certify the result to the secretary of state, and give to the person having the highest number of votes a certificate of his election, under the seal of his office."

The only evidence, therefore, which the county court could have of the result of the election was the certificate of the county clerk.

The only evidence of this certificate offered by the plaintiff was the county court record of first Monday in June, 1870, which recites:

"Now at this day is filed in open court the certificate of the clerk of this court, showing that on the 3d day of May, 1870, an election of the qualified voters of Bates county, state of Missouri, was held to obtain the assent of said voters to subscribe the sum of ninety thousand dollars (\$90,000) to the capital stock of the Lexington, Chillicothe & Gulf Railroad Company, in pursuance of an order of this court," etc.

To this evidence the defendant objected, as it showed on its face that it was an election of the qualified voters of Bates county, and not by the qualified voters alone of the township. As the plaintiff neither offered to produce nor show aliunde that the certificate of the clerk was different, it must be assumed, as against the plaintiff relying on this part of the record, that the certificate of the clerk only recited what this order states,—“an election of the qualified voters of Bates county.” As this was the evidence before the court, from which alone it was authorized to find that the proposition voted on had been lawfully carried, it is concluded therefrom that “the court being satisfied that two-thirds of the qualified voters of said township who voted at said election did vote in favor of said subscription and have given their assent thereto” was wholly unauthorized. The result, as certified by the clerk, is the only basis for the action of the county court. The certificate of the clerk was a jurisdictional fact, to be affirmatively found, to authorize the court to make its order. *State v. Harrison*, 38 Mo. 541; *State v. Steers*, 44 Mo. 224; *State v. Mackin*, 41 Mo. App. 100; *State v. Prather*, 41 Mo. App. 451, 452; *In re Rothwell*, 44 Mo. App. 215; *Comfort v. Ballingal*, 134 Mo. 281-294, 35 S. W. 609.

The act in question also provided that if the conditions of the subscription provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds in the name of the county, and the same shall be delivered to the railroad company. This act, which was the source of power to the county court, is to be presumed to have expressed the legislative will and policy, which was, that if the township, instead of undertaking to pay, by direct taxation, its subscription, should elect to issue bonds therefor, the bonds should be delivered directly to the railroad company in payment of its subscription. The statute did not contemplate or provide for the appointment of a commissioner and the delivery of the bonds to him to be hawked about and sold, and the proceeds, after the discount and expenses of the commission, be turned over to the railroad company. It was an enabling statute, conferring authority on the county court to issue bonds in payment of the subscription, to be delivered directly to the railroad company, and it was, therefore, without the power to issue and dispose of such bonds in any other manner or for any other purpose. No consent of any given number of voters of the township could confer on the county court the power to issue and dispose of the bonds, which were to create a burden upon the property, real and personal, of every property owner of the township, except as prescribed by the statute. The order of the county court not only provided for a commissioner to make the subscription to the

railroad, but expressly authorized him "to sell and dispose of said bonds to the best of his ability," with no other limitation on him. So that if the best he could do on the market was to obtain 50 cents on the dollar, at par value, he could do so. The evidence shows that 43 of the bonds issued were sold by James A. Boreing, claiming to be commissioner of the county, to Gaylord & Co., of which firm the plaintiff was then a member, and the transaction was conducted by him. The bonds were bought at a discount of 25 cents on the dollar, and a commission was allowed to this commissioner of \$1,350 out of the proceeds, thus lessening the ability of the obligation of the railroad company to build the road. The county court was but the special agent of the township, with powers clearly defined and limited by statute, which was its power of attorney. The county court having no official connection with a township, and being its special agent, created by statute, the township could not be bound unless the court's action was within the power delegated to it by the enabling act. *Wilson v. Salamanca Tp.*, 99 U. S. 504, 25 L. Ed. 330; *Scotland Co. v. Thomas*, 94 U. S. 691, 24 L. Ed. 219; *Lawson v. Schnellen*, 33 Wis. 293. Every buyer of the bonds from the so-called county commissioner took them with notice of lack of authority under the statute to sell and deliver. *Morrill v. Cone*, 22 How. 81, 16 L. Ed. 253; *Pettis County v. Gibson*, 73 Mo. 502. It is true the evidence shows that 47 of the bonds were later turned over to the railroad company by this commissioner; and therefore the contention is made that it devolves upon the defendant to show that the bonds in suit were part of the 43 sold to Gaylord & Co. It is a well-established rule of law that the validity of a statute, as of a contract, is to be determined by what it authorizes on its face to be done, rather than by what was done under it. As the order of the county court, in direct contravention of the enabling statute, directed the delivery of the bonds to the commissioner, a third party, with authority "to sell and dispose of to the best of his ability," when it is shown that 43 of the bonds were so sold, and that the plaintiff was a purchaser of said 43 bonds, the burden should be cast upon him rather than the township to trace the bonds which he claims afterwards to have bought. The county court was the agent of the township under a statutory power of attorney limiting its agency. And as the purchaser of the bonds was referred by their face to the power of attorney and the order made by the county court for their issue, and knew that the bonds were being hawked and sold by a commissioner, he was put upon his guard, and in good conscience should be held to show that the bonds he seeks to recover on were properly disposed of. The danger of permitting the county, acting for the taxpayers of the township, to depart in this respect from the express direction of the statute, is fitly illustrated by this conjuncture of affairs. Had the county ordered, as the statute directs, the bonds delivered to the railroad company, there would be no difficulty in tracing the taker; but the county, through a subagent, not authorized by statute, having sold 43 of the bonds at a discount of 25 per cent., and paying the subagent \$1,350 commission, rendered it impracticable, if not impossible, for the

township to protect itself against this wrong, unless the burden should be cast on the purchaser of the bonds situated like this plaintiff.

I am unable to assent to the proposition, asserted in the very able brief of counsel for plaintiff, that the failure of the railroad company to locate and build its road through Mt. Pleasant township to the town of Butler, and to locate and continue a depot within a third of a mile of the courthouse, constitutes no failure of consideration, and consequently is no defense to the bonds in the hands of this plaintiff with notice. The distinction between mere motive for an act and consideration therefor is recognized and applied by the courts in a proper case. The anticipated benefits to come to a community from the building of a railroad may be among the inducements to the taxpayers to subscribe to its stock; but, as applied to the facts of this case, it cannot be maintained that, because a municipality should become a stockholder by making a subscription, it becomes bound to pay the same, notwithstanding the contract expressly provides that the railroad is to build and complete the road as specified, except in favor of an innocent purchaser for value before maturity, where the recitals in the bonds show performance of conditions. It was not sufficient authority, under the statute in question, for the county court to make the subscription for the township that it should receive a petition thereto signed by 25 taxpayers, etc., but the statute requires that this petition shall state "the terms and conditions on which they desire such subscription shall be made." The county court can neither add to nor subtract from the terms and conditions.

While it is to be conceded that the petition of citizens to the county court, in prescribing the conditions of the subscription, is not as explicit as it should have been, yet, taken in its entirety, and reading all of its provisions together, with a view of ascertaining what was the true intent and purport of the consideration for the subscription, it is quite clear that it was intended that the railroad company, in case the bonds were elected to be issued by the township, should put under contract all the road south of the city of Lexington to the south line of Mt. Pleasant township; and that then the county should "make, or cause to be made, her bonds for the amount herein provided, and deliver the same into the hands of said commissioner"; and that, as the work progressed, in the work of construction 90 per cent. of the proceeds of the bonds might be turned over to the railroad company, upon evidence furnished by the engineer. This was immediately coupled with "the condition, made on the part of the railroad company, that if said railroad company shall locate said railroad into and through Mt. Pleasant township to the town of Butler in Bates county, and commence and complete a road on the line of said location to the town of Butler within two years after the delivery of said bonds (that is, after the delivery to the commissioner), and locate and continue a depot within one-third of a mile of the courthouse in Butler, and commence the building of that portion of the road lying within Mt. Pleasant township at the point where the depot is to be located, and build and complete said roadbed from that point to the north line of said township, then, and as said work is in state of progression, said bonds or their equivalent shall be delivered

to said company as herein provided." From which it is clear that neither the petitioners nor the electors contemplated that the bonds, or their proceeds, should be turned over by the commissioner to the railroad company until after its road was located and the work was being done to completion in "building a road on the line of said location to the town of Butler," and that this work was to be done inside of two years, establishing a depot within a third of a mile of the county seat, and building and completing the road from that point to the north line of the township, "then, and as said work is in state of progression, said bonds or their equivalent shall be delivered to said company."

The company was not, therefore, entitled to have the bonds turned over to it simply by locating a line of railroad, by grading it in detachments, but not completing it as a railroad, without even beginning the erection of any depot near the town of Butler, the county seat of the county, the principal town in Mt. Pleasant township, or extending its line to the north line of the township. In short, it is perfectly apparent, from the conditions imposed by the petitioners, that it was the purpose to have the railroad into and through this township, with a depot established for their accommodation, and that this work was to be done within two years; and this was made the condition of the subscription and delivery of the bonds. As said in *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519:

"Under such circumstances, any condition imposed by the vote as a condition precedent to the issuing of the bonds in payment of the subscription was a part of the vote, and a part of the authority for the subscription. So, also, any condition prescribed by the vote as a condition precedent upon which the bonds should be issued must have been complied with, in order to make the bonds valid and binding."

See also *Citizens' Savings & Loan Ass'n v. Perry Co.*, 156 U. S. 700, 701, 15 Sup. Ct. 547, 39 L. Ed. 585.

True it is, these rulings were on the laws of Illinois, inhibiting the issuing and delivery of bonds unless the conditions of the subscription were complied with, which were precedent acts; the only difference in fact in the case at bar being that the bonds were to be issued and delivered to the commissioner, to be by him held, to be delivered to the railroad company on condition that the road should, within two years, commence and complete a road on the line of the location to the town of Butler after the delivery of the bonds to the commissioner, and should also locate and continue a depot at a given point, and would commence and complete the building of that portion of the road in the township from the depot to the north line of the township, and be entitled to the delivery of the bonds as the work was in state of progression. There is nothing in the recitals of the bonds in question which precluded the county, on behalf of the township, from showing that the conditions were not complied with. The bonds only recite that they are issued by the county court of Bates county "by virtue of an act of the general assembly of the state of Missouri, approved March 23d, 1868, etc., and authorized by a vote of the people taken May 3d, 1870, as required by law." There

is no recitation that the conditions had been complied with by the railroad company, upon which the bonds were issued. As said in *Citizens' Savings & Loan Ass'n v. Perry Co.*, supra, at page 704:

"As the recitals in the bonds issued * * * neither expressly nor by necessary implication imported a compliance with the condition precedent imposed by popular vote in reference to the location of the company's shops at Duquoin, it was open to the county to show that that condition was not performed when the bonds were issued by order of the county court, and had never been performed."

Especially must this obtain as against a party purchasing after maturity, and with notice (as the evidence shows in this case) of the fact that the county was resisting payment of the bonds.

The further question is raised by defendant against the validity of these bonds, based upon the fact that the subscription, if voted for by the citizens of Mt. Pleasant township, was to the Lexington, Chillicothe & Gulf Railroad Company, which the plaintiff claims was afterwards consolidated with the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, under the name of the Lexington, Lake & Gulf Railroad Company, and as, on a well-established rule of law, the Lexington, Chillicothe & Gulf Railroad Company thereby ceased to exist by being merged into the consolidated company, the consolidated company never became entitled to the bonds in question. This question was directly passed upon by the supreme court in the case of *Harshman v. Bates Co.*, 92 U. S. 569, concerning the bonds in question, in which it was held that, as it did not appear from the record before it that the subscription had been made to the Lexington, Chillicothe & Gulf Railroad Company prior to the consolidation, it did not pass, by devolution, to the consolidated company under the statute authorizing such consolidation. The court held that, as long as the authority to the county to make the subscription remained unexecuted, "the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of the railroad companies does not change the law of attorney and constituent." This ruling was reaffirmed in *Bates Co. v. Winters*, 97 U. S. 83-89, 24 L. Ed. 933, in which it was further decided by the court that the order of the county court in this case making the subscription "was not intended to be final and self-executing. While it recited that the sum named should be, and was thereby, subscribed, it 'authorized and directed' the agent 'to make said subscription on the stock books of the said company' upon the conditions specified, and to report to the court herein." It appears from the report of the last named case, on page 90, that it was made to appear, by the agreed statement of facts upon which that case was tried, that the agent of the county to make the subscription returned to the court in January, 1871, that he had made no subscription of this stock to the company prior to the act of consolidation. Thereupon the case was reversed, and sent back for further proceedings in conformity therewith. On retrial of the case, another finding of facts was brought about by agreement of counsel, in some way unknown

to this court, by which it was made to appear that the county court of Bates county had appointed A. L. Betz agent of the county to make this subscription on behalf of Mt. Pleasant township in the order of June 1, 1870, when the order of subscription was made; and that he presented this order to the board of directors of the railroad company, and that the same was accepted on the 17th day of June, 1870; and upon this showing the plaintiff in that case prevailed in the litigation.

On the trial of the case at bar, it is developed by the original record book of the county court, introduced in evidence here, that no such order was ever made by the county court of Bates county appointing said Betz agent for such purpose. It appears on page 93 of the minute or record book of the railroad company, in what purports to be a certified copy of the records of the Bates county court, spread upon the records of the railroad company, that A. L. Betz had been appointed agent of the county at the time of making the order of subscription aforesaid. But that the insertion of A. L. Betz's name in said purported copy was a clear fabrication there can be no question. This entry on the record book of the railroad company is clearly incompetent evidence against the defendant. It is not the original record evidence of the county court, nor is it a certified copy therefrom; it only purports to be copied onto the book from a certified copy. As such it is a self-serving statement, made up by the railroad company, which, on every rule of law and common justice, is inadmissible against a third party. *Board of Com'rs v. Keene Five Cents Sav. Bank*, 108 Fed. 507, 47 C. C. A. 464; *Coffin v. Board (C. C.)* 114 Fed. 518. The only reference made in the records of the Bates county court to A. L. Betz first appears in the proceedings of the court on the 19th day of December, 1870, which merely recites that "now at this day comes A. L. Betz, commissioner heretofore appointed by this court, to subscribe stock to the Lexington, Chillicothe & Gulf Railroad Company, and as such presents his report, which is approved." What this report was, or what it contained, is not shown by the record, nor was any such report offered in evidence by the plaintiff. Neither does it appear from this entry that the stock he was to subscribe was on account of Mt. Pleasant township. A mere order of a county court, if it had been made, designating A. L. Betz agent "to subscribe stock to the Lexington, Chillicothe & Gulf Railroad Company," would not be sufficient to show that he was authorized to subscribe this particular stock, especially so in view of the fact that the record shows that Grand River township had also voted a subscription. Neither does this mere recitation show when he was appointed. This entry was of date December 19, 1870, more than two months after the act of consolidation; and it does not appear, therefore, that he was appointed such agent prior to the act of consolidation, which the plaintiff claims occurred October 4, 1870. And as proof most persuasive that the county court of Bates county had not theretofore appointed any agent to make a subscription of this stock, and that it understood that no such subscription had been made, on the 18th day of December, 1870, it appointed James M. Boreing as commissioner for the

sale of the bonds in question, and required him to give bond in the sum of \$180,000 for the faithful performance of his office,—just double the amount of the \$90,000 of bonds to be issued. On the 18th day of January, 1871, his bond was approved by order of court; and thereupon an order was made by the court for the issue of the bonds, payable to the consolidated company, the Lexington, Lake & Gulf Railroad Company. And, after reciting the consolidation of the roads, the court, on said January 18, 1871, made this further order:

"That said bonds be delivered to James M. Boreing, commissioner, and the proceeds thereof by him paid over to the said Lexington, Lake & Gulf Railroad Company, or their agent, according to the terms and conditions of said subscription herein referred to, and said bonds numbering from one to ninety, inclusive. Said James M. Boreing is hereby authorized to subscribe said stock to said railroad company."

On page 144 of the so-called minute or record book of the railroad company, after the articles of consolidation had been recorded therein, is entered the subscription, over the signature of said James M. Boreing, commissioner, of the \$90,000 of stock to the Lexington, Lake & Gulf Railroad Company, in pursuance to said order of the county court of January 18, 1871. This is followed by two other subscriptions made on said book from other townships, and these are the last entries of any character whatever made in this book. The balance of the book from page 148 to page 284 is an entire blank. Had the subscription been made by an agent appointed by the county court prior to the consolidation, there would have been no occasion for this appointment of Boreing as such agent on January 18, 1871, to make such subscription to the consolidated road, as the subscription already made to the Lexington, Chillicothe & Gulf Railroad Company would have passed, by devolution and operation of law, and the articles of consolidation, to the consolidated company. The county court did not issue any bonds until after this order of January 18, 1871, as until the subscription made by its agent, Boreing, it did not recognize any obligation to issue the bonds. The first lot of bonds, 43 in number, were sold by Boreing, as such agent, to Samuel A. Gaylord & Co., June 14, 1871, as shown by copy of the account between said Boreing and said Gaylord & Co. filed with the clerk of the county court. And on the first Monday of May, 1871, as shown by the records of the county court, said Boreing made his report showing that he had turned over the remaining 47 bonds to the railroad company and received credit therefor.

It further appears from said minute or record book of the railroad company, on page 84, that at a meeting of the board of directors of the railroad company, held at Lexington, Mo., on the 17th day of June, 1870, "A. L. Betz, together with such persons as he may designate or associate with him, be authorized to obtain subscriptions from counties, towns, or townships along the line of said railroad to the capital stock thereof, and to discharge said duty, by authority of said company, until further ordered by the board, but without expense to the said company." And on the same day said Betz appeared before said board, and presented the purported certified copies of the proceedings of the county court of Bates county, in which his name

is inserted as the duly appointed agent of the county court for making this subscription. Either he, or some one unauthorized by the county court, which can speak alone by its record, fabricated this interpolation of his name as agent of the county. There is palpable reason why the record of the Bates county court should show affirmatively the selection and appointment by the county court of the agent or commissioner to make the subscription on behalf of the township on the books of the railroad company. Both by the terms of the petition of citizens of the township to the county court asking for an election, etc., and the order for election and the order of subscription, it was provided that the agent, who was to be appointed by the county court, should be a citizen of Bates county. This was deemed important by the citizens of the township, especially as it was provided that this agent was to dispose of the bonds "to the best of his ability," and to see to the making of the subscription on the books of the railroad company. The county court had, therefore, no power to appoint any other person than a citizen of the county. So, whether or not this fact of citizenship should have been expressed on the record of the court, it must be conceded that the fact must have been found by the court in making the appointment, as much so as if the terms of the petition had required that John Smith of Mt. Pleasant township should be appointed as such agent. There is nothing in the records of the county court to show that A. L. Betz, who is claimed by the plaintiff to have acted as such agent, was a citizen of Bates county; and no competent evidence aliunde was offered by the plaintiff showing such essential fact.

In view of the fatal objections already discussed to the validity of these bonds, it is not deemed necessary to discuss and determine the question raised by defendant, that the evidence fails to show that any notice was given of the stockholders' meeting to consider the proposed consolidation of the two roads; nor the effect of the certiorari proceedings instituted during the pendency of this suit; nor the question raised by counsel that the two roads as projected were parallel roads, and therefore not capable of being consolidated under the act of the state legislature of 1870 then in force; nor the question raised by counsel that the consolidated road materially varied from the projected line of the railroad to which the subscription is claimed to have been voted.

Another important question arises on the record and the evidence in this case, which the court should discuss. As this suit was instituted October 5, 1891, if the bonds did not then belong to the plaintiff, but in fact to a citizen of Missouri, the action is a fraud upon the jurisdiction of this court; and the moment, in the progress of the case, this fact appears, the plaintiff should go out of court. There are many facts and circumstances characterizing this transaction which impel the belief in the mind of the court that the plaintiff Edwards was and is a "dummy" used to give jurisdiction to the federal court, and that the real owners of the bonds at the time the suit was instituted were Weil & Co.

The firm of Gaylord & Co. of St. Louis, of which the plaintiff was a member, became the purchasers of 43 of these bonds on June 17,

1871. Whether the bonds in suit belong to this lot the evidence does not disclose. Afterwards, about the year 1885, this firm became bankrupt. After that the plaintiff, up to the time of his alleged purchase of the bonds in suit, does not appear to have been engaged in any remunerative business so as to have recovered any part of his lost fortune. Mr. Donaldson, in his first deposition, taken May 10, 1898, in this case on behalf of the plaintiff, and who is certainly a favorite witness of the plaintiff, with an accommodating memory, testified that in the year 1890, in August or September, he remembered that the plaintiff, who claimed to have obtained the bonds from a man by the name of Champion, as administrator of some estate in St. Louis, asked the witness to get the bonds compromised for him, and that he wrote to the clerk, and went down once to the Bates county court,—he thinks in the latter part of October, 1890. He did not remember the numbers of the bonds, but that the coupons of 1873 and subsequent years were attached; that he held the bonds for a short time, until after the court had passed upon the subject, and would not agree to submit the proposition to a vote; that he offered to compromise at 65 cents; and that he saw a check given for the bonds. In his last deposition he testified that at the time of the alleged purchase of the bonds the plaintiff "had his office at that time in Weil's office," the firm of Weil & Co. being then engaged in the bond brokerage and banking business in St. Louis.

The plaintiff testified that he paid for the bonds by giving "a check or order" on Weil & Co. So the purchase money for the bonds was furnished by Weil & Co. No such check or order is produced by Weil & Co. or the plaintiff. No note was taken by Weil & Co. from Edwards for this money. No book account is shown by Weil & Co. showing any account between the parties. Edwards went to New York, and this suit was brought by Mr. Skinker, an attorney who had long been counsel for Weil & Co., on the 5th day of October, 1891.

As the two bonds, exclusive of interest, did not exceed \$2,000, and it was then an open question whether the coupons attached to the bonds sued on representing the interest could be reckoned in "the amount in controversy" to give this court jurisdiction, a second count was made to the petition, counting on several funding bonds issued by Bates county on behalf of Mt. Pleasant township, notwithstanding the interest thereon had been provided for by the county and was subject to demand by the holder of these funding bonds. It is now developed by the deposition of A. J. Weil that he was then the owner of the funding bonds, and he testifies herein: "I loaned these bonds to Mr. Skinker." Why he did this he does not even deign to explain. But, as Mr. Skinker used them to eke out the supposed necessities of the Edwards suit, the inference is justified that Mr. Skinker so advised him; and, as he disclosed no other consideration for this loan, the further inference is warranted that he must have been deeply interested in having the Edwards suit maintained in this jurisdiction.

The history of the suits on these bonds in this court is shown in the opinion of this court in *Edwards v. Bates Co.*, 55 Fed. 436. Suit was first brought on these bonds by Thomas K. Skinker, as attorney,

in the name of one Norman De V. Howard, to which a demurrer was sustained as the suit did not exceed \$2,000, exclusive of interest and costs. Without dismissing that suit, and while it was pending, the same attorney brought suit on the same bonds in favor of this plaintiff, and in addition thereto on seven funding bonds of the county for \$100 each, dated October 1, 1885, and not maturing on their face until 1905. The county, by condition attached to the funding bonds, reserved the right to redeem the same at any time after five years from their date, with a provision that, if not presented within 30 days after notice by the county of its election to redeem, the bonds should cease to bear interest, and should be payable on presentation to the county treasurer. Notice having been given to redeem, Weil did not present the bonds for payment within 30 days, and it was held that it was apparent that the suit was brought on the funding bonds (solely for the purpose of increasing the amount in suit beyond \$2,000), about which there was no real controversy, and therefore the court had no jurisdiction; the coupons attached to the two bonds in question being in the nature of interest. On writ of error to the supreme court it was held that, in determining the jurisdictional amount in an action in the circuit court of the United States to recover on municipal bonds, the matured coupons thereto are to be treated as separable, independent promises, and not as interest due upon the bond, and therefore the court had jurisdiction, exclusive of the funding bonds declared on in the second count. It was after this that the plaintiff dismissed the count as to said funding bonds. The incorporation of the second count, based on the bonds loaned by Weil to help out, as was then supposed, the jurisdiction of the court, showed a deliberate purpose to perpetrate a fraud on the jurisdiction of this court.

The fact being developed on this trial that J. C. Weil or J. C. Weil & Co. are back of this suit, paying all the expenses of its prosecution, the position is assumed by the plaintiff that J. C. Weil became the owner of the bonds since the institution of this suit. To this end the deposition of Edwards was taken, in which he testifies that in payment of the bonds "I gave a check or order on A. J. Weil, the banker, for the amount of the purchase. * * * When I got back to New York, I paid Weil in money for these bonds. I do not know how I paid him. I think I owed it to him for some time. There were a number of other transactions involving money at the same time. I never gave him a note. When settling up with Weil, I did not take up my checks and orders; I simply looked over the accounts." If this was the truth, Edwards, having liquidated the debt to Weil & Co. for the purchase money advanced for the bonds, remained their unqualified owner. How, then, did A. J. Weil subsequently become the owner, as plaintiff's counsel now admits he is? His deposition contradicts Edwards. In answer to the eleventh interrogatory: "State when and how the plaintiff paid him, or the firm of J. Weil & Company, the amount of the purchase price of the two bonds," he said: "When the Mount Pleasant township bonds were paid for by A. J. Weil & Company, of St. Louis, for Mr. Edwards, they were charged on the books of that firm to Mr. Ed-

wards' individual account, and the account was transferred from A. J. Weil & Company of St. Louis to A. J. Weil & Company of New York; and A. J. Weil & Company of New York charged the same to Mr. Edwards' individual account, and was paid for by him; and when the firm of A. J. Weil & Company of New York was dissolved, in settlement of the account of Edwards this claim was part payment of this account, and A. J. Weil & Company of New York became the owners of whatever proceeds would be realized by Mr. Edwards in this suit; and it was further understood that this suit was to be prosecuted in his name." And in answer to the twelfth interrogatory he said: "I do not remember how the payment was made, but know it was made."

A more involved, lack-candor statement by an intelligent business man is rarely presented to a court. If A. J. Weil & Co. of New York "charged the same to the individual account of Edwards, and was paid for by Edwards," why did not Edwards still remain the owner? And how, then, did Weil & Co. become the owner? The witness proceeded by way of explanation to say, in effect, that afterwards, when the firm of A. J. Weil & Co. was dissolved, in the settlement of the account of Edwards this claim was a part of this account. What was there to settle of Edwards' account if he had already paid it to the firm, as Edwards testified he had done? The fund had already gone into the copartnership assets, and there was no allotment, on dissolution, of Edwards' claim to one of the partners, and the transfer by Edwards of the bonds to one of the partners in liquidation of his alleged debt; but the bald further statement of the witness is that "A. J. Weil & Company of New York," the firm itself, became the owners. If, looking at his whole deposition, it is to be said that the witness meant to say that he took the bonds in settlement of the account against Edwards, there is not only a palpable contradiction of Edwards' statement that he paid Weil in money or otherwise, but it leaves the case in perfect consistency with the mere letter of the statement that Edwards bought the bonds and paid the vendor therefor, but with Weil & Co.'s money; and after his name served the purpose of a suit in the United States court the bonds remained those of Weil & Co., with not a dollar paid therefor by Edwards or by Weil & Co. to him, except as a "dummy" in the original transaction. There is not a mark of a pen between these parties to evidence any indebtedness of Edwards to Weil & Co. No note was ever taken; and when the account books, which should show the transaction, are called for, they are not presented. Edwards was a mere impecunious desk holder in Weil & Co.'s office when the bonds were bought on speculation, when, as the testimony shows, he knew they were being repudiated by the county. They were not put up even as collateral security with Weil & Co.

Outside of Edwards' statement that he paid the costs in this case, without producing a receipt, check, or letter from the clerk or the attorney, it is admitted that Weil has paid all of the costs of the litigation after 1892. What costs, then, did Edwards pay? What costs were due from him? If he paid to the clerk or attorney,

where is his receipt or letter evidencing it? If this is an honest, open transaction, why did Mr. Weil, in taking his deposition, refuse to show his letter book giving the correspondence touching this litigation? As the defendant, in order to get at the facts in this case as best it might, was compelled to have recourse largely to the evidence in the keeping of Edwards, A. J. Weil, and their attorney, it took the deposition of Mr. Skinner, attorney for the plaintiff, and asked him to produce the correspondence between him and Weil. This he declined to do, claiming that they were privileged communications between client and attorney, but that he would produce the letters at the trial of this case; thus placing the defendant at the disadvantage of not knowing what the evidence would be, nor how to meet it, until on the final trial of the case. At the trial of the case, plaintiff's counsel still insisted that the communications were privileged, and, without waiving the objection, agreed to submit the correspondence to defendant's counsel, with the understanding that such of it as was deemed material might be submitted to the court to pass upon the question of its competency under the plaintiff's objection. As the court sustains this objection of the plaintiff, these letters are not the subject of comment, further than to say that the letters presented to counsel from Weil & Co. and A. J. Weil (the signatures being used interchangeably) to Mr. Skinner run from February, 1893, showing that there must have been previous correspondence between them; but the letters produced from Mr. Skinner to Weil do not begin until 1896, with no explanation of this circumstance. As said by Chief Justice Waite in *Stewart v. Lansing*, 104 U. S. 510, 26 L. Ed. 866: "The testimony is noticeable rather for what is omitted than for what was introduced. It would seem to have been easy to prove the exact facts as to the parting with the bonds." The court of appeals of this circuit, in *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96-102, 49 C. C. A. 244, animadverted upon the unsupported, naked statement of a witness about a transaction, without producing books, letters, checks, or other data to support it, and for that reason such testimony ought not to be the foundation of a judgment in a case where the parties had books, letters, etc. This just rule ought to apply with especial force to a transaction like this, where it appears that checks passed and entries were made in account books of a firm, and not a letter or check or book is produced in corroboration, on the remarkable excuse that the books may have been sold or burned.

From the inception of this litigation the plaintiff and his attorney have been advised that the integrity of plaintiff's ownership has been challenged. And yet up to the time of the filing of the replication herein the plaintiff claimed to be the owner of the bonds, and never disclosed the interest now admitted to be in Weil; and in his deposition, taken in 1900, he unqualifiedly testified to having paid expenses and costs incident to the prosecution of the suit, and said that these payments had been made by drafts drawn on him by Donaldson in St. Louis, in amounts from \$60 to \$70, aggregating several hundred dollars. But Donaldson, in his testimony, afterwards taken by the defendant, testified that he never had drawn a draft on him for any

amount whatever in connection with this litigation; that he had no connection with it whatever, except the writing of the letter shown him, in his deposition, to Mr. Weil. And as further evidence of evasion and lack of candor, Mr. Weil, in his deposition, taken by the defendant, when asked as to whether or not he had paid the costs and expenses incident to this litigation, cunningly avoided disclosing the whole truth, in that he failed to answer the interrogatory (the deposition being taken on interrogatories) as to the times when these payments had been made. The question was: "Interrogatory 27. Please state what amounts, if any, you ever paid, or caused to be paid, to any and all persons as costs or expenses incident to the prosecution of this suit; to whom such payments were made and when they were made? Answer. When requested by Mr. Skinner I have paid costs in this suit."

In view of the fact that the supreme court of this state, in *Webb v. Lafayette Co.*, 67 Mo. 353, at the April term, 1878, prior to plaintiff's alleged purchase, decided that the said act of 1868, under which these bonds were issued, was unconstitutional and void, rendering it necessary that the party seeking to recover on such bonds should not be a citizen of the state of Missouri, it is the duty of this court to see that its jurisdiction is not invoked collusively to evade the decision of the supreme court of the state construing a legislative act of the state, to which that court has ever since adhered.

On all the facts and circumstances of this case, I cannot escape the conviction that Edwards' ownership of these bonds was only apparent, and not actual.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California. July 9, 1902.)

No. 878.

1. PUBLIC LANDS—RAILROAD GRANT—RIGHTS OF MORTGAGEES.

The mortgagees of the Southern Pacific Railroad Company have no other or greater rights than the company itself in lands erroneously patented or certified under its grant.

2. SAME—CONSTRUCTION OF GRANT.

None of the lands within the 30-mile limit of the grant made to the Atlantic & Pacific Railroad Company in California by Act July 27, 1866 (14 Stat. 292), passed to the Southern Pacific Railroad Company by virtue of the grants made to that company by the joint resolution of June 28, 1870 (16 Stat. 382), or the act of March 3, 1871 (16 Stat. 573).

3. SAME—SUIT TO DETERMINE RIGHTS UNDER RAILROAD GRANT—EQUITY JURISDICTION.

The United States may maintain a suit in equity, under Acts March 3, 1887, Feb. 12, 1896, and March 2, 1896 (24 Stat. 556, 29 Stat. 6, and Id. 42), to set aside patents erroneously issued to a railroad company for lands under a grant, and to test the bona fides of persons claiming to be bona fide purchasers, and establish and confirm their rights in any of the lands so patented, and may in the same suit require an accounting from the railroad company in respect to such of the lands involved as it has sold, and obtain a decree against it for the sums recoverable therefor under such acts.

4. EQUITY—OBJECTIONS TO JURISDICTION—TIME FOR MAKING.

Objections to the jurisdiction of a court of equity on the ground that the remedy at law is plain, adequate, and complete must be made at the earliest opportunity, and before the defendants have entered upon their defense on the merits.

5. PUBLIC LANDS—SUIT TO DETERMINE RIGHTS UNDER RAILROAD GRANT—PARTIES.

In a suit by the United States under Act March 3, 1887, and its amendments, to determine rights in lands erroneously patented under a railroad grant, where it is alleged and shown that purchasers from the company are very numerous, and that they all occupy the same position, it is not necessary that all should be made defendants, but a number may be joined as representatives of the class, and the titles of all confirmed, where it appears that they were bona fide purchasers.

6. SAME—CONSTRUCTION OF STATUTE.

Act March 2, 1896, amendatory of prior acts relating to suits to recover lands erroneously patented under railroad grants, and which provides that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed," but requires payment to be made for such lands to the United States either by the purchaser or by the grantee company in case it has received payment from the purchaser, does not operate to confirm the title of the company, or to enlarge its rights.

7. SAME—RECOVERY OF PRICE OF LANDS SOLD BY COMPANY.

The provision of such acts requiring the grantee company to pay to the United States the minimum government price for the lands erroneously patented to it, and which it has sold to bona fide purchasers, in case it has received so much from the purchaser, was within the power of congress, and is not invalid, as creating an indebtedness by a retrospective act, but, on the contrary, is a waiver by the government, to the extent of the excess above the minimum price, of its right to recover the full value of the land, which arose from the act of the company in selling the same without right.

8. SAME.

The fact that the error in issuing patents to a railroad company for lands to which it was not entitled under its grant was that of the land department constitutes neither a legal nor equitable defense to an action by the United States to recover such lands, or their value, when sold to bona fide purchasers, at least where such error did not prevent the company from obtaining all the lands to which it was entitled under its grant.

In Equity. Suit for adjustment of land grant.

The Attorney General and J. H. Call, Sp. Asst. U. S. Atty., for the United States.

Wm. Singer, Jr., Wm. F. Herrin, T. M. Stewart, S. V. Landt, and R. H. F. Variel, for defendants.

ROSS, Circuit Judge. By its bill the complainant sets up, among other things, the grants made by congress to the Atlantic & Pacific Railroad Company and to the defendant Southern Pacific Railroad Company by the act of July 27, 1866 (14 Stat. 292), and the grant to the defendant railroad company made by the joint resolution of June 28, 1870 (16 Stat. 382), and by the act of March 3, 1871 (16 Stat. 573), and the subsequent act of congress of July 6, 1886 (24 Stat. 123), declaring forfeited the grant to the Atlantic & Pacific Company of July 27, 1866, and restoring to the public domain all of the odd-numbered sections within 30 miles on each side of its line of road between the eastern boundary of California and the Pacific Ocean at San Buena

Ventura. It is alleged that all of the lands described in Exhibit A, annexed to and made part of the bill, situated in California, and consisting of separate and distinct tracts of the public lands, and aggregating 30,067.79 acres, fell within the 30-mile limits of the Atlantic & Pacific Railroad grant; that, regardless of the rights of the complainant, the defendant railroad company, as well as the other defendants, claim some title and interest in the lands described in Exhibit A, annexed to the bill, under some or all of the aforesaid acts of congress granting lands to the defendant railroad company, the precise nature and extent of which claims are unknown to the complainant, but which it alleges are unfounded; that subsequent to the passage of the aforesaid act of March 3, 1871, and prior to the year 1896, patents were erroneously issued by the department of the interior to the defendant railroad company in due form, purporting to convey to that company the lands described in the said Exhibit A. It is alleged that the grants made to the defendant railroad company by section 18 of the act of July 27, 1866, by the joint resolution of June 28, 1870, and by section 23 of the act of March 3, 1871, were made upon the same terms, conditions, restrictions, and limitations as the grant to the Atlantic & Pacific Railroad Company by the act of July 27, 1866, by section 20 of which latter act congress expressly reserved the right to alter, amend, or repeal that act. The bill also sets up the acts of congress of March 3, 1887 (24 Stat. 556), February 12, 1896 (29 Stat. 6), and March 2, 1896 (29 Stat. 42). By section 1 of the act of March 3, 1887, the secretary of the interior was authorized and directed "to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by congress to aid in the construction of railroads, and heretofore unadjusted." Sections 2 and 4 of the act are as follows:

"Sec. 2. That if it shall appear, upon the completion of such adjustments respectfully [ively], or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the secretary of the interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the attorney-general to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States."

"Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the secretary of the interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the secretary of the interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case

of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the attorney-general shall cause suit or suits to be brought against such company for the said amount: provided, that nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: and provided, that a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions."

By the act of February 12, 1896, congress added the following proviso to section 4 of the act of March 3, 1887, just quoted:

"Provided further, that where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the government a sum equal to the difference between the portion of the purchase price so paid and the government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

By the act of March 2, 1896, entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," congress declared, among other things, that "no patents to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed," with a proviso not pertinent to the present case.

Sections 2 and 3 of the act of March 2, 1896, are as follows:

"Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the secretary of the interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the secretary of the interior shall request that suit be brought against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the secretary of the interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the secretary of the interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the secretary of the interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the forty-ninth congress.

"Sec. 3. That if at any time prior to the institution of suit by the attorney-general to cancel any patent or certification of lands erroneously patented or certified a claim is presented to the secretary of the interior by or on behalf of any person or persons, corporation or corporations, claiming that such

person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said department of the interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the secretary of the interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

The bill alleges that more than 90 days prior to the commencement of the suit the secretary of the interior demanded of the defendant railroad company a reconveyance and relinquishment to the United States of the lands so erroneously patented, with which demand the defendant railroad company refused, and ever since has refused, to comply; that prior to December 1, 1889, the defendant railroad company sold some of the said lands, or some interest therein, to numerous persons, but that the complainant is not able to state the names of the persons to whom such lands have been sold in good faith, or the extent of the interest conveyed, or the amount paid by such purchasers respectively, or the dates of such payments, except as to those of the lands described in the said Exhibit A, specifically set forth and described in Exhibit B, annexed to the bill, which specific portions so described in Exhibit B, it is alleged, were sold to numerous persons in good faith, and whose titles thereto were confirmed by the aforesaid act of congress of March 2, 1896, and for which lands the defendant railroad company received more than \$2.50 per acre. It is further alleged that all of the lands described in Exhibit A, annexed to the bill, and constituting the subject of the suit, are of the value of more than \$2.50 per acre. It is alleged that more than 1,000 persons, among whom are the defendants M. L. Wicks, Alice B. Slosson, Ivar A. Weid, James Mair, Pomona Land & Water Company, T. Banbury, Burdette Chandler, H. H. Linville, J. R. Nevin, Henry M. Loud, William Thorpe, and Fairmount Land & Water Company, a corporation, "sued as representatives of a class, have purchased, by immediate or mesne conveyances, from the defendant Southern Pacific Railroad Company, certain tracts of land described in said Exhibit A to this bill, or some interest therein, and who are too numerous to be made parties to this bill, and that all of said persons claim an interest in such lands so purchased under and by virtue of said grants to the defendant Southern Pacific Railroad Company, and said acts of March 3, 1887, February 12, 1896, and March 2, 1896; but the nature and extent of said claims are unknown to your orator, except as heretofore set forth, and your orator has joined as defendants the persons above named as representing such numerous purchasers, and which persons fairly represent said purchasers." It is alleged that on the 7th day of January, 1898, a suit brought by the present complainant against the defendant railroad company, and numbered 600, was depending in this court for the annulment of patents issued to certain lands, including those lands described in Exhibit B, annexed to the bill herein, and that

in its answer to the bill filed in that suit the defendant railroad company alleged that the tracts of land described in Exhibit B, annexed to the bill in the present suit, had been, prior to March 2, 1896, sold by the defendant railroad company to purchasers in good faith and for value, who were bona fide purchasers thereof within the meaning of the aforesaid acts of congress; and that thereafter, upon issue joined in said suit No. 600, the testimony of Jerome Madden, general land agent of the defendant company, was taken in its behalf, in the course of which he testified that those lands had been so sold by said company to purchasers in good faith and for value, and that thereupon the complainant in that suit, relying upon the truth of such averments and of such testimony, dismissed from said case No. 600 the lands described in Exhibit B, annexed to the bill in the present suit, without prejudice; by reason of which the complainant herein avers that the defendant company ought to be and is estopped from denying that the lands described in Exhibit B, annexed to the bill herein, were so sold by said company to purchasers in good faith and for value, and ought to be and is estopped from questioning the right of the complainant herein to maintain the present suit. The bill further alleges that a controversy has arisen, and still exists, between the complainant and the defendant railroad company, as to the true meaning of the aforesaid acts of congress of July 27, 1866, June 28, 1870, March 3, 1871, March 3, 1887, February 12, 1896, and March 2, 1896, and as to the respective rights and obligations of the complainant and the defendant railroad company thereunder; that said acts of congress constitute a valid contract between the complainant and the defendant railroad company, "whereby it was agreed and understood that where any land was erroneously certified or patented to said company and sold by said company to a bona fide purchaser, that the United States would grant to and confirm the title of the United States to such bona fide purchaser, and not to or for the benefit of said railroad company; and that in such case it was further agreed and understood that said railroad company would account to and pay over to the United States the value of such land, not exceeding the government price, and in case of a sale upon executory contract, where less than the government price had been received, would account to and pay over to the United States the amount received by said company upon such sales. Your orator further alleges that such construction and interpretation of said acts is disputed by the defendant railroad company, said company contending that it was not the title of the United States which was granted to and confirmed to such bona fide purchasers, but that the United States confirmed the title to the lands so sold by said company to said railroad company, which inured through it to such purchasers, and that said railroad company is not under any obligation in law or in equity to pay to the United States the government price, or any other price, for such lands, and that said company is still entitled and empowered to recover from such purchasers, for the use and benefit of said company, the unpaid balance of the purchase price of such lands, amounting to many thousands of dollars; and in pursuance of such claim said company has instituted, and still is instituting, numerous suits to enforce such contracts against numerous persons who have purchased

such lands from said company upon executory contracts, and where only a part of the purchase price has been paid, to the great embarrassment of your orator in the administration of public lands. Your orator further alleges that it expressly disclaims any purpose or desire to annul the title to any lands held by a bona fide purchaser from said railroad company, but desires to ascertain what lands and what interest in lands have been sold by said company to bona fide purchasers, and what sum or sums are still owing to your orator by said company, to the end that patents to such lands not so sold may be annulled, and that said railroad company may be required to account to and pay over to your orator the government price of such lands as have been sold, and to the further end that your orator may protect and confirm the title of those bona fide purchasers who are entitled to receive a patent or confirmation of title from the United States by virtue of such acts of congress of March 3, 1887, and March 2, 1896." The prayer of the bill is that the court will determine the true construction of the acts of congress mentioned, and define the rights and obligations of the complainant and the defendant railroad company thereunder, and will determine the right and title of the complainant to the lands described in Exhibit A, annexed to the bill, and determine which of the said lands have been sold by the defendant railroad company to bona fide purchasers, and will annul the patents of such of the said lands as have not been sold by said company to bona fide purchasers, and quiet the title of the complainant thereto; that the defendant railroad company may be enjoined from commencing, prosecuting, or maintaining any suit against any person for the recovery of the purchase price of any of the lands described in said Exhibit A, or for the foreclosure of any contract respecting any of such lands; that as to those lands which have been sold by the defendant railroad company to bona fide purchasers it be required to account to the complainant for such sums as have been received by it from sales thereof, and to pay over such sums to the complainant; and for such other and further relief as to the court may seem equitable.

Answers were filed to the bill by each of the defendants named therein (other than the railroad company), and also by numerous other persons claiming portions of the lands described in Exhibit B, annexed to the bill, as bona fide purchasers thereof, each and all of which deny the alleged title of the United States, and allege that the lands in controversy were granted to the defendant railroad company by the acts of congress of July 27, 1866, June 28, 1870, and March 3, 1871, and that they, respectively, are bona fide purchasers of portions thereof from that company. The answer of the defendant railroad company also puts in issue the alleged title of the complainant, and sets up that all of the lands here involved were embraced by the aforesaid grants to it by congress; and also alleges, among other things, that on or about April 1, 1875, it executed to the defendant D. O. Mills and Lloyd Tevis, as trustees, a deed of trust, conveying to them all of the lands described in Exhibit A, annexed to the bill herein, to secure the payment of negotiable mortgage bonds to be issued and sold by the company, and that prior to March 3, 1887, the company duly issued, sold, and delivered negotiable bonds, secured by the mortgage, of the

face value of \$39,285,000, to bona fide purchasers thereof, who purchased the same without notice of any claim of the United States to or respecting any of the said lands, and that each and all of said purchasers paid the full value of the bonds, and that \$10,000,000 in value of them are still outstanding and unpaid in the hands of the purchasers; that prior to the commencement of the present suit the defendant Homer S. King was duly substituted for Tevis as such trustee; that on August 25, 1888, the defendant railroad company executed to the defendant Central Trust Company of New York a further mortgage or deed of trust conveying to it all of the lands involved herein, as security for the payment of certain negotiable bonds to be issued and sold by the defendant railroad company, which bonds, of the face value of \$11,375,000, were, prior to the year 1893, duly issued, sold, and delivered to bona fide purchasers, who purchased the same in good faith, and without notice of any claim on the part of the United States to or respecting any of the lands in question; and that on September 15, 1893, the defendant railroad company executed to the defendant Central Trust Company of New York a further mortgage or deed of trust covering the same lands to secure the payment of other and further negotiable mortgage bonds, which were thereafter likewise issued, sold, and delivered to bona fide purchasers without notice of any claim of the United States to or respecting any of the said lands.

Annexed to the answer of the defendant railroad company is an exhibit, which it is averred correctly sets forth the full particulars of sales made by the defendant railroad company of the lands described in Exhibits A and B, annexed to the bill of complaint, and it is alleged that each of the sales set forth in the exhibit annexed to the answer was made to a bona fide purchaser, and a citizen of the United States, who purchased in good faith, and for the full value of the land at the time of the purchase, without notice that the United States had or claimed to have any interest whatever in or to the land so purchased, and who in good faith believed that in making such purchase he was acquiring the true title to the land bought. The answer denies that the defendant railroad company is in any wise accountable or indebted to the complainant for moneys received by it for any of the lands referred to in the bill, and alleges that the United States has never demanded that the defendant railroad company pay to it any price or sum for the land so sold. The answer also denies that the defendant Wicks, and other of the individual defendants similarly situated, represent a class of persons, or any person or persons other than themselves and their predecessors in interest, holding title under the defendant railroad company.

In so far as the mortgagees are concerned, it is sufficient to say that it has been heretofore held by this court, as well as by the supreme court of the United States, that they have no other or greater rights than the defendant railroad company. *U. S. v. Southern Pac. R. Co.* (No. 600; C. C.) 86 Fed. 962; *U. S. v. Southern Pac. R. Co.* (Nos. 587, 662, 675; C. C.) 94 Fed. 427; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355. Further reference to them is therefore unnecessary.

The agreed statement of facts shows that each of the separate and distinct tracts of the public lands forming the subject of the suit specifically described in Exhibit A, annexed to the bill, and aggregating 30,067.79 acres, fell within the 30-mile limits of the Atlantic & Pacific grant; and, as I understand the evidence, none of them are embraced by the common-place limits of that grant and the grant made to the defendant railroad company by the same act of July 27, 1866, but do fall within the limits of the branch-line grant to that company. In the case of *Southern Pac. R. Co. v. U. S.*, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, it was held that the United States, having, by the forfeiture act of July 6, 1886, become possessed of all the rights and interest of the Atlantic & Pacific Railroad Company in the grant made to it by the act of July 27, 1866, within the limits of California, had an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of that grant and of that made to the defendant Southern Pacific Railroad Company by the same act of July 27, 1866, by which the latter company acquired the other equal undivided moiety thereof. But that case left undisturbed the preceding decisions, by which it has been adjudged that none of the public lands within the 30-mile limits of the grant made by congress on the 27th day of July, 1866, to the Atlantic & Pacific Railroad Company ever passed to the defendant Southern Pacific Railroad Company by virtue of the grant made by congress to that company by the joint resolution of June 28, 1870, or by the act of March 3, 1871. *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; *U. S. v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *U. S. v. Southern Pac. R. Co. (C. C.)* 86 Fed. 962; *Southern Pac. R. Co. v. U. S.*, 38 C. C. A. 619, 98 Fed. 27. It results that the defendant Southern Pacific Railroad Company never acquired any interest in any portion of the lands in suit.

The case further shows that the officers of the government, in the due and orderly course of proceedings, but misinterpreting the law applicable thereto, issued in due and proper form to the defendant railroad company patents to the tracts of public land described in Exhibit A, annexed to the bill, certain specific tracts of which (described in Exhibit B, annexed to the bill) the complainant alleges the defendant railroad company thereafter conveyed, and certain other specific tracts of which it contracted to convey, to various bona fide purchasers, a number of whom were made defendants to the bill individually, and, as contended on the part of the complainant, as representatives of the balance of such purchasers. That the government title to the lands thus patented to the defendant railroad company thereupon passed to that company is not questioned, and it is equally clear that under the decisions above cited the title was erroneously so conveyed, and wholly without consideration. The right of the government—the real owner of the land—to maintain in a court of equity a suit to set aside such conveyances and re-establish its title, in order that it may hold the land unclouded, or convey it to one entitled thereto, cannot be doubted. *U. S. v. Hughes*, 11 How. 568, 13 L. Ed. 809; *Hughes v. U. S.*, 4 Wall. 232, 18 L. Ed. 303; *Curtner v. U. S.*, 149 U. S. 672, 673, 13 Sup. Ct.

985, 1041, 37 L. Ed. 890; U. S. v. Southern Bell Tel. Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450. Whether the right should be exercised, and, if so, under and subject to what conditions, was a matter within the control of congress. U. S. v. Winona & St. P. R. Co., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789. By its acts of March 3, 1887, February 12, 1896, and March 2, 1896, congress did provide for the assertion of that right, subject to certain specific provisions respecting the confirmation of sales made by the railroad company to bona fide purchasers, and with the provisions already made to appear concerning the amounts of money that should be exacted by the government from the company for such of the lands as it might have sold and conveyed, or contracted to convey, to bona fide purchasers. The evidence shows that, as a matter of fact, all of the lands involved in the suit were either sold or contracted to be sold by the defendant railroad company to bona fide purchasers at prices exceeding the government price therefor. But the bill alleged that only a part of the lands therein described, and of which the complainant was alleged to be the owner, had been sold or contracted to be sold by the railroad company to bona fide purchasers, and it sought discovery and an adjudication by the court as to whether any of the other tracts forming the subject of the suit had been so sold to a bona fide purchaser or purchasers, and, if so, which of them. The answers of all of the defendants denied any interest in the complainant, and expressly alleged that each and every of the tracts of land in question was, prior to the commencement of the suit, granted by the complainant to the defendant railroad company. The case presented by the pleadings was, therefore, very clearly one within the equity jurisdiction of the court, calling for a decree quieting the disputes in respect to the title to the various tracts of land, and involving an inquiry into the question of bona fides in those instances where conveyances of any of the tracts, or contracts therefor, had been made by the defendant railroad company. The point made on behalf of the defendant railroad company, to the effect that the complainant's cause of action is purely and only an indivisible common-law demand for the value of so many acres of land, could not, therefore, be sustained, even if it had been made before answer to the merits, and had been properly pleaded; neither of which was done. In *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594, 32 L. Ed. 1005, the court said:

"The point is also pressed that the remedy at law was plain, adequate, and complete, and jurisdiction in equity therefore wanting. * * * The defendants fully answered the bill, and raised no such objection; and, the cause being at issue, and evidence taken, it was ordered, on the 23d of February, 1883, by consent, to be heard by the general term in the first instance. On the 24th of March, 1884, the defendant moved to dismiss on the ground of the adequacy of the remedy at law. We have had occasion recently to remark that, where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject-matter, this objection should be taken at the earliest opportunity, and before the defendants enter upon a full defense."

See, also, *Brown v. Iron Co.*, 134 U. S. 530, 535, 10 Sup. Ct. 604, 33 L. Ed. 1021; *Perego v. Dodge*, 163 U. S. 160, 164, 16 Sup. Ct. 971, 41 L. Ed. 113; *Williamson v. Monroe* (C. C.) 101 Fed. 322, 329.

Moreover, by sections 2 and 3 of the act of March 2, 1896, express provision was made by congress not only for suit by the United States to test the bona fides of persons claiming to be bona fide purchasers of any lands erroneously patented or certified under land grants in aid of the construction of railroads, and for confirmation by decree of the court of such bona fide sales, but it was also there expressly declared that any bona fide purchaser of lands erroneously patented or certified to such railroad company, who is not made a party to such suit on the part of the government, and who has not submitted his claim to the secretary of the interior, is authorized to "establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or, at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the forty-ninth congress"; so that, upon the facts appearing in the present case, very many such suits might have been brought against the United States to establish the rights of the bona fide purchasers of the lands here involved, but for the fact that they are all covered by the present suit, which is another reason why this suit was properly brought, for the avoidance of a multiplicity of actions is a common ground for the exercise of the jurisdiction of a court of equity. Story, Eq. Pl. §§ 284-286; Pom. Eq. Jur. §§ 256, 269; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Brown v. Trust & Safe Deposit Co., 128 U. S. 403, 410, 9 Sup. Ct. 127, 32 L. Ed. 468; Bailey v. Tillinghast, 40 C. C. A. 93, 99 Fed. 801. The equitable jurisdiction of the court having been properly invoked, and having attached, the court will, on well-settled principles, proceed to the final decision of the entire case. U. S. v. Union Pac. R. Co., 160 U. S. 52, 16 Sup. Ct. 190, 40 L. Ed. 319; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 12, 19 Sup. Ct. 77, 43 L. Ed. 341; Hopkins v. Grimshaw, 165 U. S. 342, 358, 17 Sup. Ct. 401, 41 L. Ed. 739; Williamson v. Monroe (C. C.) 101 Fed. 322, 329.

The defendant railroad company is the grantor of all of the other defendants, and in its answer set up the title claimed by it to the lands in question under the congressional grants, and alleged and proved that by virtue of those grants the officers of the government issued to it patents for all of the lands, all of which it either deeded or contracted to convey to bona fide purchasers, among whom are all of its codefendants, who may, in view of the alleged and agreed fact that such purchasers are very numerous, and of the showing that all of them occupy a precisely similar position, be properly held to represent the class. Equity Rule No. 48; Story, Eq. Pl. §§ 95, 97, 127; Davis v. Gray, 16 Wall. 203, 232, 233, 21 L. Ed. 447. As the proof shows that all of the lands in suit were, prior to its commencement, either sold or conveyed, or contracted to be conveyed, by the defendant railroad company to bona fide purchasers, it is obvious that the complainant is not entitled to have any of the patents in question canceled, because of that provision of the act of congress of March 2, 1896, declaring that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." The preceding act of March 3, 1887, supplemented by that of Febru-

ary 12, 1896, contemplated the annulment of patents erroneously issued to land-grant railroad companies, even where the lands for which such patents were issued had been sold by such companies to bona fide purchasers having the requisite citizenship; in which latter event the issuance of patents directly to such purchasers, upon a compliance with the provisions of the act, was authorized and directed. But the subsequent act of March 2, 1896, provided otherwise, expressly declaring, as has been shown, that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled," and in terms confirming the right and title of all such purchasers. There is nothing in the language of either act looking to a confirmation of any title in the land-grant companies to any public land erroneously patented to them; such confirmation being, to the extent to which it is given, to bona fide purchasers from the companies. And in neither act is there any intention manifested on the part of congress to donate any of the lands so erroneously certified or patented to either of the land-grant companies or to any bona fide purchaser thereof. On the contrary, the provision is that, where such bona fide purchasers have paid to the company for the land an amount at least equal to the government price for similar land, then suit shall be brought on the part of the government against such company to recover the government price of the land; and in cases where such bona fide purchasers have paid to the company less than the government price for similar land such purchasers shall pay the government therefor a sum equal to the difference between the portion of the purchase price paid by them to the company and the government price for similar land, and suit be brought by the government against the grantee company for the balance; that is to say, for the amount received by the company from the bona fide purchasers.

On behalf of the defendant railroad company it is said that "Congress exhausted its constitutional power when it confirmed the titles of the purchasers. It could not, by its fiat, make the defendant a debtor by retrospective act." The answer is that the company, having sold and disposed of the government's property without right, was, regardless of the statute, liable to the government, if not for its true value, certainly for the amount of money received by the company therefor, and which it had no right to retain; for, having received the land illegally, and disposed of it for money, there was an implied contract on the part of the company to pay over the money so received to its true owner. *Pullman's Palace-Car Co. v. Central Transp. Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, and cases there cited. There was no attempt on the part of congress to add to the company's legal or equitable liability, but surely it could waive the whole or any part of the right of the United States without any valid objection on the part of the company. And by the legislation under consideration congress did waive a part of the government's right in the present case; for it appears that all of the lands in suit that were conveyed by the company were sold by it for sums in excess of the government price for such lands, and in those instances in which there were only contracts for deeds on the part of the defendant railroad company, with part payment only of the agreed price therefor, the suit authorized and brought is only for the latter amount in the latter instances, and for

the minimum government price in the other. It is perfectly plain that the acts of March 3, 1887, February 12, 1896, and March 2, 1896, were remedial in their nature, and it has been heretofore so adjudged by this court in the course of the litigation between the United States and the defendant railroad company. It is equally clear that the legislation resulted in benefit to that company. That fact in part appears from its answer in the present suit, where it is shown that the lands in question which were erroneously patented were sold by it at prices largely in excess of the government price for such lands; and it is further shown by its supplemental answer in case No. 600, already referred to, and in evidence in the present suit, wherein it was alleged that these same lands, which were, on motion of the government in that case, dismissed therefrom without prejudice, were sold by the company to bona fide purchasers, whose title thereto was confirmed by the act of congress of March 2, 1896, and which act the company there pleaded in bar of the government's suit. Taking the benefits of the act, the company must, upon obvious principles of fairness, accept its burdens.

It is contended on the part of the defendant railroad company that the complainant is precluded from recovering from it anything for the lands in suit by reason of the decision of the supreme court in the case of *U. S. v. Winona & St. P. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789. This contention is based upon this language of the court in concluding its opinion in that case:

"If it be suggested that under the scope of these acts, though the suit must fall so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent, it is sufficient to say that: First, the government has not asked any such decree; second, that it may be doubted whether, for the mere purpose of recovering money, an action at law must not be the remedy pursued; but, lastly, and chiefly, that it does not appear from this record either that the railroad company received an excess of lands, or has even received (these lands included) the full quantity of lands promised in the grant; and, further, that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that if, simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified, and which have since been disposed of by the government to other parties, so that there is now no way of filling the grant, the government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the government to recover from the company the value of lands erroneously certified."

It is to be observed, in the first place, that in the case just referred to the government did not seek to recover the value of any land, and therefore no such question as is here presented was involved in that case, as was expressly stated by the court. But the case itself was wholly unlike the present one, for, as the defendant railroad company's grant did not, according to the decisions above cited, embrace the lands in suit, none of them could form the basis of any indemnity selection. To which may be added the fact that the parties to the present

suit "stipulated and agreed * * * that odd sections of land, exceeding twenty thousand acres in quantity, are to be found within the indemnity limits of each of the grants made to the Southern Pacific Railroad Company by the acts of July 27, 1866, and March 3, 1871, which are subject to selection, but have not been selected by said company."

It results, I think, that the complainant is entitled to judgment against the defendant railroad company, at the minimum government price, for all of those portions of the lands in suit for which it has been paid so much by bona fide purchasers, and for those portions thereof for which it has been paid less than such government price the full amount so paid, and that such of the bona fide purchasers as have paid to the defendant railroad company the full government price of such lands are entitled to a confirmation of the lands so purchased and paid for, and those of such purchasers as have paid to the company for the lands purchased by them, respectively, less than the government price thereof, are entitled to like confirmation, upon paying to the complainant the difference between the amount paid by them to the defendant railroad company and such minimum government price.

The counsel of the respective parties, who are familiar with the details of these numerous purchases, can, no doubt, agree upon a decree that meets the views of the court above indicated, and a decree in accordance therewith will be entered; otherwise I shall have to go through the evidence in respect to the various sales in order to enter the proper decree.

THE TROOP.

(District Court, D. Washington, W. D. July 3, 1902.)

No. 375.

1. SEAMEN—STATUTE REGULATING SHIPMENT—CONSTRUCTION AND SCOPE.

The provision of section 24, Act Dec. 21, 1898 (30 Stat. 763), entitled "An act to amend the laws relating to American seamen for the protection of such seamen and to promote commerce," which expressly makes its requirements as to the shipping of seamen applicable "as well to foreign vessels as to vessels of the United States," provided there is no treaty which conflicts, is within the power of congress, and is valid and effective; and the requirements of the act apply to contracts made by seamen in ports of the United States for service on a foreign vessel.

2. SAME—INVALIDITY OF CONTRACT—VIOLATION OF STATUTE.

Under Rev. St. § 4523, which provides that "all shipments of seamen made contrary to the provisions of any act of congress shall be void; and any seaman so shipped may leave the service at any time, * * *" a contract for service on a British ship made in an American port, by which the seaman was paid a month's wages in advance, in violation of Act Dec. 21, 1898 (30 Stat. 763), is void; and he may leave the service at any time, and recover full wages for the time served, without deduction on account of the advance.

In Admiralty.

Suit by an American seaman to recover wages for services on a British ship. The libelant was hired at Philadelphia, and signed shipping articles for a term of three years, and was paid one month's

advance wages, in violation of the twenty-fourth section of the act of congress of December 21, 1898 (2 Supp. Rev. St. U. S. p. 907; 30 Stat. 763). After proceeding in the ship from Philadelphia to Corea, and thence to Tacoma, he left the vessel without being discharged, and sued for wages for the time which he had served. Findings and decree for the libellant.

A. W. Buddress, for libellant.

W. L. Sachse, for claimant.

HANFORD, District Judge. The defense in this case rests upon a claim that the libellant became bound, by signing the shipping articles, to serve as second mate for a term of three years, or until the arrival of the ship at a port of discharge on the east coast of the United States or in Europe, and that he forfeited his wages by desertion. The contract relied upon was executed at Philadelphia, and its validity must be judged by reference to the laws of this country, and not by the laws of the nation to which the ship belongs; and it must be pronounced void, for the reason that in making it the captain of the ship violated an express provision of the act of congress of December 21, 1898, entitled "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce," by paying one month's wages before the vessel had left port and before anything had been earned. The schemes and devices of sharpers to cheat sailors out of their wages, practiced for many years, have called for the enactment of rigorous laws for the suppression thereof; and, for the protection of sailors, it is necessary that courts of admiralty should enforce such laws with a firm hand. The law expressly provides that it "shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation: provided, that treaties in force between the United States and foreign nations do not conflict." Section 24, subd. "f." There is no treaty between the United States and Great Britain conflicting with this statute, if applied to British vessels, and I am not able to perceive any reason for not giving effect to it.

The case has been argued in behalf of the claimant upon the theory that the rights and obligations of the parties under the contract are governed by the provisions of the English merchants' shipping act, without deigning to even discuss the questions as to the applicability of our statute, or the validity thereof. In this the proctor for the claimant takes it for granted that a court of the United States, in a suit by a citizen of the United States, will treat a contract made within the United States as if a statute of the United States and the declared policy of the government with reference to such cases may not be enforced against an alien. In some of the authorities cited by the libellant's proctor, I find that the questions suggested have been passed on by other courts, and that there is an apparent conflict of authorities. It has been held that the statute is not applicable in such cases, because it should be construed as limited by its title so as to nullify entirely the

clause above quoted, making it applicable to foreign vessels. There are several good reasons why I consider this contention erroneous. Giving attention first to the title of the act, it is to be observed that it is plainly divisible, so as to comprehend three distinct and important subjects: First, it is an act "to amend the laws relating to American seamen"; second, "for the protection of such seamen"; and, third, "to promote commerce." Passing the first of these subdivisions, we find that the title indicates that one object of the statute is to protect American seamen, and the idea that congress, in dealing with a subject of such magnitude, would belittle its effort by withholding reasonable and necessary protection to American seamen, who in the ports of this country may be engaged to go to sea in foreign ships, is not to be tolerated, even if congress had failed to declare in the body of the act a contrary intention. The last subdivision of the title indicates a comprehensive purpose,—to promote commerce; and, as foreign ships participate in the commerce of our ports, the hiring of seamen to serve in foreign vessels is clearly within the purview of the act as expressed in its title. Secondly, the legislative will on the subject is expressed in what follows the enacting clause, and it is contrary to the canons of construction to give any such effect to the title as to nullify an important provision in the body, when there is no ambiguity in the terms in which it is expressed. In the case of *The Eudora* (D. C.) 110 Fed. 430, the court, by a curious process of reasoning, first emasculated the title of the statute, so as to limit its application to contracts of American seamen, then gave paramount and controlling effect to the title as thus curtailed, so as to annul the provisions of the twenty-fourth section, making it applicable to foreign ships, and then proceeded to change the nationality of American citizens, by giving effect to the principle that seamen on board of merchant vessels take the nationality of whatever ship they may for the time being be engaged to serve, and this in a case in which the contract by which they became attached to the ship was a violation of a law of the country in which it was made. I am utterly unable to concur in a conclusion based upon such premises and the reasons assigned; and I deny that an American citizen can be deprived of the protection of the laws of his country, as if he had expatriated himself by signing an agreement which the policy of our government requires the courts to treat as a nullity. Until an American seaman has become subject to the laws of a foreign country, by making a valid contract to serve on board a vessel of that country for a particular voyage or a definite term, he cannot be treated as a foreign seaman; and even then he is not to be considered as having forfeited his birthright, but he still may invoke the jurisdiction of the courts of his own country to enforce his rights against the ship. *The Falls of Keltie* (D. C.) 114 Fed. 357. In the case of *The Eudora*, above referred to, the court also decided that the statute, if made applicable to foreign ships, is unconstitutional, upon the theory that foreign vessels are deemed to be a part of the territory of the nation to which they belong, and for that reason congress has no power to enact a law affecting the terms and conditions upon which contracts for service on board of such vessels may be made. The supposed lack of power is not to be found in any clause of the constitution limiting or

prohibiting the exercise of power by congress, nor in the broadest extension of the rule that statutes have no extraterritorial force. Contracts for hiring sailors are subject to the general rule that the law of the place governs in the determination of all questions affecting the valid execution of contracts, and the place where such contracts are made is not on board the ship, but on the land. Sailors, whether citizens or aliens, until they become bound by the execution of a valid contract for service, are entitled to be protected by the laws of the land to the same extent as other persons. To prevent the evil practice of "shanghaiing" sailors, the government must afford protection to sailors ashore, and the courts will not hold any man bound to service in a ship to which he has not agreed previous to being taken on board the ship and brought under the coercive influence of the ship's officers. The constitution expressly confers upon congress the power to regulate interstate and foreign commerce, and there is no more reason for supposing that congress is deficient in power to make a law regulating the hiring of seamen for service on board foreign ships than that contracts for the transportation of passengers or merchandise by foreign ships to or from the ports of this country are beyond the control of statutes enacted by congress, or that foreign ships may not be held responsible, according to the laws of this country, for debts contracted in this country for supplies or repairs. Instead of attempting to review or comment upon other authorities bearing upon the questions in this case, it is sufficient to refer to the able and exhaustive opinion of Judge Bradford in the case of *The Kestor* (D. C.) 110 Fed. 432. The great principle of equality of rights under the law, which pervades the jurisprudence of this country, is antagonistic to all special and discriminating legislation, such as this statute would be if the masters and agents of foreign ships were not prohibited in our ports from paying premiums to crimps for enticing sailors to ship, and subtracting such expenses from the wages to be afterwards earned, whilst the masters and agents of American ships are restrained by the severe penalties of the act from entering into competition with them. The courts are not obliged to construe the act contrary to the expressed intention of congress, so as to make it a handicap upon American ships.

By section 4523, Rev. St. U. S., it is provided that:

"All shipments of seamen made contrary to the provisions of any act of congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment."

This section is declaratory of the general rule that legal rights cannot be founded upon unlawful contracts. In accordance with that rule and the statutes, I must hold that the libellant is entitled to a decree for the full amount of wages earned, without deduction of the amount paid in advance. Other payments made to him, and the fines and subtraction of wages for the days when he was off duty without leave previous to the arrival of the ship at Tacoma, as shown by the ship's log, amounting to the total sum of \$41, will be deducted. The balance due is \$193, for which sum, with interest and costs, a decree will be entered.

In re H. G. ANDRAE CO.

(District Court, E. D. Wisconsin. October 11, 1902.)

1. **BANKRUPTCY—LIENS—WHAT LAW GOVERNS.**

Where a claim of priority is filed in bankruptcy, based on a chattel mortgage withheld from record for an unreasonable time, the validity of the claimant's lien is to be interpreted by the statutes of the state governing the record of such mortgages, where the claim does not fall within the inhibitions of the bankrupt act.

2. **SAME—FRAUDULENT CONVEYANCE—CHATTEL MORTGAGES—FAILURE TO RECORD—UNREASONABLE DELAY—EFFECT.**

Rev. St. Wis. 1898, § 2313, provides that no mortgage of personal property shall be valid against any other person than the parties thereto without delivery of possession, unless filed as prescribed by section 2314, which provides the place of filing, but contains no express limitation as to time. *Held*, that where a chattel mortgage was withheld from record an unreasonable time, and was not recorded until after the mortgagor had made an assignment for the benefit of his creditors, the mortgage was void, notwithstanding its subsequent record, as against creditors whose claims for goods sold arose prior to the recording of the mortgage.

3. **SAME—ASSIGNMENT FOR CREDITORS—ASSIGNEE—POWERS.**

Since by Laws Wis. 1901, c. 207, an assignee for the benefit of creditors represents the rights of creditors in respect to transfers or liens which are fraudulent or void as to creditors, and the creditor is given the right to enforce such claims if not enforced by the assignee, a chattel mortgage executed by the assignor, but not recorded until after the assignment, was inoperative to create a lien on the assignor's property as against the general creditors of the assignor.

4. **SAME—NECESSITY OF PRIOR JUDGMENT.**

Since Laws Wis. 1901, c. 207, confers on contract creditors the right to enforce their claims as against transfers or liens fraudulent or void as to creditors, no prior judgment on the claims, nor resort to legal remedies, is required in order to establish such creditor's interest.

5. **SAME.**

Where a chattel mortgage was not filed for record until after mortgagor had made a general assignment for the benefit of his creditors, and thereafter involuntary bankruptcy proceedings were instituted against him, the rights of the mortgagor's general creditors were fixed by the assignment, which was valid until superseded by the bankruptcy proceedings; and hence the subsequent filing of the mortgage was insufficient to create a lien against the bankrupt's estate, within Bankruptcy Act, § 67a, declaring that claims which, for want of record, or for other reasons, would not have been valid liens against the claims of the creditors of the bankrupt, shall not be liens against the estate.

6. **SAME—TRUSTEE—POWERS.**

Under Laws Wis. 1901, c. 207, declaring that an assignee for the benefit of creditors represents the rights and interests of creditors in respect to transfers or liens fraudulent or void as to creditors, a trustee in bankruptcy appointed after the execution of an assignment by the bankrupt for the benefit of creditors is entitled to hold property of the bankrupt as against a chattel mortgage which was void as against general creditors under the assignment for want of record.

In Bankruptcy. On review of order made by the referee denying a claim presented by Theo. Knapstein & Co. for payment out of the proceeds of certain property sold by the trustee, against which the

¶ 2. See Chattel Mortgages, vol. 9, Cent. Dig. § 435.

claimants assert that they had a mortgage given by the bankrupt to secure a loan of \$1,000.

Charles A. Holmes, for trustee

Pierce, Lehr & Moeskes, for creditors Theo. Knapstein & Co.

SEAMAN, District Judge. The facts are undisputed that the bankrupt made a bill of sale of certain lumber, intended as a mortgage, in favor of the claimants, November 26, 1900, to secure the latter as present indorsers of the bankrupt's notes; but the lumber was not delivered, nor the bill of sale recorded. This instrument was surrendered, and a new bill of sale of certain furniture in process of manufacture was executed in its place November 4, 1901, securing the same indorsements or renewals thereof; but the new instrument was withheld from record. The property described remained in possession of the bankrupt until March 12, 1902, when the bankrupt executed a voluntary assignment, and all its property (including that mentioned in the bill of sale) passed into the hands of A. G. Meikeljohn as assignee. On March 13th the bill of sale was filed as a mortgage. On March 15th the petition for involuntary bankruptcy was filed by creditors, and adjudication was entered April 7, 1902. The assignee was elected trustee, and sold the property in question, under an order reserving the proceeds subject to the further order of the court. The contentions on the part of the lien claimants are twofold: (1) That the filing of the instrument on March 13th—before the petition in bankruptcy was filed, but after the voluntary assignment—gave validity to the lien under section 2313, Rev. St. Wis. 1898; but, if the filing were insufficient, (2) that the lien is valid as against the title acquired by the trustee in bankruptcy. If either of these propositions is tenable, the claimants are entitled to payment out of the proceeds; but I am of opinion that both were rightly overruled by the referee.

1. The Wisconsin statute (section 2313), as interpreted by the supreme court of the state, unquestionably governs the validity of the lien, if it does not fall within the preferences inhibited by the bankruptcy act. Section 2313 provides that "no mortgage of personal property shall be valid against any other person than the parties thereto" without delivery of possession, unless "filed as provided in the next section." Section 2314 prescribes the places of filing, but contains no express limitation of the time, and declares that "mortgages so filed shall be as valid and binding upon all persons as if the property thereby mortgaged had been immediately upon the execution of such mortgage, delivered to, and the possession thereof retained by, the mortgagee." These provisions are in the chapter entitled "Of Fraudulent Conveyances and Contracts Relating to Personalty," and their general object is to prevent fraud and deception through the appearance of unqualified ownership in the possessor. They have existed many years in the present form, so far as concerns this inquiry; and the numerous decisions construing the statute are noted in the revision of 1898, above cited. Whether the mortgage can become operative, except between the parties, by either filing or delivery of possession, or both, after unreasonable or unexplained delay, is not expressly

decided in any of these cases called to my attention. In New York the rule is upheld, under like statute, that it "continues to be void" in such case (*Karst v. Gane*, 136 N. Y. 316, 325, 32 N. E. 1073; *Stephens v. Perrine*, 143 N. Y. 476, 480, 39 N. E. 11); and such construction appears reasonable in view of the language of the statute and its object. But the case of *Drug Co. v. Hvambahl*, 89 Wis. 61, 64, 61 N. W. 299, is conclusive, so far as concerns this lien claimant, as it is there held, in reference to a mortgage so withheld from filing, that the mortgage was void, as against an attachment subsequent to the filing, upon a claim for goods previously sold to the mortgagee, and that no evidence of good faith "can rescue it from the condemnation of the statute." This doctrine is reaffirmed in *Woolen Co. v. Dunn*, 92 Wis. 409, 416, 66 N. W. 354. If the decisions are limited in their application to claims arising between the dates of the execution and filing, it is stipulated in this case that claims are in proof for goods sold during that interval in excess of the proceeds of the property in question, so that the lien could not prevail over such creditors at least. I am of opinion, however, that the filing was inoperative to establish the lien as against the general creditors of the mortgagor, for the reason that it was preceded by the voluntary assignment. By statute, in Wisconsin, the assignee in such case represents the rights and interests of creditors in respect of transfers or liens which are fraudulent or void as to creditors, and such right is enforceable by a creditor if not enforced by the assignee. Chapter 207, Laws 1901. This provision is a re-enactment of previous statutes (see *Sanb. & B. Ann. St.* 1889, §§ 1702, 1693b) omitted from the revision of 1898, and is applicable to chattel mortgages which are invalid for want of filing or possession. *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627, 631, 51 N. W. 1082; *Lumber Co. v. Hogan*, 85 Wis. 366, 371, 55 N. W. 415. Under the assignment, therefore, the rights of creditors became vested, and the unrecorded mortgage was not a valid lien against the claims. As the statute confers the right of enforcement upon and in favor of contract creditors, no prior judgment upon the claims, nor resort to legal remedies, is demanded to establish their interest. Section 67a of the bankruptcy act provides: "Claims which for want of record or for other reason would not have been valid liens against the claims of the creditors of the bankrupt shall not be liens against the estate." The invalidity for want of record, at least, refers alone to the law of the state. As the mortgage was not a valid lien against creditors when their rights accrued under the assignment, it is plain that the subsequent filing gave it no better standing within the state law. It was equally invalid, under this provision of the bankruptcy act, when the petition for involuntary bankruptcy was filed, March 15th, unless that act operates through some of its other provisions to divest the creditors of such right, and thus enables the parties to the void instrument to give it validity by their mere act of filing on the intermediate day. I am of opinion that neither the terms of the bankruptcy act nor intervention thereunder have such anomalous result. True, the making of the assignment was an act of bankruptcy within the act (*West Co. v. Lea*, 174 U. S. 590, 595, 19 Sup. Ct. 836, 43 L. Ed. 1098), but the assignment was

not void, and, except for the adjudication of bankruptcy, the assignment would have remained in force to be carried out under the state law. It was voidable only; in force when this petition was filed and until displaced by the adjudication thereupon. *Vide Coll. Bankr. (3d Ed.) 42*, and cases cited; *In re Plotke*, 44 C. C. A. 282, 104 Fed. 964, 968. So considered, the subsequent filing was nugatory, and the mortgage is within section 67a, and not a valid lien against the estate.

2. Upon the general question of the right of a trustee in bankruptcy to hold the property against a chattel mortgage void for want of filing the authorities are not harmonious. In a recent case (*In re New York Economical Printing Co.*, 49 C. C. A. 133, 110 Fed. 514) the circuit court of appeals of the Second circuit denies such right to the trustee, in reference to a New York mortgage, on the ground "that only such creditors can take advantage of it as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it,"—citing the New York decisions to that effect. As a single creditor had obtained prior lien through a judgment, it was ruled that the trustee represented no right in the property covered by an unfiled mortgage except for such judgment creditor. *Per contra*, the circuit court of appeals of the Eighth circuit, in the more recent case of *In re Pekin Plow Co.*, 50 C. C. A. 257, 112 Fed. 308, hold that the proceeding in bankruptcy "amounts to an effectual sequestration for the benefit of all the creditors," and meets a similar requirement upheld in *Nebraska* in reference to the rights of creditors under an unfiled mortgage, so that the trustee can defend the estate against such mortgage. It is not necessary, however, to determine whether like rule exists in Wisconsin as to the general status of creditors under an unfiled mortgage, or which line of decision referred to should be adopted in such event, for the reason that the case at bar is excepted from any such rule by the fact of assignment. As before stated, the assignment is by statute made the equivalent of a judgment or other legal proceeding to establish an interest in favor of the general creditors of the bankrupt against the invalid lien. That the trustee fully represents the rights of the creditors is expressly declared by section 70, and recognized throughout the act. Both cases cited recognize such representation, as do the several decisions by the supreme court in reference to the interest of the trustee. See *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, and cases reviewed. The creditors were entitled to the defense against the unfiled mortgage, irrespective of the rule upheld in either of the circuit court of appeals cases; and likewise irrespective of the fact that the supreme court of Wisconsin, in the recent case of *Mueller v. Bruss*, 112 Wis. 406, 412, 88 N. W. 229, adopts the view that a trustee in bankruptcy may sue in equity to set aside fraudulent transfers as the representative of the creditors, and that the proceedings in bankruptcy exempt such suit from the general rule requiring prior judgment or other proceedings at law to establish the claims of creditors.

The order of the referee is approved accordingly.

LOVERING v. UNITED STATES.

(District Court, D. Massachusetts. September 2, 1902.)

No. 578.

1. MARSHAL'S FEES—ATTENDANCE OF DEPUTY.

A marshal is entitled to charge for the attendance of a deputy before a United States commissioner, though the same person is paid the same day for attendance as bailiff before federal courts.

2. SAME—UNNECESSARY PROCESS.

It not being for a marshal to determine whether there is occasion for issuing process, he may charge for a service of a warrant for arrest when the defendant is already under arrest for another offense, and service of subpoenas to witnesses already summoned to attend in another case on the same day; the process being placed in his hands for service, and appearing to be issued out of the proper court, and regular in form and purport.

3. SAME—DISCHARGE.

A marshal may charge for a discharge where defendants were committed for nonpayment of a fine and it was paid the same day.

4. SAME—COMMITMENT.

A marshal may charge for a commitment where defendant is already under arrest on another warrant.

5. SAME—TRAVEL.

A marshal is allowed for travel on the service of each warrant when not more than two are served on the same defendant for the same party on the same day.

6. SAME—TRANSPORTATION.

A marshal, for transportation on orders to bring in defendants or witnesses, or to take them back to jail, will be allowed only actual expenses.

7. SAME—VENIRE FOR JURY.

The marshal is entitled to \$2 for each venire, the aggregate not to exceed \$50 at any term, for bringing in grand and petit jurors.

8. SAME—BRINGING IN POOR CONVICTS.

A marshal may charge for travel and transportation and for attendance in bringing in poor convicts before a commissioner under Rev. St. U. S. § 1042.

9. SAME—COPIES OF LIBELS.

A marshal is entitled to the customary charges at the rates charged for such services by officers of the state courts for copies of libels in admiralty, for services on newspapers, and for posting; the service of copies being required by order of court.

10. SAME—MILEAGE.

The existence of a continuous line of railroad between two points, on which a train occasionally runs, which line is shorter than that ordinarily used, does not limit the marshal, in charging for mileage between such points, to the length of such line.

11. SAME—DISCHARGE OF WITNESS.

As a marshal who has a person in his custody on lawful process must either commit or discharge him, and the fee is the same in either case, a charge for discharging witnesses taken under a warrant to remove and turn them over to another marshal should not be disallowed on the ground that there was no discharge.

12. SAME—COSTS.

Costs were not allowed the marshal on a petition for the allowance of charges disallowed by the comptroller, a considerable number of charges originally made by the marshal and disallowed by the comptroller having been abandoned by the marshal in his amended petition.

James F. Sweeney, for petitioner.
Henry P. Moulton, U. S. Atty.

LOWELL, District Judge. This is a petition for the allowance of the charges of a former marshal of the United States for this district, which charges were disallowed by the comptroller. The matter could be disposed of summarily were it not that chapter 359, Acts 1887, § 7 (24 Stat. 505), makes it "the duty of the court to give a written opinion to be filed in the cause." The items in controversy are conveniently grouped under the following heads:

1. Charges for the attendance of a deputy before the United States commissioner, where the same person was paid the same day for attendance as bailiff before the United States district and circuit courts. These charges are allowed upon the authority of *Dill v. U. S.* (D. C.) 78 Fed. 614; *Saunders v. U. S.* (D. C.) 73 Fed. 792, affirmed *U. S. v. Dill*, 29 C. C. A. 586, 86 Fed. 79; *U. S. v. McMahon*, 164 U. S. 81, 17 Sup. Ct. 28, 41 L. Ed. 357; *U. S. v. Saunders*, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594. The amount of these charges is \$22.

2. Charges for the services of a warrant for a different offense, when the defendant was already under arrest, and service of subpoenas to witnesses already summoned to attend in another case on the same day. It is the duty of the marshal to serve all processes "placed in his hands for service, and appearing to be issued out of the proper court, and regular in form and purport." It did not rest with him to determine whether there was or was not occasion for issuing any subpoena or other process. *Donahower v. U. S.* (C. C.) 77 Fed. 153; *U. S. v. Harmon*, 147 U. S. 268, 279, 13 Sup. Ct. 327, 37 L. Ed. 164. The amount of these charges is \$14.12.

3. Charges for discharge where defendants were committed for payment of a fine and fine was paid the same day. These charges should be allowed, and also two charges for commitment where defendant was already under arrest upon another warrant. The sum of these charges is \$10.50.

4. Charges for travel and transportation in cases where more than one warrant was served upon the same defendant at the same place on the same day. Travel is allowed upon the service of each warrant when not more than two are served upon the same defendant in behalf of the same party on the same day. The sum of these charges is \$1.92.

5. Transportation on orders to bring in defendants or witnesses or to take them back to jail. The actual expenses of carriage hire, etc., were allowed. The further charge for "transportation" must be disallowed. The sum of these charges is \$30.20.

6. Fees paid to constables for distributing venire for bringing in grand and petit jurors at various terms of court. It is well settled, not only by decisions in the district courts, but by the supreme court of the United States, that the marshal is entitled to charge \$2 for each venire, the aggregate of such charges not to exceed \$50 at any one term of court. *Harmon v. U. S.* (C. C.) 43 Fed. 563, affirmed 147 U. S. 268, 13 Sup. Ct. 327, 37 L. Ed. 164. These charges amount to \$295.

7. Charges for travel and transportation and for attendance in bringing poor convicts before a commissioner under section 1042. These charges should be allowed. *Hitch v. U. S.* (D. C.) 66 Fed. 937; *Saunders v. U. S.* (D. C.) 73 Fed. 791. The sum of these charges is \$7.80.

8. Charges for copies of libels in admiralty for service on newspapers, for posting notices, etc. These charges were customary, and were at the rates charged for such services by officers of the state courts. The service of copies was required by order of the court. The sum of these charges is \$10.

9. Charges for mileage disallowed because in excess of the sums properly chargeable for the distances traveled. The marshal charged according to the table of distances adopted by the Massachusetts house of representatives. At the time these charges were made the department of justice had not adopted any official mileage schedule, and the one used had been in use in the marshal's office since 1878. One item of the disallowance was from Boston to Brooklyn, N. Y., the distance charged being 240 miles. The comptroller allowed but 222 miles, being the distance reckoned by the "Air Line," so called. But the Air Line was not the road commonly or conveniently used for passage between Boston and New York at the time the charge was made. Only one or two trains then ran over it each day, and passenger traffic between the two cities was ordinarily carried on by the Shore Line or by the Springfield Line. Because there exists a continuous line of railroad upon which a train occasionally runs, and this line is shorter than that ordinarily in use, it does not follow that mileage is to be computed according to the former, rather than the latter. The sum of these charges is \$10.96.

10. The charge of \$1 for the discharge of two witnesses taken to New York under a warrant to remove, and turned over to the marshal of the Eastern district of New York. The comptroller disallowed this charge on the ground that there was no discharge. The charge is allowed, as a marshal who has a person in his custody upon lawful process must either commit or discharge him. The fee in either case is the same.

Many of the objections thus disposed of are of a "frivolous and vexatious nature," as was said in *Harmon v. U. S.* (C. C.) 43 Fed. 560. See same case on appeal, *U. S. v. Harmon*, 147 U. S. 268, 282, 13 Sup. Ct. 327, 37 L. Ed. 164. Costs are not allowed the marshal, because a considerable number of charges originally made by the marshal and disallowed by the comptroller have been abandoned by the former in his amended petition, and so are not dealt with in this opinion. In going through the numerous items the court has been greatly assisted by the discrimination of the assistant district attorney. It is to be regretted that the comptroller is without the advice of some lawyer like him, of competent knowledge and common sense. Such advice would save honest creditors of the United States from disheartening delay, and the court from a burden of needless litigation. The government is not protected from unjust claims by the postponement and refusal of payment upon technicalities of which a private employer would not avail himself. A method which savors of sharp practice does not pro-

tect the government from ill-founded claims, but rather begets them, and soon becomes more costly than that prompt discharge of liabilities which is customary among men of business.

In re HEMSTREET.

(District Court, N. D. Iowa, C. D. August 25, 1902.)

1. BANKRUPTCY—WITNESSES—ATTENDANCE—DISTANCE.

Bankr. Act, § 41, enacts that no person shall be required to attend as a witness before a referee in bankruptcy at a place outside of the state of his residence, and more than 100 miles from such place of residence. The rule in force when the bankrupt law was adopted, with respect to the power to compel the personal attendance of witness, was embodied in Rev. St. § 876, which declares that subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district; provided that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than 100 miles from the place of holding the same. *Held*, that one cannot be compelled to attend a reference in bankruptcy within the state of his residence, but at a distance of more than 100 miles from where he resides.

In the Matter of Charles R. Hemstreet, a Bankrupt. Answer to question as to construction of bankruptcy act, submitted on certificate of referee.

Morling & Davidson, for creditors.

SHIRAS, District Judge. From the certificate of the referee, it appears that one H. O. Michaels, a resident of Marshalltown, Iowa, was served with a subpoena directing him to appear as a witness in the bankruptcy proceedings of Charles R. Hemstreet, before the referee for Palo Alto county, at a hearing set for August 18th, at Emmetsburg, Iowa; the mileage and fee for one day's attendance being duly tendered him. The witness declined to attend at the time and place named, claiming that as his residence was more than 100 miles from Emmetsburg, where the hearing was to be had before the referee, he was not required to attend in person; and the question presented by the certificate of the referee is whether, under the provisions of the bankrupt act, a witness can be compelled by a subpoena to attend a hearing before a referee at a place more than 100 miles from his residence. Counsel for the creditors contend that by the express terms of the proviso to section 41 of the bankrupt act which enacts "that no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence," it was the clear intent of congress to enact that referees should have the right to require the attendance before them as witnesses of all persons residing within the state wherein the referee is acting, and that a witness cannot lawfully refuse obedience to a subpoena calling him to appear before a referee, unless he is a nonresident of the state, and resides more than 100 miles from the place of hearing. If this is the correct construction of the proviso just cited it follows that a person can be compelled

to attend as a witness before a referee at any point within the state of his residence, without regard to the distance to be traveled, which might in the larger states be several hundred miles; and furthermore it would also follow that a witness could be compelled to appear before a referee when he could not be compelled to appear before the circuit or district courts of the United States, if a session thereof was held at the place of the hearing before the referee. In the construction of statutes, it is well settled that all other provisions of the statutes which deal with the same subject-matter may be considered, as well as the purpose intended to be subserved by the particular enactment under consideration. The general rule in force when the bankrupt act was adopted, with respect to the power to compel the personal attendance of witnesses, is found in section 876 of the Revised Statutes, which declares that "subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; provided, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." This proviso was enacted for the protection of witnesses, and under its provisions a person living outside of the district wherein the court is held, at a distance of more than 100 miles from the place of holding court, cannot be required to attend as a witness before any circuit or district court; and this general rule, governing these courts, has not been changed by any provision of the present bankrupt act. The proviso found in section 41 of the act has reference only to hearings before referees, and does not change or enlarge the power of the district or circuit courts to compel the attendance of witnesses, as defined in section 876 of the Revised Statutes. The phraseology used in the proviso clearly indicates that it was intended as a limitation upon, and not as an enlargement of, pre-existing rights. Under the provisions of section 21, the court, upon due application, can require the attendance of witnesses before the referee, and, under general order No. 3, the clerk will furnish the referee with the necessary subpoenas; but the subpoenas thus issued would be subject to the limitations found in section 876, Rev. St. If the proviso found in section 41 of the bankrupt act had not been enacted, then subpoenas issued under section 21 would have been effectual to compel the attendance of witnesses living within the district, and also of witnesses living outside the district, but within a distance of 100 miles. The proviso enacted as part of section 41 is intended, not as an enlargement of the jurisdiction of the referee over witnesses, but as a limitation, for the benefit and protection of the witnesses. The proviso does not declare that the referee or the court shall have the right to compel the attendance before the referee of all witnesses living within the state, or within 100 miles of the place of hearing, but the declaration is that no person shall be required to attend as a witness before the referee at a place outside of the state of his residence, and more than 100 miles from the place of hearing. The meaning of the proviso is that no one shall be compelled to attend as a witness at a distance of more than 100 miles, and he shall not be compelled to leave the state wherein he resides. If the witness

lives at a greater distance from the place of hearing before the referee than 100 miles, or in another state, ample provision is made in the provisions of section 21 for taking his testimony orally or by deposition, and thus protection is afforded to all without imposing a burden upon witnesses, from which they are protected under the general rule governing the issuance of subpoenas in courts of the United States. As it is admitted that the witness H. O. Michaels does not live within 100 miles of Emmetsburg, where the hearing before the referee is to be had, it follows that he cannot be compelled to attend the hearing in person, and his testimony must be procured under the provisions of section 21 of the act.

In re WHITE STAR LAUNDRY CO.

(District Court, E. D. Wisconsin. August 23, 1902.)

1. BANKRUPTCY—OCCUPATIONS—JURISDICTION—CHARACTER OF BUSINESS—LAUNDRY.

The business of a laundry is not within Bankr. Act, § 4, giving the federal courts jurisdiction over corporations for an adjudication of bankruptcy when they are "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits."

In Bankruptcy.

In the matter of the White Star Laundry Company, an alleged bankrupt. Petitioning creditors sought an adjudication in bankruptcy, and the answer raised an issue whether the business of the corporation was within the provisions of the act. Petition dismissed.

Fish & Gillen, for petitioning creditors.

Cooper, Simmons, Nelson & Walker, for the alleged bankrupt.

SEAMAN, District Judge. The White Star Laundry Company, a corporation, has made a voluntary assignment, and an adjudication of bankruptcy is sought by petitioning creditors. The answer denies the allegations of the petition as to the business of the corporation, and alleges that its sole business has been to receive clothing and other articles of other parties to be cleaned and laundered, and perform "the manual and mechanical work of laundering or cleaning the same," and that it was merely "operating and conducting the usual business of a laundry." No replication is filed, and the issue is submitted on the facts so stated in the answer. Jurisdiction over corporations for an adjudication of bankruptcy exists only when they are "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" (section 4), and the sole question is, whether the business of a laundry, so described, is within either of these classifications. Definitions under the act of 1867 furnish little aid in the solution, as "all moneyed, business or commercial corporations

¶ 1. What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

and joint-stock companies" were there included, and the decisions under the present act are not entirely harmonious. As the provision in question relates alone to involuntary adjudication of bankruptcy, and intends to take from the corporation, or its assignee under the voluntary assignment, all control over the corporate property and affairs, the case must "be well defined in the law" to bring it within such provision (*Wilson v. City Bank*, 17 Wall. 473, 482, 21 L. Ed. 723); and unless the laundry business is fairly within one or the other of these classifications,—is either (1) "manufacturing," (2) "trading," or (3) a "mercantile pursuit,"—this corporation is not subject to adjudication as a bankrupt.

1. The terms "manufacture" and "manufacturing" have well-recognized interpretations (see citations in *Coll. Bankr.* [3d Ed.] 51), which are clearly inapplicable to the business under consideration; and those given in *Lawrence v. Allen*, 7 How. 785, 794, 12 L. Ed. 914, *People v. Roberts*, 155 N. Y. 408, 412, 50 N. E. 53, 41 L. R. A. 228, and *Dudley v. Aqueduct Corp.*, 100 Mass. 183, 184, mark the distinction. Indeed, under the present act, it has been held that corporations principally engaged in mining were not manufacturing corporations, nor engaged in trading or mercantile pursuits. In *re Elk Park Mining & Milling Co.* (D. C.) 101 Fed. 422, 4 *Am. Bankr. R.* 131; *McNamara v. Helena Coal Co.*, 5 *Am. Bankr. R.* 48, 51; In *re Rolins Gold & Silver Min. Co.* (D. C.) 102 Fed. 982, 986; In *re Chicago-Joplin Lead & Zinc Co.* (D. C.) 104 Fed. 67; In *re Woodside Coal Co.* (D. C.) 105 Fed. 56, 5 *Am. Bankr. R.* 186; In *re Keystone Coal Co.* (D. C.) 109 Fed. 872. In *re Tecopa Mining & Smelting Co.* (D. C.) 110 Fed. 120, recognizes the same rule in reference to mining, but holds that smelting operations are manufacturing.

2. Is the business of the corporation either trading or mercantile? This inquiry is satisfactorily discussed and decided in the opinion by Judge Brown in *Re New York & Westchester Water Co.* (D. C.) 98 Fed. 711, 3 *Am. Bankr. R.* 508, in reference to a corporation supplying water to municipalities and individuals, and receiving "large rentals" from such customers. On the definitions and authorities there cited, the business was held to be neither trading nor mercantile, and the petition was dismissed. On appeal, the ruling was affirmed upon the opinion below. *Coll. Bankr.* 53. The cases above cited of mining corporations adopt like view, and In *re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* (D. C.) 96 Fed. 756, 2 *Am. Bankr. R.* 372, holds that the business of insurance is not within the provision. See, also, In *re Chesapeake Oyster & Fish Co.* (D. C.) 112 Fed. 960, and In *re Fulton Club* (D. C.) 113 Fed. 997, for strict constructions in the same line. Two cases are cited—In *re San Gabriel Sanatorium Co.* (D. C.) 95 Fed. 271, and In *re Morton Boarding Stables* (D. C.) 108 Fed. 791—which tend to more liberality in the interpretation of the provision; but the weight of authority is the other way, and I am of opinion that the true doctrine is stated in the *Water Supply Case*, above mentioned, and, irrespective of any view which may be taken of its application in one or the other of the cases cited above, that the business of this corporation described in the answer is neither principally "trading" or "mercantile," nor within

any recognized definition of those terms in any feature therein mentioned.

The case, therefore, is not within the bankruptcy jurisdiction, and the petition is dismissed.

In re CARR et al.

(District Court, E. D. North Carolina. September 5, 1902.)

1. **BANKRUPTCY—DEPOSIT OF FUNDS.**

The funds of an estate in bankruptcy should be deposited to the credit of the trustee as such, designating the estate.

2. **SAME—ALLOWANCE OF ATTORNEY'S FEES.**

Bankr. Act 1898, § 64b, cl. 3, does not make the allowance of an attorney's fee in involuntary cases a matter of right, but gives the court discretionary power, and, where such an allowance is asked for, the attorney must disclose his dealings with his client, that the court may act intelligently in the matter.

3. **SAME—RULE GOVERNING.**

Rule adopted governing the allowance of attorney's fees to the attorney for petitioning creditors in involuntary proceedings in bankruptcy in the Eastern district of North Carolina.

In Bankruptcy. On report for final dividend and settlement. See 116 Fed. 556.

C. F. MacRae, for petitioner.

PURNELL, District Judge. This cause is again presented on a corrected dividend sheet, accompanied by vouchers, and a statement from the depository showing that the amount reported is on deposit to the credit of the trustee. There is no express provision in the bankrupt act as to how funds belonging to bankrupt estates shall be deposited, except in cases of composition, in which section 12b provides deposits shall be subject to the order of the judge. Section 47 (3) requires all funds to be deposited in the designated depository, and (subsection 4) disbursed only by check or draft. The general orders do not provide how deposits shall be made, but No. 29 provides that the checks or drafts on the depositories shall be drawn by the trustee, and countersigned by the judge, or some one, as specified, designated for this purpose by order. As the trustee must in any event sign the checks, it would seem the funds should be deposited to the credit of the trustee, as such, designating the estate in bankruptcy. Some complication has arisen in this respect, and it will simplify the practice for trustees and depositories to follow this rule. The estate is now in a condition for final distribution when the question of attorney's fees is settled. Facts now appear which have not heretofore been disclosed. At best, this is a delicate question, with which, for many reasons, the court is loath to deal, especially when attorneys simply ask for an allowance, and place, without explanation, what seems to be exorbitant value on services rendered. While

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 897.

disposed to be liberal to members of the bar, in the exercise of the judicial discretion, the court is restrained by a consideration of the evident intention of congress to make the administration of these estates as economical as possible, and the rights of creditors in whose interest the involuntary features of the act were adopted. Attorneys lose sight of these matters, and are inclined to confound the discretion to allow fees in bankruptcy with the practice in chancery, and magnify the importance of services rendered under the bankrupt act, when the forms to be used are prescribed and published, hence the services are, in a large measure, perfunctory and clerical. This court has had occasion in several cases to express views on this subject, and has been much harassed with frequent petitions for the allowance of fees in disregard of these views. It is unnecessary to refer to or repeat the reported cases, as the whole matter is so well summed up in the opinion of Judge Phillips in *Re J. W. Harrison Mercantile Co.*, 2 Am. Bankr. R., at page 420 (s. c. 95 Fed. 125), as follows:

"The history leading up to the adoption of the present bankrupt law shows that the great abuses under the preceding national bankrupt act, in the way of exorbitant fees, which largely consumed the assets of the bankrupt, whereby the ministerial officers grew rich upon the administration of the act, while the creditors starved, impelled congress, in the adoption of the present bankrupt act, to reverse the practice, so that the bankrupt law should be so administered that the creditors should be the favorites of the courts, rather than the agents assisting the court in the preservation and distribution of bankrupt estates. The obvious policy of the present act, manifest throughout all its provisions respecting fees and commissions, is to reduce to the lowest minimum the expenses of administration. This is especially made manifest in the meager fees allowed clerks, referees, and trustees. Indeed, so inadequate is the compensation allowed to these officers, that it is a matter of happy surprise to the courts that they have been able to secure the services of such competent persons to fill the places of referees and trustees. And because of the meager compensation allowed by the act to these officers, courts are exposed to the constant temptation to either read into the act some provision not found in its letter, or by the most liberal construction of doubtful or ambiguous terms to augment fees and commissions. This is a tendency, however, in my judgment, which it is the bounden duty of the court to resist. It is the duty of the court, from which it cannot honestly escape, in applying this statute, to give it such construction and application as will carry out and effectuate the legislative will. Any other action by the court is but an attempt to set up and substitute the notions and inclination of the individual judge as to what would be a reasonable compensation for services under this law for that of the legislature, whereas, as already suggested, the court can have no policy in conflict with that of the legislative scheme. Section 64 of the act authorizes the court in an involuntary proceeding to allow, among claims entitled to priority, 'one reasonable attorney's fee for professional services actually rendered, irrespective of the number of attorneys employed.' This court discovered, after administering this act for a season, that it was to be plagued and perplexed with what it conceived to be demands enormous in their extent for attorney's fees, both in involuntary and voluntary cases. The impression among lawyers in this particular seems to be that the proceeding in involuntary cases should be likened to the practice in chancery, and that, where a creditor files a bill in equity to reach the assets of an insolvent debtor for the benefit of creditors generally, an allowance for the attorney of the petitioning creditor should not only be made a charge upon the general fund, but its extent should be the largest liberality of the chancellor. While the bankrupt act contemplates that the allowance for an attorney's fees shall be taken out of the general fund, it must be a reasonable attorney's fee."

For future guidance in this matter, there being no rule on the subject in the district now, the following rule will be adopted: For preparing petition in involuntary bankruptcy, and superintending the filing thereof, and in the issuance of subpoena thereon, and preparing schedules, in case such duty falls on the petitioning creditors, a fee of not exceeding \$50, in the discretion of the court, where the same is payable out of the estate of the bankrupt; and no further fee shall be allowed such attorney where there is no contest or trial before the court touching the adjudication in bankruptcy; and in case the defendant therein contests the adjudication, necessitating a trial before the court or referee of such issue, such further fee as the court may find to be reasonable in the particular case. And for the allowance of this fee, as said in *Re Smith*, 108 Fed. 39, 5 Am. Bankr. R. 559, the attorney asking for such fee must disclose his dealings with his client, that the court may act intelligently. The words of the statute do not sustain the view that the allowance of an attorney's fee in a bankruptcy cause is a matter of right. The statute says "the court may allow," thus lodging in the court a discretion to allow an attorney's fee, to be paid out of the estate.

There having been no specific rule on this subject, it would be manifestly unfair to apply this rule to the case at bar. Notwithstanding the rule, in exceptional cases the allowance of an attorney's fee will be made when, in the discretion of the court, the circumstances warrant a more liberal allowance.

As to the attorney for the petitioning creditors, the facts now appear to be (which were not heretofore disclosed) that Beck & Gregg, the largest creditor of the bankrupt, employed C. F. MacRae, Esq., to file a petition in bankruptcy, agreeing to pay him \$100 for this service, which they now decline to pay, and he has received nothing. More than one-half of the final dividend will go to this firm. Under these circumstances, the court will protect attorneys, and tax costs. Sections 2-18. The referee will enter upon the dividend sheet an allowance of \$150 to the attorney for the petitioning creditors, and \$125 allowance to the attorney for the bankrupt. The draft for the dividend for the petitioning creditors will be made payable to their attorneys, and, if such dividend is not sufficient to cover the fee allowed their attorney, the balance of the fee hereinbefore allowed will be paid by draft out of the general fund.

In re EVANS.

(District Court, E. D. North Carolina. September 5, 1902.)

1. **BANKRUPTCY—INVOLUNTARY PROCEEDINGS—ALLOWANCE OF ATTORNEY'S FEES.**
Attorneys representing the petitioning creditors of an involuntary bankrupt, and elected by the creditors to represent the trustee, who followed property fraudulently disposed of by the bankrupt into another state, and there recovered all that has come into the hands of the trustee for distribution to creditors, will be allowed a reasonable fee for their services therefrom by the court, where the creditors refuse to pay such fee.

In Bankruptcy. On petition for allowance of attorney's fees.
Morrison & Whitlock, pro se.

PURNELL, District Judge. After the opinion in this cause, filed July 11, 1902 (116 Fed. 909), a petition was filed in behalf of Messrs. Morrison & Whitlock, asking a rehearing touching the question of fees asked and then refused for reasons stated. Counsel have been heard on such petition, and much desired information given the court on the subject. The general remarks in an opinion this day filed in *Re Carr*, 117 Fed. 572, apply equally to this case. The facts now appear to be that the bankrupt had disposed of about all his property, and these attorneys first took out attachment proceedings in the state court, which were abandoned, and a petition in bankruptcy filed. The goods in the meantime had been taken out of the district and carried to Georgia, to which jurisdiction the attorneys followed them, and brought suit for \$2,600. They advanced initiatory costs, secured testimony, and paid the expenses of litigation. The petitioning creditors have paid them nothing, and, after solicitation to do so, declined, insisting that the court must allow the attorney's fee. This puts an entirely different phase on the case from that presented in the original bill for attorney's fee, in which nothing of this was shown. The attorneys have followed the property, done all that has been done, and by their efforts realized a fund for the benefit of creditors, who have done literally nothing. Under these circumstances, attorneys should be paid from the fruits of their labors, even though such fruit was less than was anticipated. Had they recovered what was expected, a larger fee would have been considered by all as reasonable, and probably would have met with no objection. The attorneys are not responsible for what seems to have been one of those incidents of a trial which so frequently cause adverse comment on petit jury verdicts.

Upon the facts as now disclosed, the court allows Messrs. Morrison & Whitlock \$150, as a reasonable attorney's fee, to be paid them out of the fund realized.

In re HARRIS et al.

(District Court, W. D. Tennessee, W. D. August 1, 1902.)

No. 189.

1. BANKRUPTCY—COMPOSITION OF DEBTS

Where the bankrupt and his creditors have agreed on a composition of his debts, without any agreement as to payment of the costs, neither can be compelled to pay them; but, in the absence of further agreement in regard thereto, the composition will fail, this being a matter entirely of agreement.

In Bankruptcy.

Hays & Biggs, for bankrupt.
E. S. Mallory, for creditors.

HAMMOND, District Judge. The bankrupt and his creditors have agreed on a composition of his debts at 50 cents on the dollar, and he has the money to deposit in bank under the rules of practice in that behalf. But their agreement did not comprehend the costs; that is to say, whether the costs are to be paid out of the \$6,000 he has to deposit as the 50 per centum of his indebtedness, or are to be additionally paid by him. He was prepared to pay what is called the common or regular costs of the court, amounting to some \$25, but not the receiver's and attorney's fees, amounting to about \$400 more of costs. The court is asked to determine whether these costs are to be fully paid by the bankrupt, or out of the fund deposited for the creditors. But the court declines to decide any such question. Neither the creditors nor the bankrupt can be compulsorily made to pay these costs. Of course, the case cannot be closed and the composition confirmed until they are provided for, but this must be done by agreement between the parties. Composition is wholly a matter of arrangement by the bankrupt and his creditors, and the negotiations always should comprehend a disposition of all the costs, with a definite understanding of amounts and the method of their payment. If there be an attorney's fee not waived, the attorney should agree with the parties on the amount, or, if disagreed, application should be made to the court to fix the fee, and so of the receiver or the trustee; and with every item not distinctly fixed by the statutes or rules of practice, this should be done, as a preliminary of the composition agreement, and as a part of it. When the amounts are ascertained, the parties should agree whether the costs come out of the deposit for creditors, or whether the bankrupt provides an additional sum to meet costs. If he is to do this, he should bring the cost money with the other, to be deposited in court. It is all, however, purely a matter of agreement by negotiation, and the court will take no part in it by compelling either to do anything about it. It is a mistake to suppose that the statute requires the bankrupt, as a matter of law, to pay the costs in addition to what he agrees to pay the creditors. He is not obliged to pay the creditors anything whatever, nor the costs, and unless all the elements of the composition are mutually settled by the agreement they make, the technical and logical result is that the composition fails, or, rather, the attempt at composition fails, and the ordinary administration of the assets goes on as if there had been no attempt to compound the debts. The costs, then, come out of the assets, and practically out of the creditors, always being paid out of whatever fund is in court, unless otherwise agreed upon and provided for by the parties. Hence, the payment of the costs by the bankrupt under composition is in a proper sense voluntary.

Motion denied.

TELLER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1902.)

No. 1,603.

1. GOVERNMENT PROPERTY—CONVERSION BY TRESPASSER—GOVERNMENTAL RELEASE—EFFECT.

Where railroad ties were cut from government land by a trespasser, and after the seizure of the ties by the government its agent executed a release of the ties to the trespasser on his agreement to pay for the same according to an appraisal to be subsequently made, such release transferred and vested the title to the ties in the trespasser.

2. SAME—REPLEVIN—BREACH OF CONTRACT.

Where the government, after seizing railroad ties cut by a trespasser from government land, released the ties to the trespasser on his agreement to pay for the same, the contract of release became executed, and was not broken by the government's subsequent bringing of replevin to recover the ties, so as to entitle the trespasser to defend a second action for the value of the ties, under the contract, on the ground of breach of contract or failure of consideration.

3. SAME—CUSTOM—INTENT TO PURCHASE LAND.

Where a trespasser cut railroad ties from government land, it was no defense to a subsequent action to recover the value of the ties that the trespasser had an intent to purchase the land, and that it was the custom in that community to begin the cutting of timber on government land intended to be purchased before actually entering or doing any act indicative of such intention.

4. SAME—PURCHASE OF LAND—EFFECT—RELATION.

An application to purchase government land was made by M. on January 5, 1898; he having previously contracted with defendant that, in consideration of defendant's advancing the necessary money with which to make payments, defendant should be entitled to cut from the land all timber suitable for railroad ties. The entry was duly made and between that time and June 22d following, when M. paid the purchase price for the land, and thereby became entitled to a patent, defendant cut from the land certain ties, for the value of which suit was brought. *Held*, that the payment of the price vested in M. the equitable title to the land by relation as of the date of the application, including ties cut from the land after that date.

Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

In the fall of 1897 the plaintiff in error, John C. Teller, defendant below, was engaged in furnishing ties to the receivers of the Union Pacific Railroad Company on contract. John H. Mullison was then the claimant, and for many years in the possession, of certain placer mining grounds, consisting of 720 acres, in Carbon county, Wyo., known as the Montezuma Placer, and was desirous of obtaining the title thereof from the government. In October, 1897, it was agreed between the defendant and Mullison that defendant should furnish Mullison the money necessary to enable Mullison to enter said placer tract at the local land office, and make payment therefor at the rate of \$2.50 per acre, and pay all incidental expenses, and that in consideration thereof said Mullison should allow defendant to cut and remove from said placer tract all the timber thereon suitable for railroad ties. On the 5th day of January, 1898, Mullison duly made application to the land office to enter said 720 acres, and for a patent therefor, having before that time procured the land to be surveyed agreeably to the rules of the land office, and on June 22, 1898, paid for said land at the land office, at said rate of \$2.50 per acre, the sum of \$1,800, and obtained the receipt of the receiver of said

land office for the same. The defendant furnished Mullison said money to pay for said land; also money to pay the cost of surveying and other expenses,—in all, about \$2,000. Prior to said 5th day of January, 1898, the defendant entered upon said Mullison placer tract, and made preparation for the cutting and removal of ties therefrom. But few ties were cut thereon before that date, but thereafter, and before June 22, 1898, the defendant cut upon that land about 48,974 ties. The defendant had also during the same time cut and removed from other public and unappropriated land of the United States in the vicinity of said Mullison tract a large number of railroad ties. On July 22, 1898, the United States government, through George B. Abbott, an agent of the land department, seized all of said railroad ties cut from said Mullison tract, as well as from said public, unappropriated lands, as the property of the United States; the said ties being then mostly in the Platte river, at Ft. Steele, and on its banks and in its tributaries above that place. On August 3, 1898, by the authority and express direction of the commissioner of the general land office, said George B. Abbott, as special agent of said general land office, by his instrument of writing, released to the defendant all of the said ties, and all claims of the United States thereto, in consideration of the written agreement of the defendant then made that he (the defendant) would pay the United States the full value, according to rules specifically referred to, of all such ties as belonged to the United States; the number of ties to be determined by report of said Abbott, and the question of title, and of which of said rules as to value should apply, to be determined by the general land office. Said release and agreement are printed in full in 45 C. C. A. 416, 106 Fed. 448. Afterwards, about November 1, 1898, the United States commenced an action of replevin against this defendant, in the circuit court of the United States for the district of Wyoming, to recover a portion of said railroad ties, alleging that the same had been cut by the defendant, without authority, from unsurveyed public lands; and under the writ of replevin the marshal seized 47,000 railroad ties, of which at least 44,000 were parcel of the ties aforesaid cut before August 3, 1898. The defendant answered, pleading title in himself under said release and agreement of August 3, 1898. On the trial of said action of replevin the court held that the effect of that release and agreement was to vest in the defendant the title to all of said ties which had been cut up to the date last mentioned. Conformably with such ruling, the jury returned their verdict in favor of defendant for \$18,843 damages, and judgment was entered in his favor for that sum, which judgment was affirmed by this court. *U. S. v. Teller*, 45 C. C. A. 416, 106 Fed. 447. The petition in the present action charges that the defendant, Teller, between December 1, 1897, and September 1, 1898, entered on lands belonging to the United States in the county of Carbon, in the district of Wyoming, and, without authority or permission of plaintiff, cut timber growing thereon, from which he made 111,708 railroad ties. The petition then alleges the seizure of those ties by the agent, Abbott, July 22, 1898, and the release of the ties by Abbott upon the written agreement of the defendant, all as above stated, and that the number of the ties had been determined on the report of said Abbott, and that the value thereof to which the plaintiff was entitled, according to the rules referred to in defendant's written agreement, was \$41,343.08, for which judgment was demanded. The answer of defendant, Teller, admits that on July 22, 1898, the plaintiff, through its agent, Abbott, seized 111,708 ties at and above Ft. Steele, and the release of the ties as above stated, and alleges that a part of the ties were cut on mining lands for which the government has accepted as purchase price \$2.50 per acre; that others were cut under mistake of fact, and others on land which Teller intended to enter, and in accordance with a custom to cut timber on lands entered upon for such purpose, and that the general land office had never considered these matters, nor determined on what lands the ties were cut, and that not more than 39,000 ties, and of the value of 3 cents per tie, were cut on government land, and that the plaintiff, by replevying a part of the ties, had broken the contract of August 3, 1898, and defendant was no longer bound by that contract. Plaintiff's reply alleged the affirmation of said contract by the defendant by his successful defense based thereon in the action of replevin. The

Union Pacific Railroad Company was originally made a defendant in this action, but its demurrer to the complaint was sustained, and judgment of dismissal rendered in its favor, December 3, 1900, and thereafter said John C. Teller was the sole defendant. At the close of the trial the jury returned their verdict in favor of the plaintiff for the sum of \$27,963.96, and judgment was entered in its favor for that sum and costs.

Willard Teller (Clayton C. Dorsey, on the brief), for plaintiff in error.

Timothy F. Burke (Earl M. Cranston, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The release of the ties to the defendant by the government by its authorized agent, Abbott, in writing, August 3, 1898, and the defendant's written agreement of the same date that he would pay for such of the ties as the government was entitled to be paid for, when the number of such ties and the amounts to be paid for them should be ascertained as therein provided for, constituted, together, a valid contract, and then transferred to and vested in the defendant all the title and property right which the government then had in the ties. *U. S. v. Teller*, 45 C. C. A. 416, 106 Fed. 447. While this contract on the part of the defendant was wholly executory, and to be performed in the then future, on the part of the government, it was wholly executed and performed on the delivery of the written release, so far as vesting in the defendant the government's title to the ties was concerned. About that matter the government did not stipulate that it would do or refrain from doing anything further. There was not, therefore, and could not be, any breach of the contract in respect to this matter, as to which the contract had been fully and irrevocably performed. The subsequent action of replevin may have been wrongful and baseless, but it was no breach of the contract, and was in fact defeated by that contract, and the property rights which it had vested in the defendant. As the defendant in that action, because of his title derived through that contract, recovered judgment against the government for the value of the ties replevied, there was no failure of consideration, to excuse nonperformance of the contract on his part.

Some of the rulings respecting which error is assigned may be disposed of very briefly. The record discloses nothing improper in the rulings of the court in fixing the time for the trial of the cause, and denying the defendant's application for a continuance, and no prejudice to the defendant appears to have resulted from either.

The testimony of Mullison, who acted as defendant's superintendent, respecting reports of foremen as to the number of ties cut at different places, was harmless, in view of the admissions in the case, and testimony of other witnesses, including the defendant.

It seems needless to say that no proof of a custom to cut and remove timber from public lands will shield a trespasser, and that

no proof of mere intention to subsequently purchase a tract of such land, without any act done towards acquiring the title, could give any color of excuse for appropriating the timber growing on such tract. "The absolute title to these lands being at the time in the United States, it had, as owner, the same right and dominion over them as any owner would have. No one had the right to enter upon the lands, no one had the right to cut a stick thereon, without its consent. Any one so going upon the lands and cutting timber would be guilty of the commission of an act of trespass." *Railroad Co. v. Lewis*, 162 U. S. 366, 376, 16 Sup. Ct. 831, 834, 40 L. Ed. 1002.

Other assignments of error are based on the court's charge to the jury to the effect that the defendant was liable for the value of the ties cut from the Mullison placer tract. The court charged the jury that:

"Mr Mullison had no right to sell the timber not necessarily taken down in the ordinary working of the placer claim as a placer mine, and the defendant had no right to purchase it from him until a patent issued to him for the land."

And in other portions of the charge, to all of which exceptions were duly taken, the court gave the jury the same directions, in substance. Upon these exceptions to these parts of the court's charge arises the only serious question in this case.

In *Teller v. U. S.*, 51 C. C. A. 230, 113 Fed. 273, it was held, and very clearly demonstrated, that this defendant was properly convicted of a misdemeanor, under Rev. St. 1878, § 2461, for cutting and removing these very ties from this Mullison placer tract, between January 5, 1898, when Mullison filed in the local land office his application for a patent for that tract on payment of \$2.50 per acre therefor, and June 22, 1898, when he actually made full payment for the land, and obtained the receiver's certificate receipt entitling him to a patent therefor. During this interim when the ties were cut and removed, Mullison was in lawful possession of the placer tract, with an option contract with the government, permitting him to purchase the tract with the timber and whatever else was parcel of the tract on January 5, 1898, upon payment of the designated purchase price within the proper time. But until such purchase was completed by payment of the purchase price, the land continued to be part of the public lands of the United States, and only segregated from other public lands to the extent that Mullison's option right to acquire the title would, while it existed, prevent entry or valid claim from being initiated by any other person, but did not vest in Mullison any dominion over the land in excess of what he had by his location and working of the tract as a mining claim. He was, before making payment for the land, amenable for any waste or spoliation of the timber, and could grant no valid license to the defendant to cut the timber. Defendant was therefore guilty of criminal misdemeanor, and his guilty act was complete when he cut and removed the ties; and no change in the title to the land or the timber or ties by any act subsequent to the cutting and removal of the ties, when all title, legal and equitable, was in the government, could condone or wipe out the guilt of the completed misdemeanor, although a

subsequent change in the title might divest the government of its right to seize and recover the ties so cut. In this case the release and transfer of the ties to the defendant by the government through its agent, Abbott, after the commission of the misdemeanor, was not even suggested as any defense to the prosecution for that misdemeanor, though it was adjudged to be an ample defense to the government's action of replevin for the ties. Upon the payment for the land by Mullison on June 22, 1898, when he obtained the receiver's certificate receipt entitling him to a patent for the land, Mullison became the equitable owner of the land in fee, with the absolute, unrestricted right to use and exercise dominion over it; and the holding by the government of the naked title till its patent to Mullison could issue was a holding in trust for Mullison. This court so held in the case of *Teller v. U. S.*, 51 C. C. A. 236, 113 Fed. 279, as follows:

"It may be conceded that the payment for the land conferred upon Mullison an equitable title to the same, which entitled him to a patent, and that he was not required to wait for the actual issue of a patent, converting the equitable right into a legal title, before exercising all the incidents of ownership. We think this is the law as established by the authorities. *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 839; *Stark v. Starrs*, 6 Wall. 402, 417, 18 L. Ed. 925; *Deffenback v. Hawke*, 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423; *Cornelius v. Kessel*, 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482; *Railroad Co. v. Whitney*, 132 U. S. 357, 361, 10 Sup. Ct. 112, 33 L. Ed. 363; *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 63 Fed. 192. And the contention of the government in this case to the contrary is not well founded. The foregoing cases are, however, no authority for the proposition that lands cease to be public lands, or that a claimant secures an equitable right to a patent, until all the acts are performed and all the money is paid by the claimant, which are made by the law prerequisite to securing the legal title."

As stated, the application of Mullison to enter the land, and receive a patent therefor on payment of \$2.50 per acre, when accepted at the land office, January 5, 1898, constituted a contract on the part of the government to sell him the land as it then was,—standing timber included,—and convey him the same by patent on the payment by him of that price within the proper time. To his previous possessory right as mining claimant was then added his right as purchaser. This gave him no right, before full payment, to commit waste or lessen the value of the land while it still belonged to the government, by denuding it of its timber. But when he made full payment, June 22, 1898, and obtained the receiver's certificate voucher for such payment, he became the equitable and potential owner of the land, and of everything that was parcel of it on January 5, 1898, when the contract of purchase was made. His title, when completed by payment, took effect, under the equitable doctrine of relation, from the date of his contract of purchase; and he could have maintained an action of trover for any timber removed from the land by a stranger between the time of the making of the contract and obtaining the title. *Heath v. Ross*, 12 Johns. 140. "Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other act shall

have relation. Vin. Abr. tit. 'Relation,' 290; Harper v. Bailiffs of Derby, Jones, W., 425. This principle has been repeatedly recognized. In Jackson v. Bull, 1 Johns. Cas. 81, it was held 'that a deed executed in pursuance of a previous contract for the same premises is good, by relation, from the time of making the contract, so as to render valid every intermediate sale or disposition of the land by the grantees.' Jackson v. Raymond, Id. 85, note; Case v. De Goes, 3 Caines, 262, per Thompson, J.; Jackson v. Bard, 4 Johns. 234, 4 Am. Dec. 267." Jackson v. McCall, 3 Cow. 80.

In U. S. v. Ball (C. C.) 31 Fed. 667, one Green entered a tract under the homestead act in November, 1880, and paid the fees. He made final proof in January, 1886, and received his final certificate, entitling him to a patent. In the meantime, while he was holding the land under the act, and before making final proof, he had cut from the land and sold to defendants, who had knowledge of the facts, 239,680 feet of logs; and the government brought suit to recover the value of the logs. Held, that it could not maintain the action, because when a vendee has fully completed his contract of purchase, and becomes entitled to a deed of the land, he is no longer liable for any waste which he has previously committed thereon. The court added:

"But it has been suggested that the defendants having received this timber from the settler and converted it to their own use while the contract of purchase was only partly performed, and the land belonged to the United States, they are liable therefor. Under the circumstances, they certainly took the chances of Green's complying with the law and obtaining the certificate. But if the performance of his contract and the issue of the final certificate relieves Green from liability for cutting and removing this timber when and as he did, it ought to prevent the United States from maintaining an action against his vendees for converting it to their use. Before the timber was cut, the United States had disposed of the land to Green, and afterwards acknowledged the performance of the conditions of sale. The plaintiff has had pay for the timber once, and has no right to claim it again from these defendants. If A. takes B.'s horse and sells him to C., but afterwards pays B. for it, the latter cannot then maintain an action against C. to recover the horse or its increase. The effect of the whole transaction between Green and the United States is to establish the title of the former to the land, and the timber thereon, from the date of the entry in the land office, and all those who claim under him for either the land or timber are entitled to stand in his shoes."

In U. S. v. Freyberg (C. C.) 32 Fed. 195, one Klingenberg in November, 1883, entered the land as a homestead, and lived on the same thereafter. By his consent, and for a price paid to him, the defendants in 1884 and 1885 cut and removed from the land 210,668 feet of pine timber. The cutting was not to improve the land, but for sale of the timber. The action was commenced by the United States to recover the value of the timber. Afterwards, on January 15, 1886, Klingenberg commuted his homestead entry, and paid for the land at 1.25 per acre, and obtained the receiver's receipt therefor. The proofs were forwarded to the department, but the patent had not yet issued. Upon these facts the court held that the United States could not recover. The court said:

"The consummation of the purchase, and the payment of the purchase money in full, must be held to relate back to the original entry, and con-

sequently to protect the occupant and purchaser from liability for acts done on the land while he was holding under his homestead entry. And the protection resulting to him, of course, inures to the benefit of his vendees. No other conclusion seems consonant with justice. As suggested on the argument, the case is quite analogous in principle to that of a purchase of land by one person from another under contract. In violation of the contract, the purchaser, being in possession, commits waste. But when the purchase money is due he pays it in full, and becomes entitled to a deed. Could the vendor in such case, after receiving and retaining the purchase money, recover for the waste committed while the contract was yet unperformed? Or could he, after parting with his entire interest in the land by accepting payment, yet maintain a suit previously begun, and recover damages therein for such waste? If not, it is difficult to see how the government is entitled to recover in the case at bar."

Defendant's purchase of the timber from Mullison, and payment for it to enable Mullison to perform his contract with the government and obtain title to the land, was lawful and unobjectionable, had he allowed the timber to stand until Mullison had so obtained the title. He violated the law by cutting the timber before Mullison got title, and while the land was still public land, and he has been punished for that violation. His title to the ties cut on this Mullison placer tract is in no way based upon his unlawful trespass, but rests entirely on the sale and transfer by the United States to Mullison of the land and the timber which was on it January 5, 1898, which sale and transfer was consummated by payment after the ties were cut, whereby the government can no longer assert title to that timber, nor question any disposition made of it by Mullison at any time. It follows that the defendant, and not the government, was the owner of those ties when this action was begun, and at all times since June 22, 1898, when Mullison became the owner of that placer tract. The court therefore erred in its instruction to the jury that the plaintiff was entitled to recover for those ties, and for this error the judgment is reversed, and a new trial granted.

THAYER, Circuit Judge (dissenting). The majority of the court entertain the view, it seems, that the judgment below must be reversed because the trial judge, in one paragraph of his general charge, remarked that "Mr. Mullison had no right to sell the timber not necessarily taken down in the ordinary working of his placer claim as a placer mine, and the defendant had no right to purchase it from him, until a patent issued to him for the land." I am not able to concur in this view of the case, for the following reasons:

In the first place, no sufficient exception was taken to the above excerpt from the charge to bring the question involved before us for review, if we adhere to the rule, which has frequently been announced by this court, that exceptions to a charge, to be of any avail upon appeal, must be specific, and point out with certainty the particular part thereof which is supposed to be faulty, and that a general exception to a long paragraph of the charge, a part of which is unobjectionable, will not suffice. *Price v. Pankhurst*, 3 C. C. A. 551, 53 Fed. 312; *Philip Schneider Brewing Co. v. American Ice Mach. Co.*, 23 C. C. A. 89, 98, 77 Fed. 138; *Railway Co. v. Johnson*, 4 C. C. A. 447, 54 Fed. 474; *Railway Co. v. Spencer*, 18

C. C. A. 114, 71 Fed. 93; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527. In the present instance, counsel for the plaintiff in error took a general exception to a long paragraph of the charge, which covers more than two pages of the printed record, a part of which is unobjectionable. In this paragraph the short excerpt above quoted is found, but the court's attention does not appear to have been called to the particular clause which is now adjudged to be erroneous. I think we might well hold, and ought to hold, that the question on which the decision of the majority of the court is made to turn was not raised below in any such form as to bring it before this court for consideration and decision.

In the second place, I very much doubt whether the plaintiff in error pleaded as a defense, with respect to the ties cut on the Mullison claim, that he was not obligated to pay for them, because after the trespass was committed the government accepted payment for the land on which it had been committed, and thereby estopped itself from demanding payment for the ties. It is certain that no such defense was pleaded in a clear and concise form, as it should have been if the accused intended to rely upon it as a defense. The government, as I construe its complaint, sued upon the agreement signed by Teller, when the ties were released by the government, to the effect that, if released, he would pay for them according to the rule of valuation theretofore prescribed by the commissioner of the general land office, and that the government should have the right to determine, as respects all of the ties, including those cut and removed from the Mullison claim, whether a trespass had been committed in cutting them, and whether Teller should be compelled to pay for them. On the other hand, the defenses pleaded by the plaintiff in error appear to have been—First, that he had been released from his obligation to pay for any of the ties, as he had agreed to do, by the action of the government in replevying them after they were released; and, second, that, if he was not released by such wrongful conduct on the part of the government, he was at least entitled to set off against the value of the ties cut on the Mullison claim the sum of \$1,800 which he had advanced to Mullison subsequent to the trespass to pay for that claim. A set-off to the amount last stated was distinctly pleaded in the amended answer. As I view the case, therefore, the defense now insisted upon, that the government cannot recover the value of the ties cut on the Mullison claim because it accepted payment for the land at the rate of \$2.50 per acre some months after the timber thereon was unlawfully cut and removed, was not made in the answer, or at least it was not made in such a clear and concise form as to enable the plaintiff in error to avail himself of that defense. For this reason the paragraph of the charge which is criticised and held to constitute a reversible error did no harm, and in my opinion the judgment below ought not to be reversed on account thereof.

By what has thus far been said, I would not be understood as conceding that the charge of the lower court would have been erroneous even if the question to which it relates had been properly raised by the pleadings, and even if an exception had been preserved in due form. In the case of *Teller v. U. S.*, 51 C. C. A. 230, 113 Fed. 273,

which was a criminal proceeding against Teller for unlawfully cutting and removing the very timber now in controversy, this court, after a very full and careful consideration of all the circumstances attending the trespass, held that Teller was guilty of a criminal offense in cutting and removing timber from the Mullison claim before the land was paid for and the United States was divested of its title, as well as for cutting timber on other lands described in the information, to which he had no shadow of a claim, and a conviction for the offense was sustained. We held, in substance, in that case (51 C. C. A. 230, 113 Fed. 279-282), that, at the time the timber in question was cut on the Mullison claim, Mullison, not having made any payments for the land, and being entitled to relinquish it at his mere pleasure, had a possessory title only, and that while such possessory title segregated the land from the public domain, so as to protect him from rival claimants, yet it gave him nothing but the right to occupy the claim for mining purposes; that it did not give him a complete equitable title, nor entitle him to cut timber thereon except for ordinary mining purposes, nor divest the United States of its legal title, "or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste." I still adhere to these views, and believe them to be sound, notwithstanding the doctrine of relation which has been invoked to arrive at the result that a person may be punished criminally for unlawfully cutting and removing timber from public land, but cannot be made to pay for the timber so unlawfully converted, if, perchance, some months after the trespass is committed, the government accepts payment for the land under an entry which happened to be made previous to the trespass. In the present case the testimony shows, I think, that a considerable quantity of the ties in controversy were cut on the Mullison claim in November, 1897, before the land was even entered for purchase; but in any event, as the act of cutting was unlawful, and as the trees, when cut, ceased to be realty, and became at once the personal property of the United States (*Schulenberg v. Harriman*, 21 Wall. 44, 64, 22 L. Ed. 551; *Wooden Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Railroad Co. v. Lewis*, 162 U. S. 366, 374, 16 Sup. Ct. 831, 40 L. Ed. 1002), I am unwilling to concede that its subsequent acceptance of payment for the land destroyed its right of property in the ties, which had long previously ceased to be a part of the realty. Moreover, as one who enters land for purchase is under no obligation to complete the purchase, but may abandon his entry at any moment, and cannot be proceeded against as upon an executory contract to buy, I think it is a vicious doctrine which denies to the government the right, if it is so disposed, to recover the value of the timber which one unlawfully cuts and removes, while he has not even a complete equitable title, merely because he eventually concludes to complete his purchase, and does so.

For these reasons, somewhat hastily expressed, I think that the judgment below ought to be affirmed, instead of reversed.

DYER v. MUHLENBERG COUNTY, KY., et al.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.)

No. 1,065.

1. COMPROMISE AND SETTLEMENT—CONTEMPORANEOUS AGREEMENTS—CONSTRUCTION.

A county was indebted on a series of railroad bonds to an amount equal to about one-fourth the value of all its taxable property, and numerous judgments had been recovered on such bonds, which could not be collected. The legislature authorized it to compromise such indebtedness, and for that purpose to levy taxes and issue new bonds, and a part of it had been so compromised. Plaintiff, who was the owner of a number of judgments on the old bonds and also of one rendered on some of the new issue, entered into two written agreements with the county on the same day, by the first of which it was provided that, in consideration of similar agreements by the other creditors, plaintiff's judgments on the old bonds should be compromised for 20 per cent. and costs, to be paid by the county by a day named. The second agreement recited that it was made in consideration of the first, and provided that on the same date the county should pay the remaining judgment in full. *Held*, that such agreements were parts of the same contract, to be construed together, and that the acceptance by plaintiff of payment of the second judgment after the date fixed by the contract, with knowledge that such payment was made from taxes levied and collected to carry out the compromise agreement, and which, under the constitution of the state, could be used for no other purpose, was a waiver of the right to insist that time was of the essence of the contract, and bound him to carry out the compromise agreement as to the other judgments.

2. SAME—CONSIDERATION.

The contract, having been made in consideration of similar agreements by the other creditors, and as a part of a general scheme to settle and adjust the entire indebtedness of the county, was based on a valid consideration, and the other creditors who came into the scheme had an equitable right to its fulfillment, which made it binding on both the parties.

3. SAME.

The fact that the judgments on the old bonds stood in the name of plaintiff alone, while that on the new bonds was in the name of himself and his partner, did not alter the effect of the receipt of payment as a waiver, where the contracts were executed by both, and recited their joint ownership of all the judgments, and it appeared that in fact they were so owned.

4. TENDER—SUFFICIENCY—CONDITIONS

Where a compromise agreement required a judgment debtor to pay a certain sum upon which the creditor bound himself to release the debtor "from any and all liability on said judgments," a tender of the sum due thereunder was good, though made "in full of principal, interest, and costs."

In Error to the Circuit Court of the United States for the Western District of Kentucky.

By an act passed by the legislature of Kentucky February 24, 1868, the several counties of that state were authorized to subscribe to the capital stock of any railroad company whose line should pass through the county, and to issue its bonds therefor, upon a vote of the electors at an election ordered by the county court. At an election held thereunder in Muhlenberg county it was voted to subscribe \$400,000 to the stock of such a railroad company, and issue its bonds for that sum, with interest at 7 per cent. The subscription was made, and the bonds were issued bearing interest coupons. For five years thereafter the interest was paid by the county, but in 1873 the county defaulted, and repudiated its bonds upon the ostensible

ground, among others, that the county court had not ordered the election as provided by the statute; the real ground probably being the heavy burden of the debt, which was out of all proportion to the property of the county. Many suits were brought and judgments obtained by the holders of the bonds, but, in consequence of the resistance of the people of the county, and the shifts and devices of its officials, when any were elected, by resignation or concealment of themselves, or otherwise, the judgments could not be collected, either by execution or mandamus. Another act was passed by the legislature in 1878, authorizing the county to compromise and pay or fund its bonds by the issue of new bonds for the amount for which the old bonds should be compromised, and to levy taxes to pay the old bonds at the amount agreed upon, or the new bonds, as the case might be. Most of the bonds were thereupon compromised at 20 cents on the dollar, and new bonds issued, when the proceeding was suspended by an injunction of a state court in a suit brought by taxpayers. This injunction was finally dissolved upon an appeal to the supreme court of the state. But in the meantime the holders of both the old and new bonds had been unable to collect them. Under the provisions of the refunding act just mentioned, the county compromised most of the old bonds, and its officials constituted the Fidelity Trust & Safety Vault Company of Louisville the financial agent of the county for the purpose of converting the new bonds into funds for paying the sums required to take up the old bonds or exchanging the new for the old bonds in such proportion as should be agreed, and this purpose had been in part accomplished. The petitioner had obtained, several years before, a judgment in the United States circuit court for the district of Kentucky for the sum of \$11,987 upon some of the old bonds, and he and one Gillett had also obtained another judgment in the same court for the sum of \$17,169 upon some of the new bonds which had been issued to take up some of the old; neither of which judgments had the plaintiffs in those cases been able to collect. They had also acquired other judgments on old bonds by assignment. In this state of things, the county and Dyer and Gillett, on the 20th day of March, 1900, entered into a compromise agreement, consisting of two parts, both executed on the same day. The parts of this agreement were as follows. One was:

"This contract, made and entered into this 20th day of March, 1900, by and between Azro Dyer and S. P. Gillett, partners doing business under the name of Dyer & Gillett, of Evansville, Indiana, of the first part, and Muhlenberg county, Kentucky, of the second part, witnesseth: That whereas, Muhlenberg county, Ky., subscribed \$400,000 to the capital stock of the Elizabethtown & Paducah Railroad Company, and issued its bonds in payment of the same, but more than twenty years ago ceased to pay any interest on the said bonds, or to make any provision for the payment thereof, and in fact repudiated same, and now owes on account of the said original bonds about \$650,000, the greater part of which indebtedness is in the shape of judgments against said county, which the owners thereof have found no way to collect; and whereas, the said county and the holders of the said bonds and judgments wish to compromise the same, and have mutually agreed on the terms of said compromise; and whereas, the said Dyer and Gillett now own the following judgments on the said original bonds, to wit: * * * Now, therefore, in consideration of the premises, and of the agreement of certain other owners of said bonds or judgments thereon to accept a like sum from said county in compromise of their respective debts, the said Dyer and Gillett have agreed, and do hereby agree, to accept in compromise and as full payment of all of the said judgments, twenty cents on the dollar of the principal and interest thereof as aforesaid, and payment in full of all the cost of actions in which said judgments were rendered, said payments to be made in cash on or before the first day of January, 1901; and upon the payment of the said money the said Dyer and Gillett further agree and bind themselves to release said county from any and all liability on said judgments, or any of them, on said old bonds, and to acquit them in full of all said indebtedness evidenced by the said judgments. And the said county of Muhlenberg agrees and binds itself to pay to the said Dyer and Gillett, in cash, on or before the first day of January, 1901, twenty cents on the dollar of the principal and interest of all of said judgments and the costs

of all of said actions in full upon the delivery to it of said acquittances from all of said indebtedness as aforesaid."

The other part was in the same words, with this added recital:

"Whereas, the said Dyer & Gillett own judgments against said county on said original bonds, which amount to about \$124,502.80, and also own a judgment against said county, rendered in the circuit court of the United States for the district of Kentucky, at Owensboro, January 24, 1899, for the sum of \$11,987, on which a balance of \$10,600, with six (6) per cent. interest from October 1, 1899, remains unpaid: Now, therefore, in consideration of the premises, and of the written agreement of the said Dyer & Gillett, executed simultaneously herewith, and made a part hereof, to accept twenty cents on the dollar of the amount of said judgments on said original bonds, and payment in full of the costs of the actions in which said judgments were rendered, the said Muhlenberg county agrees that at the same time it shall pay said twenty cents on the dollar of said original debt on or before January 1, 1901, it will also pay to said Dyer & Gillett all the unpaid balance of their said judgment in the circuit court of the United States at Owensboro, said balance amounting, October 1, 1899, to \$10,600, and bearing interest from that time until paid at the rate of six per cent. per annum."

In a letter dated August 29, 1900, the petitioner, in a letter addressed to the Fidelity Trust Company, said:

"It is understood that your company is the agent of the county to negotiate sale of the new bonds of the county. Kindly inform me what prospects, if any, you have of negotiating the new bonds, and when the transaction is likely to materialize."

And again, in a letter to that company, dated December 10, 1900, he said:

"Kindly write me whether or not Muhlenberg county is likely to get the money with which to carry out its compromise agreement by January 1st."

To these letters the Fidelity Trust Co., on December 10, 1900, made the following reply:

"12-10-1900.

"Azro Dyer, Esq., Atty. at Law, Evansville, Ind.—Dear Sir: Your letters of recent date, making inquiry with reference to Muhlenberg county bonds, received. We have the matter now under consideration, and we hope to have the money within a short time to carry into effect the agreement made between the bondholders and the county. This, we trust, will be done prior to the 1st of Jan.

"Very truly yours, John W. Barr, Jr., V. President."

On the 24th of the same month, T. J. Sparks and Wm. H. Yost, acting as commissioners for the county, addressed a letter to the plaintiff, stating that "the option you gave us on taking up your bonds—old issue—at twenty cents on the dollar expires on the first of next month, and we write you this letter to urge you to grant us a short extension." To this the petitioner, Dyer, replied:

"Evansville, Ind., Dec. 25, 1900.

"Judge T. J. Sparks, Greenville, Ky.—My Dear Sir: I have received your communication of yesterday, and, replying thereto, will say, in behalf of Mr. S. P. Gillett and myself, that we decline to extend the time of our contract. Wishing you the compliments of the season, I remain,

"Sincerely your friend, Azro Dyer."

On January 29, 1901, the county paid to Dyer & Gillett \$1,000, and on March 19, 1901, another \$1,000, on the judgment rendered on the new bonds. These payments were made from the tax levy of the county for the year 1900,—a levy made in furtherance of the compromise agreements with its creditors, Dyer and Gillett among the rest. The constitution of Kentucky (section 180), provides that "every ordinance passed by any county * * * levying a tax shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

On the 6th of May, 1901, the Fidelity Trust Co. wrote to the petitioner as follows:

"5-6-1901.

"Judge Azro Dyer, Atty. at Law, Evansville, Ind.—My Dear Sir: The Fidelity T. & S. V. Co., acting under instructions from the Muhlenberg fiscal court, is prepared and ready to pay in full to you all of the judgments obtained by you on the bonds of Muhlenberg county issued under the act of Mar., '78, and are likewise prepared to pay to you 20 per cent. on the dollar of the principal and interest of all of the judgments obtained by you on the old bonds of said Co., and also to pay the costs in full incurred in such actions. The Co.'s contracts with you bind it to pay the principal, interest, and costs of all the judgments you hold against said Co. on the new bonds and to pay you 20 per cent. on the dollar of all the judgments you hold against it on its old bonds, issued in 1869, and to pay the costs in full of all such actions in which judgments have been recovered. We are prepared, as before mentioned, to pay you these sums upon a receipt in satisfaction of the judgments, and if you will indicate in what way you prefer the funds to be sent to you we shall take pleasure in complying with your request. You can either present your judgments in person, or send the necessary papers to this company, with a draft attached for the amount, and the same will be paid. We would state to you that the interest has been calculated upon all of your claims up to and including the 10th day of May, 1901.

"Respectfully, John W. Barr, Jr., V. P."

To which he replied:

"Evansville, Ind., May 10, 1901.

"Mr. John W. Barr, Jr., Louisville—My Dear Sir: Have received your letter of the 6th, but do not understand its meaning. Muhlenberg county has no contract with me. I have only one unpaid judgment rendered in bonds of 1878, and that is the judgment entered in favor of Dyer & Gillett Jany. 24, 1899. In January last I furnished the county with a copy of the judgment. Any payment of the bond debt of 1878 ought to include an item of \$23.15 cost of mandamus paid Thos. Sumner, clerk, June 21, 1898; also cost made in mandamus proceeding, case number 110, now pending in U. S. court, Owensboro. Kindly write me (1) whether it is necessary for me to furnish a second copy of the above-mentioned judgment; (2) the amount, according to your figures, due us May 10, 1901, on the debt of 1878; (3) the form of the voucher you want signed. It will save time to fix the precise amount due before making draft on your company.

"Respectfully, Azro Dyer."

On the 16th of the same month the Fidelity Trust Company paid to Dyer & Gillett, out of the proceeds of the new bonds, the balance of their judgment against the county, and it was receipted for in full by them. At the same time the Fidelity Trust Company tendered to the petitioner, in gold, the whole sum due on his judgment on the old bonds, as fixed by the agreement of March 20, 1900, and accompanied the tender with the following communication:

"Louisville, Ky., 5-16-1901.

"Messrs. Dyer & Gillett—Dear Sirs: The Fidelity Trust & Safety Vault Co., acting under instructions from Muhlenberg county and the fiscal court of Muhlenberg county, hereby tenders to you in gold the sum of twenty-seven thousand one hundred (\$27,100.00) dollars, in full of principal, interest, and costs to the present date, based upon the compromise arrangement heretofore entered into between said county and yourselves.

"Very respectfully, John W. Barr, Jr., V. P."

This tender was refused upon the ground that the agreement of March 20, 1900, had been forfeited by the failure to pay on or before January 1, 1901, and was no longer in force. Then, having made a demand for the levy of a tax to pay his judgment in full (which was refused), Dyer filed in the court below his petition for a mandamus to compel the levy. That court having denied his petition, a bill of exceptions was settled, and the case brought here on a writ of error.

Azro Dyer, for plaintiff in error.

W. L. Reeves, for defendants in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The main question in this case depends upon the construction and effect of the compromise agreements between the parties made on March 20, 1900. It is strenuously contended by the plaintiff in error, and the point is emphasized in his brief in reply, that they are separate and distinct agreements, relating, the one, to the judgment recovered by himself on the old bonds, and the other, to the joint judgment of Dyer and Gillett on the new. And he says: "The promise of the county embodied in agreement No. 1 was supported by a good consideration. The promise in agreement No. 2 had no valid consideration to support it. The circumstances that the two agreements were made at the same time does not cure the defect." By which last proposition it is doubtless meant to say that the fact of their being contemporaneous does not necessarily import that they are dependent parts of one contract; and this, as a general statement of a rule of construction, may be admitted. But, to say nothing of the circumstances that the stipulations of these two agreements relate to a general purpose of effecting a compromise, they are interrelated by their express terms, and it is stated that the one is the consideration of the other. There cannot be the slightest doubt that the two agreements should be read as one. Although the other bondholders did not join in the particular agreement between the county and Dyer and Gillett, it sufficiently appears that it was a condition to the scheme of refunding or paying off the old bonds at 20 per cent. that all, or substantially all, the old bonds should be compromised, and that this was practically accomplished when the agreement here in question was made. Each of the numerous bondholders, therefore, had an interest in the assets which were to become available under the new effort of the county to disencumber itself. The old bonds amounted to about one-fourth of the whole taxable value of property in the county, and it was manifest that, if the tax levies were to be consumed by paying off the old bonds at par and interest, there could be nothing left for those coming into the new scheme. The agreement here in question recites that "the said county and the holders of said bonds and judgments wish to compromise the same, and have mutually agreed on the terms of compromise; and whereas, the said Dyer and Gillett now own the following judgments on the said original bonds: Now, therefore, in consideration of the premises, and of the agreement of certain other owners of said bonds or judgments thereon to accept a like sum from said county in compromise of their respective debts, the said Dyer and Gillett have agreed, and do hereby agree, to accept in compromise," etc. The other creditors have a clear and strong equity to the fulfillment of the contract, and their agreement in reference to their own bonds was a sufficient consideration to support the agreement of Dyer and Gillett in the present instance. So far as the agreement relates to the

payment of the judgment on the new bonds, it has been accomplished, and we have only to inquire, upon the point we are now considering, whether there was a sufficient consideration for the agreement in reference to the judgment on the old bonds. We think it clear that there was. In a letter of the county commissioners to Dyer, mentioned in the preceding statement, this contract is called an "option," and in the brief of the plaintiff in error it is claimed to be such. But that is a misnomer. It was a complete mutual engagement, and bound both the parties to its stipulations.

But it is contended that time was of the essence of the contract, and that by its failure to pay the amount stipulated on or before January 1, 1901, the county forfeited its right thereunder, and that the other parties were remitted to their original right. Whether, in the circumstances of this case, and especially having regard to the facts that time was not in terms made essential, and that the contract affected, and was affected by, the rights of the other creditors, it may be doubtful whether the court would be justified in applying the rule relied upon by the plaintiff in error. In the case cited—*Clarke v. White*, 12 Pet. 191, 9 L. Ed. 1046—the reason given for the rule is that, until the agreement is executed, it continues unilateral, and is not obligatory upon the creditor. Says the court: "It is generally true, in cases of composition, that the debtor who agrees to pay a less sum in discharge of a contract must pay punctually; for until performance the creditor is not bound." And undoubtedly this is so where the agreement is a mere privilege to the debtor, and is not one pervaded by the substantial elements of a mutual contract. But we need not pursue this subject in view of the conclusion we reach upon another point. It is undoubted that a party who has the right to strict performance of a contract in respect to the time thereof may waive it, and does so if he subsequently accepts the benefits of the contract. It is shown—indeed, is admitted—that subsequently to January 1st the petitioner received from the county two payments of \$1,000 each upon the judgment rendered in favor of himself and Gillett out of moneys levied for that express purpose, and that on May 16, 1901, he received the balance of the judgment out of the proceeds of bonds sold for the purpose of enabling the county to pay this judgment. We can have no doubt that he knew from what source those moneys came, and that they had been raised for the purpose of meeting the obligations of the county assumed by the contract he had with it; and the agents of the county held the funds he received charged with that definite purpose, which he knew they could not rightfully disregard. His suggestion is that he was entitled to be paid his judgment on the new bonds any way, and that his reception of the payment was no more than his right. But the county had the right to have these funds applied to the fulfillment of its contract of March 20, 1900. His claim that he had repudiated the continuing obligation of the contract, and was, therefore, acting independently of it, cannot be sustained. If one's acts and speech do not conform with each other, the things done must have their due legal consequence, notwithstanding all protestations

to the contrary (*Dodsworth v. Iron Works*, 13 C. C. A. 552, 66 Fed. 483), and Dyer's intention must be held to be what his acts import.

The petitioner further contends that "the acceptance of payment by Dyer and Gillett of their partnership judgment did not operate as any waiver by Dyer of his individual rights in respect to the present judgment"; but we think it did. The evidence tends to show that, although Dyer was the nominal plaintiff in the case, the judgment really belonged to Dyer and Gillett, and the contract itself, to which Dyer was a party, so states.

Again, it is urged that the accepting of payment of the new judgment was not effectual as a waiver, because it was not supported by a valuable consideration. What we have already said disposes of this contention. The county, although it owed the judgment, had the right to determine the application of the funds. It had, as he knew, determined that they should be applied upon the contract, and not as a payment of the judgment independently considered.

Lastly, it is contended that the tender was insufficient. The reasons given are that it was made to Dyer and Gillett, whereas the judgment was in favor of Dyer alone, and "because it was not an absolute tender, but the money was offered on condition that it should be accepted in full of principal, interest, and costs." The first of these reasons is answered by what we have said upon another point. The tender was rightly made to the parties whom the contract recognized as the owners of the judgment. As to the second, no such objection was made at the time of the tender. It was refused upon the ground that the contract was no longer in existence. This technical objection, now made, appears to be an afterthought. The objection, not being taken at the time, was waived. Besides, the contract expressly stipulated that upon payment of the money Dyer and Gillett should release the county from all liability upon the judgments, and should acquit it of all liability upon "all of said indebtedness." It is not contended that the amount tendered was insufficient, or that there was any doubt as to what it was intended to cover. The judgment on the new bonds was already paid. It would seem, therefore, that the statement that the tender was made in full of principal, interest, and cost to that date was justified by the express stipulation of the parties. Certainly, such statement was not larger than a demand for the release and acquittance stipulated for, and in *Hepburn v. Auld*, 1 Cranch, 321, 2 L. Ed. 122, it was held that in such case the tender was not insufficient because it was accompanied by such a requirement.

We think the circuit court did not err in refusing the writ, and its order is affirmed.

KERR v. MODERN WOODMEN OF AMERICA.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,629.

1. REMOVAL OF CAUSES—AMENDMENT OF PETITION.

A federal court may properly allow the amendment of a petition for removal which is sufficient to give it jurisdiction for the purpose of correcting a mistaken allegation as to plaintiff's citizenship, where plaintiff's own showing establishes the requisite diversity of citizenship to sustain the jurisdiction.

2. WITNESSES—COMPETENCY—INTEREST.

Under Rev. St. U. S. § 858, which forbids the exclusion of a witness because of interest in the issue tried, the fact that witnesses called in behalf of a fraternal insurance order are members of such order does not affect their competency.

3. LIFE INSURANCE—ACTION ON POLICY—EVIDENCE ON ISSUE OF SUICIDE.

Upon an issue as to whether an insured committed suicide, evidence of declarations made by him shortly prior to his death, and of other facts tending to show his mental condition and his expectations and apprehensions at the time, which might have influenced his act, is admissible.

4. EVIDENCE—PROOF OF CONTENTS OF WRITING—AUTHENTICATION OF COPY.

A newspaper clipping, purporting to be a copy of a note written in the memorandum book of an insured, found after his death, is sufficiently authenticated to render it admissible as secondary evidence to prove the contents of such note by the testimony of a witness that he made a copy of the note from the original, and subsequently compared the clipping with such copy, and found it correct.

5. LIFE INSURANCE—ACTION ON POLICY—MEASURE OF PROOF TO ESTABLISH SUICIDE.

A fair preponderance of the evidence only is required to establish the fact of suicide as a defense to an action on a life insurance policy.

6. TRIAL—INSTRUCTIONS—RIGHT OF JUDGE TO STATE OPINION AS TO FACT PROVED.

In a federal court the judge may properly state to the jury his own opinion as to what facts are proven or not proven by the evidence in the cause, and the bearing of such facts upon the issues submitted, if he also instructs them that they are not bound by his opinion on such matters, but that it is their duty as jurors to consider the evidence, and find the facts therefrom.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This action was begun in the district court of Crawford county, Iowa, by the plaintiff, as beneficiary, to recover \$3,000 upon a benefit certificate issued by the defendant to her husband, James R. Kerr, a member of the defendant fraternal order, by the terms of which certificate that amount was to be paid by defendant to plaintiff, as beneficiary, upon the death of her said husband while a member in good standing of said order. One of the conditions of said certificate was that it should become and be null and void in case the member should die "by his own hands, whether sane or insane." Said James R. Kerr died at his home in Manilla, Iowa, July 27, 1897, from a pistol shot, which passed through his head. The only defense pleaded was that said James R. Kerr had committed suicide, and died from wounds inflicted by his own hands. This was denied by plaintiff's reply, which averred that the death was caused by an accidental discharge of the pistol, without intent on the part of deceased to destroy his life. In proper time the defendant filed

¶ 5. Suicide as a defense to suit for life insurance, see notes to insurance Co. v. Florida, 16 C. C. A. 623; Casualty Co. v. Egbert, 28 C. C. A. 234.

its petition for removal of the cause into the United States circuit court for the Southern district of Iowa, setting forth that the defendant was a corporation and citizen of the state of Illinois, and that plaintiff was a resident and citizen of the state of Iowa, and that the matter in controversy exceeded \$2,000, exclusive of interest and costs. It also filed a proper bond, which was approved, and the cause was then removed to said United States circuit court; whereupon the plaintiff filed a motion to remand said cause to the state court, on the alleged ground "that at the time of the commencement of the action she was not a citizen of Iowa, but a citizen of the dominion of Canada." She also then filed her plea in abatement to the jurisdiction of said United States circuit court, alleging therein that "at the date of the commencement of this action, and prior and subsequent thereto, she was a resident and citizen of the dominion of Canada, and a subject of the queen of Great Britain and Ireland." Thereupon the defendant, by leave of said United States circuit court, amended its petition for the removal of said cause from the state court by changing the statement therein that the plaintiff was and is a resident and citizen of the state of Iowa to a statement that the plaintiff was at and before the commencement of the action, and is, a citizen and resident of the dominion of Canada, and a subject of the queen of Great Britain. The plaintiff's motion to remand, as well as her plea in abatement, was then overruled. It appears that said James R. Kerr was married to the plaintiff in Canada in 1880; that they had a little daughter, named Georgia, and had resided at Manilla about 2½ years; that Kerr was a contractor and bullder, and was a man of good reputation and standing in the community; was a member and regular attendant of the Presbyterian Church, a member of masonic orders, and a member, and the clerk, of the local camp at Manilla of the Modern Woodmen of America. On July 27, 1897, W. C. Irwin, county attorney of Sullivan county, Mo., and B. F. Lawson, a constable of Manilla, Iowa, arrested said James R. Kerr at a lumber yard in said Manilla upon a warrant and requisition for his arrest and removal to the state of Missouri for trial upon a charge of the crime of bigamy, alleged to have been committed by him in the state of Missouri, after his marriage to the plaintiff. Said Kerr went to his home near by, with Irwin and the constable, to prepare for his departure to Missouri. While there he made a check upon the local bank, upon which his wife, the plaintiff, then obtained \$395.78; wrote his minutes as clerk of the local camp of Modern Woodmen; arranged papers, and did some other writing; took downstairs a trunk for his wife, who had been purposing a visit to Canada; and was left by plaintiff alone in an upstairs bedroom, arranging his clothing and his valise preparatory to going to Missouri. In a few minutes, upon hearing a shot, the plaintiff and Irwin hurried upstairs to the bedroom, and found Kerr dead upon the floor, just in front of a dresser with a mirror on its top, in a corner of the room. A revolver was lying upon or near his right hand. There was a shot wound where a bullet had entered his head in front of his right ear, and passed out near the parting of the hair on the left side of the top of his head. Some of the witnesses testified to a slight spattering of blood on the mirror and dresser, and to a piece of skin on a handle of a lower drawer. On the bed were his open valise, some clothing, memorandum books, and papers.

Exhibit E: The clipping from the Manilla Register of July 30, 1897, mentioned in the opinion, is as follows:

"Dearest Jessie: They are onto this for the money there is in it. The others are nothing to me. Collect my insurance. Take good care of Georgia. Good-bye.
Your Loving Husband."

I. N. Flickinger (A. T. Flickinger and Clark Varnum, on the brief), for plaintiff in error.

C. G. Saunders (David E. Stuart, J. G. Johnson, and J. W. White, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The petition for the removal of the cause from the state court set forth the diversity of citizenship of the parties, and was sufficient to give the circuit court jurisdiction. The statement that the plaintiff was a citizen of Iowa was made in apparent good faith, in view of her long residence therein. Her showing upon her motion to remand, and the allegations of her "plea in abatement to jurisdiction," made certain the existence of the diversity of citizenship, and the circuit court properly allowed the petition for removal to be amended as to the particular facts. *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Johnson v. Manufacturing Co.* (C. C.) 76 Fed. 616; *Tremper v. Schwabacher* (C. C.) 84 Fed. 413.

The testimony of the witnesses Irwin, Lawson, and Sterling as to declarations made to them severally by James R. Kerr was properly admitted. These witnesses, though members of the defendant fraternity, were competent, under section 858, Rev. St. U. S., which forbids the exclusion of any witness because of interest in the issue tried. The testimony was competent and material as tending to show the mental condition of Kerr, and what were his expectations and apprehensions, at and just preceding his death. And the testimony of Sterling as to Kerr's alleged Missouri family, and the relationship of the witness to them, was competent and material for the same reason, and to explain why the witness had the conversations with and made the demands of Kerr related in his testimony.

The clipping from the *Manilla Register* of July 30, 1897, was made competent. Irwin had seen Kerr writing in the memorandum book. Just after the death of Kerr he found the memorandum book on the bed, and copied from it the brief note of Kerr to his wife. He still had this copy, when, a few days later, he saw the copy of the note in the newspaper, and then knew that it was correct. The testimony showed that the original note in the memorandum book was read and examined at the inquest, and then delivered to the plaintiff. Her attorneys, before the trial, were served with proper notice to produce it, and did not do so. It was therefore competent to show its existence, and that it was in Kerr's handwriting, and its tenor by secondary evidence. The evidence that the note was in the memorandum book, and was in Kerr's handwriting, was abundant from persons who had seen it at the inquest and knew the handwriting. So many of these witnesses testified to its tenor from memory, without aid from the newspaper clipping, that it was abundantly proven; and the introduction of the clipping, if erroneous, was harmless. Even Mr. Jones—the only witness on the part of the plaintiff as to this note—gave its tenor substantially as did the other witnesses and as shown in the clipping. But the clipping itself was made competent by the testimony of Irwin. He saw it in the newspaper while the note, which was very brief, was fresh in his recollection, and while he had a copy of it which he had himself made, and was then certain that the clipping was a correct copy of the original. There was really no contention in the case, when on trial, as to the existence of this note in the hand-

writing of Kerr in the memorandum book, nor as to its tenor. The witness Jones stated that his knowledge of Kerr's handwriting was based on having Kerr's books and papers as administrator. But he did not attempt to state that he knew Kerr's handwriting as a matter of fact.

The hypothetical question put to Dr. Macrea as to the probable distance of the revolver from deceased's head was properly overruled. The doctor was allowed to state his knowledge, observation, theories, and views respecting the subject very fully. The question sought an answer based on conjecture.

The plaintiff's first request for instruction to the jury was properly refused. It was sufficient if the defendant satisfied the jury by a fair preponderance of the evidence that Kerr had committed suicide. The third request of the plaintiff was improper, because it contained a statement that it is usual in cases of suicide to hold the revolver against the head.

The assignments of error predicated upon the charge to the jury, as given, though very numerous, may be disposed of briefly. The second, fourth, and sixth paragraphs of the charge simply impressed upon the jury the doctrine that all persons and parties have equal rights before the law and in the courts, and that the jury should not act on sympathy or prejudice. The court very clearly directed the attention of the jury to the sole issue in the case. This was whether the death of Kerr was the result of accident, casualty, or mishap, or of suicide. The judge discussed the evidence, and in respect to some matters stated or intimated his own impressions or conclusions as to minor facts proven or not proven by the evidence. But he carefully and repeatedly told the jury that it was their province and duty to find the facts from the evidence, and that they were not bound by his conclusions or intimations in respect to matters of fact. That the judge may properly state to the jury his own opinions as to what facts are proven or not proven by the evidence in the cause on trial, if he also instructs them that they are not bound by his opinions on such matters, but that it is their duty as jurors to consider the evidence, and find the facts therefrom, has been the uniform holding of the federal courts. *Transportation Line v. Hope*, 95 U. S. 297, 302, 24 L. Ed. 477; *Rucker v. Wheeler*, 127 U. S. 85, 93, 8 Sup. Ct. 1142, 32 L. Ed. 102. "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when, in his judgment, the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination. *Railroad Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; *Railroad Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161." *U. S. v. Philadelphia & R. R. Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138.

In determining the mental condition of Kerr at and just prior to his death, and whether it was such as would be likely to lead him to suicide, it was proper for the jury to consider the situation in which he was then placed, including his arrest for removal to another state,

the imminence of exposure, disgrace, and peril, and his acts, sayings, and writings at the time having a tendency to throw light on the subject, and also his character, standing, and connections in the community. And whether the impression of the judge that a man moving in the better class of society, with the standing of a gentleman and man of character, associating with respectable men and women in church and in society, would be more humiliated by such disclosures, and the possible consequences of such situation, and likelier to destroy his own life, than would a person without standing or character, whose associates were criminals and vicious persons, was correct or not, it was only stated to the jury as the judge's impression or conclusion, after carefully instructing them that they were not bound by his opinions or conclusions respecting such matters, but must themselves determine all matters of fact.

It was the duty of the court to see that the minds of the jury were not diverted from the real issue in the case by unfounded attacks by counsel upon the witnesses Sterling and Irwin; even such as are admitted on page 7 of the reply brief of plaintiff in error to have been made.

The remarks of the court in respect to conditions against suicide in policies of insurance, upon which the two next to the last of the assignments of error are based, could in no way have prejudiced the plaintiff. The certificate on which the action was brought contained a condition against suicide, and the validity of that condition in this certificate is not questioned.

What has been said covers all the assignments of error which need be considered. It may be added that, in view of all the circumstances surrounding the death of Kerr, and especially the two notes of like purport written to his wife just before his death, the verdict was fully justified, and the judgment is affirmed.

RAINWATER-BRADFORD HAT CO. et al. v. McBRIDE et al.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1902.)

No. 1,703.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—LAWS OF INDIAN TERRITORY.

A deed of general assignment made under the statute in force in Indian Territory relating to assignments (Mansf. Dig. Ark. c. 8) is not void on its face because of a provision directing the assignee to sell "all the property" assigned to him, at public auction, contrary to section 307 of the statute, which requires him to collect choses in action, where such direction is immediately followed by a provision that the assignee "shall, in executing this trust, be governed in all things by the laws regulating assignments for the benefit of creditors now in force in the Indian Territory."

2. SAME—OMISSION OF PROPERTY.

The omission from a deed of general assignment of a claim for compensation for personal services to be performed by the assignor under an indivisible contract, which services had not been completed, did not render the assignment invalid, since the assignor had no claim at the time which he could transfer by the assignment.

Appeal from the United States Court of Appeals in the Indian Territory.

On the 3d day of January, 1893, D. W. Hodges, a merchant of Lehigh, Ind. T., being largely indebted, executed his deed of assignment of that date, whereby he conveyed all his "property, real, personal, and mixed, choses in action, debts, dues, assets, and demands, of every nature, kind, and description, wheresoever the same may be, except such property as is by law exempt to me," to W. A. McBride, his successors and assigns, in trust for the benefit of the creditors of said Hodges. Said deed of assignment contained the following provision: "Said assignee, McBride, is required to sell all the property herein assigned to him for the payment of debts, at public auction, one hundred and twenty days after the execution of said bond required herein; and he shall give at least thirty days' notice of the time and place of such sale, and shall, in executing this trust, be governed in all things by the laws regulating assignments for the benefit of creditors now in force in the Indian Territory." On August 10, 1893 (Hodges having in the meantime died), the appellants (complainants below) began this suit against the assignee, W. A. McBride, Alice Hodges, widow of the assignor, and others, and by their second amended bill alleged that certain of the complainants were judgment creditors having unsatisfied judgments against said Hodges, and that said deed of assignment was fraudulent and void, and made to defraud the creditors of said Hodges, and that property of said Hodges that should have passed by such assignment was intentionally omitted and withheld from the schedules and inventory filed by the assignee, and that said assignee had in many specified ways been guilty of mismanagement and betrayal of his trust. Decree was prayed adjudging that the said assignment was fraudulent and void, and enjoining defendants from disposing of or interfering with the property, and appointing a receiver of the property, and for other relief. Issues were formed by the answers of the defendants, McBride, Alice Hodges, and other defendants; and after certain proceedings, in which said McBride was removed, and one R. Sarlls appointed as assignee in his stead, on March 6, 1897, the cause was duly referred to William Costigan as special master to take the testimony in the cause, and from the evidence and the law to make and report to the court his findings of fact and conclusions of law. Such report was filed June 28, 1899, and in it the special master found the facts in favor of the defendants, and, as conclusions of law, that the deed of assignment was good on its face, and should not be set aside. The complainants in due time filed exceptions to the master's report, which were overruled by the court, and on March 22, 1900, decree was duly entered that the complainants take nothing by their suit, and that the defendants recover their costs, and that Sarlls, the substituted assignee, proceed to discharge the duties imposed on him by the deed of assignment. The complainants appealed from said decree to the United States court of appeals for the Indian Territory, which at the October, 1901, term of that court duly affirmed such decree and judgment. *Hat Co. v. McBride*, 64 S. W. 556.

Joseph G. Ralls, George A. Pate, Napoleon B. Maxey, and Harrison O. Shepard, for appellants.

George A. Mansfield, J. F. McMurray, and Melven Cornish, for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The first assignment of error assails the confirmation by the court of that part of the report of the special master which in effect sustains the validity of the deed of assignment, as executed; holding

that whatever is questionable in the clause providing that the assignee shall sell all the property at public auction within 120 days after the execution of his bond is cured by the next clause, which requires that the assignee "shall, in executing this trust, be governed in all things by the laws regulating assignments for the benefit of creditors now in force in the Indian Territory." Chapter 8 of Mansfield's Digest of the Statutes of Arkansas, in force in the Indian Territory (26 Stat. c. 182, § 31), contains the law of that territory on the subject of assignments. Section 309 of that chapter empowers the assignee "to sell all the property assigned to him for the payment of debts, at public auction, within one hundred and twenty days after the execution of the bond required by this act," while section 307 of the same chapter—a later enactment—contemplates that the assignee shall not sell choses in action, but shall collect them. Appellants' counsel claim that the clause in this deed of assignment providing that the assignee shall sell all the property assigned, at public auction, within 120 days, etc., authorizes and directs him to sell the choses in action assigned, contrary to the purport of section 307, above referred to, and that thereby the deed of assignment is invalidated. *Churchill v. Hill*, 59 Ark. 54, 26 S. W. 378. But in the deed of assignment before the court in the case just cited, the assignee was, in terms, required to sell all the property assigned, within 120 days after executing his bond. The court said:

"The words 'all property assigned to him' necessarily included the choses in action. The assignee was required to sell them. The language of the deed to that effect is clear and unambiguous, and there is nothing in it to indicate a contrary intention."

That deed contained no provision like that found in the deed in the present case, requiring the assignee in the execution of the trust to be governed in all things by the laws regulating assignments for the benefit of creditors.

So in *Pace v. Drug Co.*, 48 S. W. 1061, the court of appeals of the Indian Territory held that a deed of assignment in which the only clause respecting the disposition of the assigned property was as follows: "After filing said inventory and description of said property, and executing and filing said bond as required by law and complying with the requirements of the law in such cases, T. T. Pace is hereby authorized and empowered to take possession of said property and to sell the same as required by law, and to receive the proceeds thereof,"—was invalid, because the power and direction to sell, by the terms made use of, included choses in action with the other property, in contravention of section 307 of the statute referred to.

But in *Noyes v. Guy*, 48 S. W. 1056, decided on the same day with the case last cited, by the same court of appeals of the Indian Territory, the deed of assignment had the following provision:

"And hereby empowers his said assignee to carry out this trust by conforming to the laws of the United States in said territory, provided as follows: My said assignee, after executing a good and sufficient bond and filing an inventory, shall within one hundred and twenty days sell all the property herein conveyed at public auction, and pay the proceeds to my creditors, as herein provided."

The court sustained the deed of assignment, holding that the clause empowering the assignee to carry out the trust by conforming to the laws of the United States in said territory was proper, and by itself was sufficient, and that, if this clause was rendered ambiguous by the proviso, such construction should be given to the whole as would support the deed and render it legal and operative, rather than a construction which would invalidate it. This case of *Noyes v. Guy* was brought to this court by writ of error and the judgment of the court of appeals of the Indian Territory was affirmed. *Noyes v. Neel*, 100 Fed. 555, 40 C. C. A. 539. The decision just referred to is conclusive against the argument of appellants that the deed of assignment in the present case was void upon its face.

Other assignments of error based on the contention that the assignment of Hodges to McBride was fraudulent because there was an intentional withholding by the assignor of unexempt property, with the knowledge and assent of the assignee, are not sustained by the evidence in the record. One of the items so claimed to have been withheld was a claim of the assignor, D. W. Hodges, against the Choctaw Nation for \$15,000 for services as delegate or agent of that nation in respect to its claim against the United States for what was called the "Leased District Money." The evidence shows that the services of Hodges as delegate or agent in that matter were not completed when he executed the deed of assignment. As the services to be performed were the personal services of Hodges, he could not transfer the unperformed contract to his assignee, nor authorize the latter to act in his stead; and as the compensation was entire, indivisible, and only payable upon full performance, Hodges at the time of his assignment had no claim against the Choctaw Nation which he could transfer to his assignee or to any one. The services were afterwards completed, whereupon Hodges became entitled to compensation; but this was an after-acquired right, to which the assignment did not attach.

The only other property claimed to have been improperly withheld from the assignee was an alleged interest of Hodges in a coal-mining claim in the town of Lehigh, known as "Coal Claim No. 6." The evidence in respect to this shows that, at the time the deed of assignment was executed, Hodges had no interest in this mine; that the title to the mine was then in litigation between other parties, and that Hodges was to be a witness for one of these parties to prove the location of the mine; and that in compensation for the testimony of Hodges, so to be given, such party agreed that, in case of success in the litigation, Hodges should be given a small designated interest in the mine. It is needless to say that under this unexecuted agreement, so manifestly illegal and immoral that no court would ever enforce it, even after Hodges should have given his testimony, he had no shadow of interest in that mine which he could transfer to his assignee. That the litigation was settled subsequently, and Hodges in some unexplained way got some interest in the mine, which he sold for \$400, is another case of after-acquired property. Some evidence was received respecting an interest of Hodges in coal claim No. 7. But this claim was not mentioned in the bill, and the evidence

showed that whatever interest in that mine stood in the name of Hodges belonged in fact to his bookkeeper, Martin, who obtained whatever it was afterwards sold for.

The only other matter urged against the assignment is that the assignee, before giving his bond and filing the inventory, took possession of the assigned property. The finding of the special master against this contention is well supported by the evidence. The only claim in respect to this was that the assignee, before qualifying, had employed one Pate, an attorney, to collect some outstanding claims. The testimony of the assignee was direct and positive that he did not so employ him until after he had fully qualified. The only other testimony on the subject was that of Pate, which was so vague, uncertain, and in some respects contradictory, that it did not tend to prove anything.

This disposes of all the questions presented by this appeal, and the decree appealed from is affirmed.

LONDON, PARIS & AMERICAN BANK, Limited v ARONSTEIN.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1902.)

No. 803.

1. CORPORATIONS—TRANSFER OF STOCK—RIGHT OF EXECUTOR.

Under the law of California an executor is entitled to have shares of stock in a corporation, owned by his decedent, transferred by the corporation to his own name as such executor.

2. SAME—REFUSAL TO TRANSFER STOCK—LIABILITY FOR CONVERSION.

The refusal of a corporation without lawful excuse to transfer shares of stock on its books to one who is entitled to such transfer may be treated as a conversion of the stock, and its value may be recovered in an action at law.

3. SAME—BY-LAWS REGULATING TRANSFER OF STOCK.

Provisions in the by-laws of a corporation giving it the option to refuse to transfer stock on its books when the holder is indebted to the corporation, and requiring the instrument of transfer to be executed by both transferor and transferee, have no application where the transfer demanded is to the executrix of a deceased stockholder, in whom the title and right to a transfer vests by operation of law.

4. SAME—FOREIGN CORPORATION DOING BUSINESS IN CALIFORNIA—LAWS GOVERNING TRANSFER OF STOCK.

The constitution of California provides that every business corporation organized or doing business in the state shall maintain an office therein for the transaction of its business, where transfers of stock shall be made. It also provides that no corporation organized outside of the state shall be allowed to transact business in the state on more favorable conditions than are prescribed by law for domestic corporations. *Held*, that a British corporation, which transacted business in California, and there maintained an office in charge of managers who were empowered to transfer stock and issue certificates for shares, and which there sold and issued stock to a citizen of California, was governed as to the transfer of such shares by the laws of California, and that on the death of the stockholder his executrix, appointed under the laws

¶ 2. See Corporations, vol. 12. Cent. Dig. §§ 513, 514.

¶ 4. Foreign corporations "doing business" in state, see note to *Wagner v. Meakin*, 33 C. C. A. 585.

of California, was entitled to have the stock transferred to her name as executrix at the corporation's office in that state, and could not be denied such right because the estate was not administered upon at the domicile of the corporation in England.

In Error to the Circuit Court of the United States for the Northern District of California.

The answer of the defendant denies that it has any officers in the city and county of San Francisco or in the state of California save and except managers and cashiers of its banking business local to the state of California, and avers that it is a corporation duly organized and existing under and by virtue of the laws of England and Great Britain, having its principal place of business in London, England. That there is in full force and effect in England and Great Britain an act of parliament providing "that every person who shall administer the personal estate of any person dying after the passage of this act, or any part thereof, without proving the will of the deceased, or taking out letters of administration of such personal estate, within six calendar months after the death of the person so dying, shall forfeit and pay the sum of fifty pounds to be recovered in his majesty's court of exchequer, by action of debt," etc. This statute is known as "Chapter XC, Anno Regni Georgii III Tricesimo Septimo," and quotes other acts passed August 25, 1857, by the parliament of Great Britain, relating to probate and letters of administration, and also an act of parliament passed July 5, 1865, to amend the procedure and practice in crown suits in courts of exchequer, providing the method of administering upon the estates, and the act entitled "Customs and Inland Revenue Act," passed by the parliament of Great Britain in 1881, known as "44 & 45 Vict. c. 12," section 40 thereof providing for a duty to be charged in the settlement of estates of deceased persons, which duty was changed by the "Finance Act" of 1894 (57 & 58 Vict. c. 30), which act provided that, where an estate exceeds £1,000 the duty shall be £3 per £100, and, in addition thereto, 1 per cent. duty where the property is settled. That said defendant was incorporated under what is known as the "Companies Act," entitled "An act for the incorporation, regulation, and winding-up of trading companies and other associations" (25 & 26 Vict. c. 89). By part 2, § 22, of said act, it was provided that the shares of any member in the company shall be personal estate, capable of being transferred in manner provided by the regulations of the company. That by section 39 of said act it was provided: "Every company under this act shall have a registered office to which all communications and notices may be addressed; if any company under this act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on." That by section 8 of the first schedule of said act it is provided that "the instrument of transfer of any share in the company shall be executed by both the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof." By section 12 of said schedule it is provided that "executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to his share." That by the articles of memorandum of association of the defendant, and by resolutions and by-laws duly passed, it was provided that the registered office of the company should be situated in England; that the register of shareholders shall be kept by the secretary of the company under the control of the board; that "the instrument of transfer of any share shall be in a form approved by the board, and shall be executed by both the transferor and transferee," and then sets forth the form of transfer adopted by the corporation. Section 30 of the said articles of memorandum provides that "the transferor of any share shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof." Section 31 provides that the board may decline to register any transfer made by a member indebted to the company, or where the certificate of the share proposed to be transferred is not left with the secretary for examination. Section 33 provides that:

"The survivor or survivors, in the case of joint holders, and the executors or administrators of a deceased member in the case of a sole holder, shall be the only persons recognized by the company as having any title to a share registered in the name of such member, and the company shall not be affected by any notice of any trust, or of any agreement to transfer or charge any registered share, or of any equitable, contingent, future or partial interest in any registered share, or of any other right in respect of such share, except an absolute right thereto in the person from time to time registered as the holder thereof, and except also the right of any person becoming entitled to a registered share in any way (other than by transfer) to become a registered shareholder, or to transfer such share." Section 34 provides that "any person becoming entitled to a registered share in consequence of the death of any member, or in any way other than by transfer may be registered as a member in respect of such share." That by article 14 of said by-laws of said corporation it is provided that "the directors may appoint an authority in San Francisco, or such other place as the board may from time to time think fit, to approve of or reject transfers of shares, and to direct the registration of approved transfers in a register of shares, which shall be kept at such place as aforesaid." That pursuant to said by-laws it was resolved by the board of directors of said corporation on the 15th day of November, 1899, that the managers of the said London, Paris & American Bank, Limited, in San Francisco, be empowered, and they were authorized, to pass and register transfers of shares, and to issue, under the local seal of the company, new certificates to the holders or transferees of such shares, subject to the articles of association and by-laws of defendant to approve or reject the transfer. It is further alleged that on the 12th day of January, 1884, Adolph Aronstein was a resident of the city and county of San Francisco, state of California, and in writing made the following application to the defendant, to wit: "To the Directors of the London, Paris and American Bank, Limited.—Gentlemen: Having paid to your bankers the sum of fifty pounds, being a deposit of one pound per share on an application for fifty shares of twenty pounds each in the capital of the London, Paris and American Bank, Limited, I hereby request that you allot to me that number, and I hereby agree to accept such shares, or any less number you may allot to me, subject to the memorandum and articles of association of the company, and I further agree to pay to your bankers the sum of two pounds per share on allotment, and the balance as when required, and I hereby authorize you to place my name on the register of shareholders in respect of such shares. [Signed] Adolph Aronstein." That said Adolph Aronstein departed this life in the city and county of San Francisco, state of California, at said time being a resident of the city and county of San Francisco, state of California, on the 27th day of August, 1901; and that the shares which the said plaintiff alleges the said defendant has converted are the same shares issued to said Adolph Aronstein under and by virtue of said contract, laws, memorandum, and schedule and by-laws. That said Adolph Aronstein died testate in the city and county of San Francisco, state of California, on the 27th day of August, 1901. That at the time of his death he was the owner and holder of said shares of the said London, Paris & American Bank, Limited. That said Adolph Aronstein died testate, as aforesaid, and that no administration has been taken out upon his estate under the laws of England or Great Britain, and that under the laws hereinbefore quoted, if any transfer were made by said corporation other than under the laws of Great Britain, the said corporation would become liable for large costs, fines, and duties. It also alleges that, if said transfer were made at any time by said defendant "under said act of 28 & 29 Vict. § 57, the said London, Paris & American Bank, Limited, would become liable to the said commissioners for the value of said property, and for the duty thereon, and for the costs of the proceeding"; that neither the decedent nor his personal representative nor his duly authorized executrix has complied with the provisions of the companies act, nor with the articles of association, by-laws, agreements, or resolutions of the said corporation in force and effect at the time of the issuance of said shares and at all times since; that there is no instrument of transfer of said shares in form approved by said board; that there is no transfer of

any shares in said corporation executed by both the transferrer and transferee; that a certificate of said shares is not and has not been left with the secretary for examination. The answer further alleges that by subdivision 31 of the memorandum of association and under the by-laws of said corporation it is provided that "the board may decline to register any transfer made by a member indebted to the company, or where the certificate of the share proposed to be transferred is not left with the secretary for examination, or where the transferee is a person under any legal incapacity, or in the case of any share or shares not being fully paid up where the transferee is not approved by the board"; that said plaintiff has not complied with said subdivision 31; that each and every of said shares mentioned in the complaint herein lacks £4 sterling of being fully paid up; that said shares are not transferable under section 33, before quoted; and that there has not been produced to the said board such evidence of title as such board requires under section 34, and as is necessary under the laws of Great Britain, namely, administration upon the estate of the decedent and under the laws of Great Britain, and because the fee required by said section 38 has not been paid, and because the administration charges due upon said shares of stock have not been paid as required by the laws of Great Britain.

The provisions of the constitution and laws of California referred to in the opinion read as follows: Article 12, § 14, Const.: "Every corporation, other than religious, educational, or benevolent, organized or doing business in this state, shall have and maintain an office or place in this state for the transaction of its business, where transfers of stock shall be made, and in which shall be kept, for inspection by every person having an interest therein, and legislative committees, books in which shall be recorded the amount of capital stock subscribed, and by whom; the names of the owners of its stock, and the amounts owned by them, respectively; the amount of stock paid in, and by whom; the transfers of stock; the amount of its assets and liabilities, and the names and places of residence of its officers." Article 12, § 15, provides: "No corporation organized outside of the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

Henry Ach, for plaintiff in error.

Rosenbaum & Scheeline, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). This suit was commenced by Rosalie Aronstein, as executrix of the last will and testament of Adolph Aronstein, deceased, to recover damages against the London, Paris & American Bank, Limited (plaintiff in error herein), for the conversion of 50 shares of the capital stock of the corporation, owned by her deceased husband at the time of his death, she having demanded from the officers of the corporation at its place of business in the city and county of San Francisco, state of California, that said shares be transferred to her as such executrix upon the books of the corporation, and said demand having been met by a refusal. From the averments in the complaint it appears that Adolph Aronstein was a resident of San Francisco at the time of his death, the 27th day of August, 1901; that the defendant is a corporation organized under the laws of England, and is engaged in carrying on a banking business in San Francisco, and "has books in said city and county for the transfer of its capital stock"; that at the time of the demise of Adolph Aronstein he was the owner and pos-

essor of 50 shares of the capital stock of the defendant corporation of the value of \$8,500. To this complaint the corporation interposed a general demurrer, which was overruled by the court. Thereafter the corporation filed an answer, setting up the acts of parliament and laws of England, its charter and by-laws (a reference to which is made in the statement of facts), under which it claims that it is not authorized and cannot be compelled to make any transfers of shares of its stock in California which are held by executors or administrators of deceased persons who were residents of this state at the time of their death, "without administration upon such property under the laws of England and Great Britain." Upon the coming in of this answer the plaintiff in the court below (defendant in error herein) moved the court for judgment in her favor upon the pleadings, which motion was granted. Plaintiff in error contends: (1) That the court erred in overruling the demurrer; (2) that it erred in granting the motion for judgment on the pleadings.

1. Plaintiff in error, in support of its first assignment of error, contends that under the laws of California an executor or administrator does not obtain title to personal property belonging to the estate, but is only entitled to the possession thereof for the payment of debts against the estate and expenses of administration, and argues that the defendant in error had no legal right to have the shares of stock belonging to her husband's estate transferred to her own name. The answer to this is that she did not demand the transfer of the stock in her own individual name, but did demand "that the officers of said corporation should transfer the said shares of stock on the books of said corporation to plaintiff as executrix of the last will of said Adolph Aronstein, deceased." Although the plaintiff in the suit might not, at the time she made the demand, have been entitled to have a transfer made to herself individually on the ground that she was the owner, having title to the shares of stock, she, nevertheless, as executrix, had such a special right to the property as would enable her to bring a suit to recover its value if it was wrongfully converted. *Halleck v. Mixer*, 16 Cal. 574; *Jahns v. Nolting*, 29 Cal. 507, 510; *Ham v. Henderson*, 50 Cal. 367, 369. The fact suggested by the defendant in error that Mrs. Aronstein might vote the stock (*Railway Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225), or be eligible to a corporate office (*Cook, Stock & S.* § 623; *Schmidt v. Mitchell* [Ky.] 41 S. W. 929, 72 Am. St. Rep. 427), without having the transfer made on the books of the corporation, does not change the rule. The transfer of the shares of stock is a right to which, under the law of California, she is entitled, irrespective of other privileges given her by law. In *Ralston v. Bank*, 112 Cal. 208, 213, 44 Pac. 476, 477, the court said:

"We are not convinced that there is any fiction in ascribing the term 'conversion' to the defendant's refusal; but, however this may be, there is at the present day no difficulty in applying the remedy which was afforded by the common-law action of trover to a case where the owner of corporate shares has been wrongfully deprived thereof, even though his possession of the certificate evidencing his title has not been disturbed. *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80. See *People v. Williams*, 60 Cal. 1; *Dodge v. Meyer*, 61 Cal. 405. 'It may be stated as a rule,' says an eminent author,

though he dissents from its principle, 'that, where a corporation refuses to allow a transfer of shares upon its books, the assignee may treat this as a conversion of his shares, and sue the company for their value.' Mor. Priv. Corp. § 217. Such is the law as declared and enforced in this state. *Kimball v. Water Co.*, 44 Cal. 173, 13 Am. Rep. 157; *Fromm v. Mining Co.*, 61 Cal. 629. A suit in equity, where registration of the transfer may be compelled, or damages recovered as an alternative, may be preferable, but it is not exclusive of the remedy invoked in this action. Mor. Priv. Corp. §§ 216-221; *Cook, Stock & S.* §§ 289-292."

The executrix was entitled to the dividends, if any, on the shares of stock, and she was entitled to have the shares of stock transferred upon the books of the company to enable her to draw such dividends. In *Low. Tr. Stocks*, § 137, it is said:

"If a corporation refuses, without lawful excuse, to transfer stock upon its books * * * to the purchaser, the latter may treat the refusal as a complete denial of his ownership, and he may, therefore, sue the corporation, and recover the full value of the stock, as in a suit for the conversion of a chattel at common law."

The court did not err in overruling the demurrer.

2. The second assignment of error presents the question whether the constitution and statutes of the state of California or the acts of parliament and laws of Great Britain govern the question at issue. In the consideration of this question it must be remembered that during the time of all the transactions between the parties relative to the shares of stock in controversy Adolph Aronstein was, in his lifetime, a citizen and resident of the city of San Francisco, Cal., and that all of said business transactions occurred between the parties in the city and county of San Francisco. Preliminary to any discussion on the main point involved herein, it is deemed best to refer to a few of the many provisions in the charter and by-laws of the corporation. The prohibition against the transfer of the shares of stock where the holder thereof is indebted to the corporation has no application to a case like the present. Mrs. Aronstein legally represents the decedent. As such she is entitled to the possession of the shares of stock held by him in his lifetime as a part of the estate. If the corporation had any lien thereon for any part of the unpaid purchase price, it would not be lost by a transfer of the stock to her on the books of the company as the executrix of the estate. The lien on the shares, if any existed at the time of his death, would remain after such a transfer the same as before. The clause as to the form of the transfer has relation only to cases where the transferor and transferee are both living. How could the owner of the stock after his death join with his executrix in signing the form prescribed by the by-laws for the transfer of the stock on the books of the corporation? The application for the transfer of the shares of stock as demanded by the defendant in error did not have to be presented to the home secretary of the corporation for examination. Article 14 of the by-laws of the corporation, and the resolution passed on the 15th day of May, 1899, allow the transfer of the stock, if otherwise legal, to be made in San Francisco, Cal., and the constitution of California requires it to be so transferred. It is deemed unnecessary to notice any of the other provisions of the by-

laws of the corporation. It is evident from a perusal thereof that they constitute no defense to this action, except upon the theory that the corporation was not required to make the transfer until there was an administration upon the estate of Dr. Aronstein, deceased, in Great Britain. If the defendant in error be compelled to have the estate administered upon in England, she will, in addition to the expense incident thereto, be required to pay an inheritance tax to the English government of about \$600; but if the law, as applied to the facts herein, demands that such steps must be taken, she will have to bear this extra burden. Does the law require it? It must be conceded that, if there were no provisions in the constitution or statutes of California relating to or governing this question, the laws of Great Britain and the articles or memorandum of association of the plaintiff in error, which constitute its charter, would prevail.

In *Relfe v. Rundle*, 103 U. S. 222, 225, 26 L. Ed. 337, the court said:

"No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but, if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In *Railroad Co. v. Gebhard*, 109 U. S. 527, 537, 3 Sup. Ct. 363, 369, 27 L. Ed. 1020, the same principle is announced with greater elaboration. Among other things, the court said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank v. Earle*, 13 Pet. 588, 10 L. Ed. 274), though it may do business in all places where its charter allows and the local laws do not forbid (*Railroad Co. v. Koontz*, 104 U. S. 12, 26 L. Ed. 643). But wherever it goes for business it carries its charter, as that is the law of its existence (*Relfe v. Rundle*, 103 U. S. 226, 26 L. Ed. 337), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."

See, also, *Phosphate Co. v. Perry*, 20 C. C. A. 490, 74 Fed. 425, 428, 33 L. R. A. 252; *Murfree*, *Foreign Corp.* § 18; *Story*, *Conf. Laws*, § 23.

In line with these general principles it has been held that the validity of the assignment to pass title to stock in a corporation depends upon the law of the domicile of the corporation. *Black v. Zacharie*, 3 How. 483, 511, 11 L. Ed. 690; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109; *George H. Hammond & Co. v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960; *Masury v. Bank* (C. C.) 87 Fed. 381. These and other authorities of like import are cited by the plaintiff in error as sustaining the proposition that the laws of Great Britain are paramount. Within the limits stated, they are recognized as controlling; but not beyond. The constitution and statutes of California, which are copied in the statement of facts,

must also be examined, construed, and given the full weight to which they are entitled. What is the result? When the plaintiff in error came to California for the purpose of transacting its business, it brought its charter with it as evidence of the laws of its existence, of its right to do business. It might, if the state of California had deemed it proper, have been excluded from the transaction of business in this state. But under its laws she chose to permit such corporation to do business within her borders, subject to certain conditions and regulations prescribed by her constitution or imposed by statutory regulations. Recognition of its existence in other states, and enforcement of its contracts made therein, rest upon comity, and not upon inherent right. Under this comity California extends to foreign corporations the privilege of exercising the powers conferred by their charters beyond the limits of the country wherein they have their origin and existence. The only restriction on this rule of comity is that in giving effect to the foreign laws the state has properly taken the precaution to prescribe regulations and impose certain conditions, in order that no wrong, injury, or injustice may be done to its own citizens, and to see that the policy of its own laws is in no way contravened or impaired. This comity embraces and recognizes the artificial person which the foreign country created with all its capacities, obligations, liabilities, and powers. In *Hooper v. California*, 155 U. S. 648, 655, 15 Sup. Ct. 207, 210, 39 L. Ed. 297, the court said:

"The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States."

Noble v. Mitchell, 164 U. S. 367, 370, 17 Sup. Ct. 110, 41 L. Ed. 472; *Insurance Co. v. Spratley*, 172 U. S. 602, 621, 19 Sup. Ct. 308, 43 L. Ed. 569; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 46, 20 Sup. Ct. 518, 44 L. Ed. 657; *Insurance Co. v. Cravens*, 178 U. S. 389, 396, 20 Sup. Ct. 962, 44 L. Ed. 1116; *Diamond Glue Co. v. United States Glue Co. (C. C.)* 103 Fed. 838; *Williams v. Gaylord*, 42 C. C. A. 401, 102 Fed. 372, 375, affirmed in decision of supreme court (recently decided) 22 Sup. Ct. 798, 46 L. Ed. 1102.

We are of opinion that the constitution and laws of California, as quoted in the statement of facts, apply to the present corporation, and govern and control its business conducted within the state.

It is true that the courts in California cannot control the internal affairs of any foreign corporation. Such matters are to be conducted in pursuance of and in compliance with the provisions of the charter of the foreign corporation, and the laws of the country where it was created; but in the management and method of its business affairs in California with the citizens and residents thereof, in the sale or disposition or transfer of the shares of stock, it must conform to the laws of California in relation to such matters, and is bound thereby. In the recent case of *Williams v. Gaylord*, *supra*, the supreme court of the United States said:

"When a corporation sells or incumbers its property, incurs debts, or gives securities, it does business; and a statute regulating such transactions does not regulate the internal affairs of the corporation. And it is certainly within the power of a state to say what remedies creditors of corporations shall have over property situated within the state. * * * And we have no doubt of the power of the state to so prescribe, not only from its power over the manner of conveyance and the disposition of property situated within the state, but from its power over foreign corporations doing business within the state."

The defendant in error was entitled to have the transfer of the stock made upon the books of the company in her name as executrix of the estate of her deceased husband, under the laws of the state of California, and this right could not be denied to her because the estate was not administered upon at the domicile of the corporation in Great Britain.

The principles applicable to this case are analogous to those which are found in many insurance cases where the doctrine contended for by the insurance corporations was that letters of administration upon the estates of parties insured must be taken out at the domicile of the corporation. In *Insurance Co. v. Woodworth*, 111 U. S. 138, 144, 4 Sup. Ct. 364, 366, 28 L. Ed. 379, the court said:

"In the growth of this country, and the expansions and ramifications of business, and the free commercial intercourse between the states of the Union, it has come to pass that large numbers of life and fire insurance companies and other corporations, established with the accumulated capital and wealth of the richer parts of the country, seek business and contracts in distant states which open a large and profitable field. The inconveniences and hardships resulting from the necessity on the part of creditors of going to distant places to bring suits on policies and contracts, and from the additional requirement, in case of death, of taking out letters testamentary or of administration at the original domicile of the corporation debtor, in order to sue, has led to the enactment in many states of statutes which enable resident creditors to bring suits there against corporations created by the laws of other states. * * * In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable on death to an administrator, the corporation must be regarded as having a domicile there, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there."

The averments in the answer constitute no defense to this suit. The judgment of the circuit court is affirmed, with costs.

UNITED STATES ex rel. KERR v. CITY OF NEW ORLEANS et al.

(Circuit Court of Appeals, Fifth Circuit. October 7, 1902.)

No. 1,128.

1. COURTS—UNITED STATES CIRCUIT COURT—JURISDICTION—JUDGMENT—MANDAMUS TO ENFORCE.

The circuit courts of the United States have power to issue writs of mandamus in aid of an existing jurisdiction only; and when such writs are issued to enforce a judgment of the circuit court the jurisdiction cannot be enlarged to enforce a judgment of the state court, though such judgment was the foundation of the action in the circuit court.

2. SAME—JUDGMENT AGAINST MUNICIPALITY—FILING WITH COMPTROLLER—NECESSITY.

Laws La. 1870, Act No. 5, denies the power of courts to issue writs of execution or fieri facias against the city of New Orleans, and declares that final executory judgments against such city may be filed and recorded in the city comptroller's office, to be thereafter paid from money set apart in the annual budget, or from the annual estimate for contingent expenses. *Held*, that where relator filed a judgment recovered against such city in the state courts, and thereafter brought suit against the city in the federal court on such judgment, but failed to file the judgment subsequently recovered in the federal courts, he was not entitled to mandamus from the federal court to compel the city officers to include the amount of the judgment in the annual budget of expenses, and to pay the same.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

H. L. Lazarus, for plaintiff in error.

Arthur McGuirk, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The case shows that on February 7, 1898, the relator, George P. Kerr, recovered a judgment in the supreme court of the state of Louisiana against the city of New Orleans for the sum of \$2,503, with legal interest thereon from September 10, 1892, together with all costs incurred. As stated in the opinion of the supreme court, the judgment rendered was founded upon a contract. *City of New Orleans v. Kerr*, 50 La. Ann. 414, 23 South. 384, 69 Am. St. Rep. 442. This judgment was duly recorded in the office of the comptroller of the city of New Orleans, in accordance with the provisions of Act No. 5 of the Laws of Louisiana of 1870. On March 13, 1900, Kerr brought a suit in the United States circuit court for the Eastern district of Louisiana on the above-mentioned judgment for the purpose, now alleged, of making it the judgment of the said circuit court, and in said suit Kerr recovered a judgment against the city of New Orleans for the sum of \$2,503, with legal interest from September 10, 1892, and for \$152.90 costs, with legal

¶ 2. Mandamus to enforce payment of judgment against municipality, see note to *Holt Co. v. National Life Ins. Co.*, 25 C. C. A. 475.

interest thereon from April 5, 1898. This judgment does not appear to have been recorded in the office of the comptroller of the city of New Orleans in accordance with the provisions of Act No. 5 of 1870, Laws of Louisiana. Several efforts were made by Kerr to enforce the payment of the judgment of the circuit court through duly issued writs of fieri facias, under which certain alleged property of the city of New Orleans was seized, but at the suit of the city the seizures were enjoined pendente lite. On December 7, 1901, the relator instituted this suit, wherein, after reciting the several judgments he had obtained, and that the judgment of the supreme court of the state was duly recorded in the office of the comptroller of the city of New Orleans under the provisions of Act No. 5 of the Laws of 1870; that under the provisions of said act it was the duty of the city council to appropriate a sum sufficient to pay said judgment from the annual budget; that the said city of New Orleans for the past three years had neglected and refused to make any appropriation out of the revenues of the city for the payment of judgments rendered against the said city; that the city council of the city of New Orleans were about to prepare its budget for the year 1902, and that they will not make any provision for the payment of the same,—he prayed for a writ of mandamus directed to the mayor and the city council of the city of New Orleans ordering them to insert in their budget of appropriations for the year 1902 the sum of \$2,503, with 5 per cent. interest from September 10, 1892, and costs, to pay the judgment obtained by relator against the city of New Orleans, and further ordering them to assemble and adopt the budget, etc. To the alternative writ of mandamus obtained in this suit the city of New Orleans made answer, denying the relator's right to the writ upon the grounds, among others, that under the provisions of Act No. 5 of 1870, in effect at the time his cause of action arose, relator is not entitled to mandamus to enforce his judgment, and that the petition discloses no legal or valid cause of action. On these pleadings a trial by jury was waived, and the cause of action submitted to the judge presiding in the circuit court, who found the facts in the case, and denied the writ on the ground of prematurity, in that the city council had not adopted any budget, and because two executions to enforce relator's judgment were outstanding. Act No. 5 of the Extra Session of 1870 in terms denies the power of the courts to issue writs of execution or fieri facias against the city of New Orleans, and prescribes that final executory judgments against the city may be filed and recorded in the office of the city comptroller, to be thereafter paid on proper warrant from any money in the treasury especially designated and set apart for that purpose in the annual budget. The act further provides that, in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans shall have been exhausted, the common council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses a sufficient sum to pay the same; but, if no such appropriation be made, then that all judgments shall be paid in

the order in which they shall be filed and registered in the office of the comptroller of the city from the first money next annually set apart for that purpose. As the relator invokes this act to support his present contention, he should show a compliance with the provisions of the same as to the registry of his judgment. See *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132. The registry with the city comptroller of the judgment of the supreme court of the state cannot be taken as an equivalent to the registry of the subsequently recovered judgment in the circuit court. Except in a few cases provided for by law, the circuit courts of the United States can only issue writs of mandamus in aid of an existing jurisdiction, and when such writs are issued by any circuit court to enforce its own judgment the jurisdiction cannot be enlarged to cover the judgments of other courts. Before the city authorities can be compelled, under Act No. 5 of the Extra Session of 1870, to pay the judgment of the circuit court, that judgment must be filed and recorded in the office of the city comptroller. The relator understood this, for he filed and recorded the judgment of the supreme court of the state, on which the judgment of the circuit court was based. To allow the mandamus herein demanded would either be to use the process of the circuit court to enforce the judgment of the supreme court of the state, or else to excuse the relator from complying with the prerequisites of the law which he invokes, and seeks to have enforced in his own interest. It may be that the recording of the judgment of the circuit court in the office of the city comptroller can be and was waived in this case, but we find no reference thereto in the record, and the answer of the city of New Orleans negatives such waiver.

For the reasons herein given, the judgment of the circuit court is affirmed.

GENERAL ELECTRIC CO. v. BROOKLYN HEIGHTS R. CO.

(Circuit Court, E. D. New York, May 29, 1902.)

1. PATENTS—INFRINGEMENT—ELECTRIC RAILWAY MOTORS.

The Knight patent, No. 354,793, covers a combination of two motors in the same circuit for use on electric railways with a controlling device for each adapted to be operated from a common point. As illustrated in the specification and drawings, such device consists of a small or pilot motor connected with each power motor, controlled by a common switch, and which operate mechanism for shifting the commutator brushes. Claim 2 is limited in terms to such device, but claims 10 and 11 claim broadly the combination of the motors with any controlling device operated from a common point. *Held*, that such claims were not limited by the specification to a combination in which the controlling device operates by shifting the brushes, and that they were infringed by one in which the controller operated by introducing a rheostat to interrupt and waste the current, instead of reversing it.

In Equity. Suit for infringement of letters patent No. 354,793 for electric railway motors, issued to Walter H. Knight December 21, 1886. On final hearing.

Betts, Betts, Sheffield & Betts (Frederic H. Betts and L. F. H. Betts, of counsel), for complainant.

Mitchell, Bartlett & Brownell (C. E. Mitchell, T. W. Bakewell, H. B. Brownell, and Thomas Ewing, Jr., of counsel), for defendant.

THOMAS, District Judge. The bill charges the defendant with infringement of letters patent No. 354,793, issued to Walter H. Knight on December 21, 1886. The claims involved are as follows:

"(2) The combination, with two separate trucks of a car or train, of an electric motor on each truck in the same circuit and connected to the axles of the trucks, movable commutator brushes for each motor, and shifting devices for said brushes controlled from a common point."

"(10) The combination of two electric motors in the same circuit having a common load, a controlling device for each of said motors independent of said circuit, and actuating mechanism for said devices adapted to be operated from a common point.

"(11) The combination of two electric motors in the same circuit having a common load, a controlling device for each motor independent of said circuit, and electro-dynamic mechanism actuating said devices and included in a common circuit."

Passing for the moment some other differences, it is observed that claim 2 differs from claims 10 and 11 by providing in terms for "movable commutator brushes for each motor, and shifting devices for said brushes." Such shifting devices are not employed by the defendant, and, if they are a necessary element of any claim, it is not infringed.

It is necessary to consider, first, what Knight stated he had invented. He declared that he had "invented certain new and useful improvements in electric motors for railways," and then:

"My invention consists in the combination of two electric motors in the same circuit and connected to a common load, the motors each having means for shifting their commutator brushes and a common device for actuating

said means. It further consists in the application of two motors so combined to an electric railway."

The specification refers to several drawings, not necessary to produce here, of which Figs. 1 and 2 illustrate the invention as applied to an electric locomotive, and 3, 4, 5, and 6 show the invention, when the two motors are upon separate trucks of a car or train; the inventor stating that:

"Instead of both motors being combined in a single locomotive, they may be upon separate trucks of a car or train, and both be controlled from a single point."

The description of the invention, as applied to an electric locomotive, is this:

"The brushes are adapted to be moved around the commutator in any of the well-known ways. In this case the brush holders, D, D', are adapted to be shifted in either direction by means of levers, d, d', which are connected at their upper ends by cross-bar, E. Through a vertical slot in E projects a pin, p, from hand lever, F, which moves over a notched segment, G. The two motors will be both connected in circuit with the main conductors of the railway in any of the well-known ways, and I have found that both sets of brushes may be so adjusted as to be simultaneously moved by a common lever, and both kept at the point of least sparking, and both motors be controlled at will, independently of the circuit through them."

Hence, when the invention is applied to an electric locomotive, it is illustrated diagrammatically and descriptively as providing for shifting commutator brushes, and means for shifting the same, and there is a distinct expression of the conceptions—First, that the two motors will be both connected in circuit with the main conductors of the railway in any of the well-known ways; second, that both sets of brushes may be so adjusted as to be simultaneously moved by a common lever, so that both may be kept at the point of least sparking, and both motors be controlled at will independently of the circuit through them.

Passing to motors adjusted upon separate trucks of a car or train, both of which are to be controlled from a single point, detailed descriptions with reference to Figs. 3, 4, and 5 are found, and then this language:

"When two or more such trucks are placed under a car or train, it will be, of course, of especial importance that their motors should have their commutator brushes controlled from a common point. This can be done in any mechanical way; but it is more conveniently attained by electrical means, as is shown in the diagram, Fig. 6. Upon each motor I place a smaller motor having its armature geared to the brush holder, so as to shift the brushes in one direction or the other, according to the direction of its rotation. These small motors are in series in the same circuit, which may be a branch circuit from the main conductors, + and —, as is shown in the present instance. The direction of current in this circuit is controlled by lever, L, which is placed at some convenient point on the car or train where the driver may be stationed. This lever, L, operates a pole changer in the circuit, which is of ordinary construction, and need not be minutely described. When in its vertical position no current passes through the small motors, and they remain at rest; but, when it is moved, a current passes of a polarity determined by the direction of movement, and actuates the motors to shift the brushes in one direction or the other. Any electro-dynamic devices may be employed in lieu of the motors."

After providing for a device by which the operator may see whether one motor is free from injurious sparking, and thereupon infer a similar condition of the others, the specification adds:

"Any number of motors may, of course, be provided with a common brush-shifting device, without departing from the spirit of my invention."

Thereupon follow the 18 claims.

The first important question to be decided is whether brush-shifting devices so far enter into the spirit of the invention as to relieve the defendant, not using them, from infringement. What did Knight believe he had invented? What did he describe? And did he intend to limit himself to the one exhibited mode of applying his invention? Referring to claims 10 and 11, it is evident that Knight intended, as prominent elements of the combination, two electric motors, a controlling device for the same, and an actuating mechanism for such devices, operated from a common point. Whatever else the letters show, these factors clearly appear. If the motors be upon separate trucks of a car or train, the control thereof from a single point is one indispensable condition, controlling devices for the motors is another indispensable condition, and actuating mechanism is another. Hence, claim 10, if unfettered and unconditional, provides for a control of two electric motors, by devices actuated by mechanism operated from a common point. Claim 11 is of similar import. Claims 10 and 11 do not in terms limit the controlling device to means for shifting commutator brushes. The words are, "a controlling device," whereof there is actuating mechanism, and operation thereof from a common point.

The brush-shifting form of controller was not new; but Knight was using it, it was the only form to which he referred, and the only form of which there is any conception expressed in the descriptive portion of the specification. Nevertheless, no person before Knight had provided for controlling electric motors by controllers actuated by an electrodynamic device operated from a common point; that is, he stated that the operator, by the movement of his switch, could operate a pilot motor, which in turn should actuate a device that should control motors, so that there would be harmony of action. The defendant employs this unitary control to operate a pilot motor to actuate a motor which controls the car motors. The motor controlling the car motor does not shift the commutator brushes, but introduces a rheostat. In the complainant's invention, the control is obtained by the movement of the brushes tending to reverse the direction of the current. In the defendant's device, the control is obtained by interrupting and wasting the current. But the importance of the invention is not in the reversal of the current, or means therefor, which was by no means new, but in this: that the operator could, by controlling the pilot motors, affect the car motors through intermediate controllers,—first, the operator, then the pilot motor operated by him, and in its turn actuating a device controlling the car motor. That was the train of thought in Knight's mind, and that he expressed; but when he came to illustrate its mode of operation he used a motor controller, which consisted of means for shifting the brushes, and he embodied this thought of

shifting brushes in the second and in several other claims. But in claims 10 and 11 he was indefinite as to the nature of the controlling device, and generalized by using the words, "a controlling device."

After a consideration of the extended argument, which has been presented to the court orally and in the briefs, the most important consideration is thought to be this: Is the apprehension that two or more motors may be controlled by the operator, by means of a pilot motor actuating each motor controller, limited to a particular form of motor controller, from the mere fact that the inventor, in all his diagrams and in his whole description, illustrates his invention by means of such particular form of controller, although he selects certain claims, and therein uses language so broad and indefinite that such particular controller is not specifically pointed out? This invention was valuable, and, if the inventor had not limited himself in his descriptions to a controlling device which shifts the brushes, the great utility and benefit of the invention should be manifest and freely acknowledged. The question is not free from doubt; but it is finally thought that the defendant should not be permitted to claim the advantage of Knight's invention, by changing his motor controller so as to interrupt and waste the current, rather than to diminish its efficiency by reversing its direction. This leads to the first conclusion, that claims 10 and 11 are not limited to a controlling device that involves movable commutator brushes, and to the conclusion that claim 2 is in terms limited to a controller that shifts movable commutator brushes.

It is further urged on the part of the defendant that the terms of claims 10 and 11 are such in other respects that the defendant's device does not infringe. As to claim 10 it is urged that it provides for a controlling device for each motor, but that the defendant uses the same controlling device for more than one motor; that defendant's controllers are not independent of the circuit in which the electric motors are, but act upon the same rheostatically; that the defendant has no common circuit for its motors, and therefore cannot have the controllers independent of any such nonexistent common circuit. As to claim 11, the defendant differentiates its apparatus in the manner stated with reference to claim 10,—that is, that the motors are not in the same circuit, but each car has its own motor circuit, which is separately connected to the source; that defendant's motors do not have a controlling device for each motor; that defendant's controllers act directly upon the circuit to choke and interrupt it, and so can and do control two motors on each of defendant's cars; that the controllers are not independent of the circuit through the control motors.

These contentions of the defendant are not without force, but are open to controversy; and, if the complainant's invention be given the broad interpretation accorded by the conclusion already reached, the doubt should be resolved in favor of the complainant. An invention of such magnitude and utility should not be disturbed because the claim calls for a controlling device for each motor, and the defendant uses the controlling device for two motors, or a group of motors; nor should the defendant be permitted to use such invention because

it may be found that his controller is placed in the main circuit, for the purpose of interrupting the same, rather than upon a subsidiary circuit. Giving to such attempted differentiation all the consideration that is due it, it seems that there is an appropriation of the great main thought and statement of Knight's invention, with some difference in the mode of employing the same, the most marked being an interruption of the current, rather than a change of its direction, and that all that was of chief value in Knight's propositions, viz., unitary control of mechanism actuating the controllers of the motors, is retained.

For the reasons stated, there should be a decree that the defendant has infringed claims 10 and 11, and that it has not infringed claim 2.

NATIONAL TOOTH CROWN CO. v. MACDONALD.

(Circuit Court, N. D. California. July 14, 1902.)

No. 13,046.

1. PATENTS—INVENTION—SUBSTITUTION OF MATERIALS.

Substitution of materials used as means for making an article is not invention, unless such substitution involves a new mode of construction, or develops new uses and properties of the article made, or unless the substituted material is more efficient in action.

2. SAME—MOLD FOR MAKING TOOTH CROWNS.

The White patent, No. 571,102, for a mold for shaping metallic tooth crowns, was anticipated by the Parker patent, No. 537,481, for a swage for dental plates and analogous articles; the operation of the two devices being practically the same, and the only substantial difference being in the material used for swaging purposes.

In Equity. Suit for infringement of letters patent No. 571,102, for a mold for shaping metallic tooth crowns, issued November 10, 1896, to Louis Lynn White. On final hearing.

James L. Hopkins, John J. Scrivner, and Jeff. P. Chandler, for complainant.

James H. Boyer, for defendant.

MORROW, Circuit Judge. This is a suit in equity for the infringement of letters patent. The complainant, a California corporation, alleges that by divers mesne assignments in writing it has acquired the entire right, title, and interest in and to letters patent of the United States numbered 571,102, issued on the 10th day of November, 1896, to Louis Lynn White for an improvement in molds for shaping metallic tooth crowns; that it is making the molds under the said patent, and each mold so made by it bears thereon the word "patented," together with the date and number of the said letters patent. It is alleged that the defendant is violating the rights of the complainant by the making and using of molds containing and embracing the invention of the said White. An injunction is prayed for, and an accounting by the defendant; that the proper amount of damages may be decreed, etc. The defendant makes a general denial to the charges of the bill, and, as matter of defense,

sets up letters patent of the United States numbered 537,481, granted to J. C. Parker on April 16, 1895, for an improved swage for dental plates and other analogous articles of manufacture, as anticipating the patent under which complainant sues. The complainant's invention is designed for the manufacture of metallic tooth crowns that shall be formed of a single piece of metal, without soldered seams, and completely conforming to the contour of the natural tooth. A cast is first taken of the tooth to which the crown is to be applied, and from it a metallic die is made. A disk of gold is then shaped into a cap or cup, by means common in the art, fitted to the metallic die, and manipulated by mild hammering to reduce and round the edges of its grinding surface. At this point the mold contained in the complainant's device enters into use. He provides a casing containing a soft metal core or mold, with a hole for the reception of the metallic die and its gold covering. By appropriate pressure, the die is forced into the soft metal, and the soft metal itself, acting in accordance with the laws governing fluids under pressure, forces or swages the sides of the thin gold or other metallic cap into conformity with the inner metallic die. In the alleged anticipatory device, a mold is made from the initial impression of the plaster cast, a thin plate of aluminum, gold, or other ductile material is roughly formed around said mold, and the mold then placed within a cup-shaped casing. A quantity of granular, shot-like material is then placed around the mold, filling the space between the mold and the casing. Vertical pressure is brought to bear upon the shot-like material. By reason of the curved surface of the casing, and the conversion of the shot into a solidified mass under pressure, the pressure upon the mold is practically equal in all directions, and the thin metal plate is thus made to conform to the contour of the mold. The same law of operation is undoubtedly involved in these devices. In the Parker patent it is stated that the object is to obtain a pressure that will be practically equal, without the use of water or other liquid. For this purpose, shot-like material is used as an adjustable medium. In the complainant's device a soft, solid material is used in the place of the shot. In each case a solid core is formed around the mold and its covering. The idea of each device is to produce a perfectly formed or contoured covering upon a certain shaped die,—in the Parker patent a dental plate, and in the complainant's patent a tooth crown,—without seaming or soldering. In each case a receptacle approximating to the form of the die is used, and the intervening space filled with a material that, under vertical pressure, gives lateral pressure upon the die, thus swaging the metallic covering to the perfect contour of the die. It is urged that the complainant's device differs from that of Parker in that the character of the article intended to be formed—namely, the tooth crown—is of a wholly different shape from the dental plate; that instead of a comparatively flat curved plate, which may be formed by means of force acting in a vertical direction, the object is to compress laterally a cup or sack-like shell around a die. Also, that the variation in form of the interior of the casing of the complainant's device, and the providing of an aperture in the casing for the escape of superfluous metal, con-

stitute such an improvement in the art as to involve invention. In the opinion of the court these variations from the earlier patent are merely such a carrying forward of the original idea as would naturally present itself to the mind of any skilled metal worker. "Something more is required to support a patent than a slight advance over what has preceded it, or mere superiority in workmanship or finish." *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 62, 11 Sup. Ct. 716, 35 L. Ed. 347, and cases there cited. Substitution of materials in the production of an article is not invention, unless such substitution involves a new mode of construction, or develops new uses and properties of the article made; or, where the superiority of the substituted article is shown to consist not only in greater cheapness and greater durability, but also in more efficient action. *Walk. Pat. (2d Ed.)* §§ 28, 29. Such a showing has not been made in this case.

Let a decree be entered for the defendant.

H. W. JOHNS MFG. CO. v. NEW YORK ASBESTOS MFG. CO. et al.

(Circuit Court, E. D. New York. June 2, 1902.)

1. PATENTS—INFRINGEMENT—COVERING FOR STEAM PIPES.

The Pierce divisional reissue, No. 10,376 (original No. 252,400), for a covering for steam pipes, *held* valid, and claim 1 infringed.

In Equity. Suit for infringement of reissued letters patent No. 10,376, issued August 26, 1883, based on a part of original patent No. 252,400, granted to Jas. D. Pierce January 17, 1882, for a covering for steam pipes. On final hearing.

Wetmore & Jenner (Edmund Wetmore, of counsel), for complainant.

Schreiter & Mathews (Henry Schreiter, of counsel), for defendants.

THOMAS, District Judge. Letters patent No. 252,400 were issued to James D. Pierce on January 17, 1882, for which, on August 26, 1883, upon the application of the patentee's successors in title, a patent in two parts was issued, to wit, letters Nos. 10,375 and 10,376. The bill charges infringement of letters 10,376. In 1898 this court, after a hearing before Judge Lacombe, in the Southern district of New York, in a suit wherein the present complainant charged infringement of letters 10,376 by Henry W. Robertson and another, decreed that letters 10,375 were inoperative, and the validity and infringement of 10,376. Reissues of patents are authorized by Rev. St. § 4916:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, * * * the commissioner shall * * * cause a new patent for the same invention * * * to be issued. * * * The commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant; * * * but no new matter shall be introduced into the specification."

The inventor applied for the "reissue in two divisions, A and B, of letters patent No. 252,400, and states:

"The drawing and specification as a whole indicate, and the state of the art shows, that the most important feature of applicant's invention is providing a covering with adequate dead air spaces by means of corrugation or indentations in one or more layers forming a covering composed of non-conducting material, whether of paper or not; and in this respect the patent is wholly inoperative, and affords applicant no protection."

This statement refers to the following portion of the specification in letters 10,376, the italicised words showing the only amendment in such part:

"If my covering is designed for a flat surface, I merely secure flat layers of paper to each other in lines A', and through these make the cuts which divide the covering into blocks or sheets. As the layers which compose my improved covering are only secured together in lines, through which the dividing cuts are to be made, there will be left between the layers at other points (those between the secured portions) a great deal of space for noncirculating or dead air, and this gives to my covering, *if corrugated or indented*, a maximum power to resist the passage of heat through it, and, *if plain*, a resistance considerably above the maximum of a covering composed of layers secured together over substantially their entire surface."

Concerning this amendment Judge Lacombe said in the Robertson Case (C. C.) 89 Fed. 504:

"Comparing the language of the two descriptions, it may be readily understood why the inventor deemed it advisable to indicate more sharply the particular merit of his invention, viz., the artificial production of numerous air spaces in a pipe covering of paper without employing other materials, such air spaces being so arranged that the air therein is not free to circulate."

It would seem, therefore, from the opinion of the learned judge, that the patent was neither inoperative nor invalid, and that the amendment was made for the mere purpose of emphasis. The reissue of letters 10,375 and the history of the same indicate that marked departure was intended from the primary conception, and the claims based thereon, as expressed in the original letters. But this court, in the Robertson Case, decreed that the reissued letters 10,376 are valid, and the conclusion then reached should be followed. Moreover, claim 1 was construed, and held broad enough to cover the Robertson structure; and the court's reasoning would bring the defendant's covering within the claim. No anticipatory device is added to those considered in the former suit, which constrains this court to annul or limit the claim. The single question is, does claim 1 fairly admit of an interpretation that would include defendant's covering? Read apart from the specification, it is capable of such construction. Whether the inventor intended that it should have such expansion admits of grave doubt and serious discussion; but the learned judge in the Robertson Case must have considered such doubt, taken notice of uncertainties, and found the balance of probabilities in the complainant's favor. In the same circuit a claim should not be construed at different terms, by different judges, in different ways, upon records not materially distinguishable, when the former conclusion is one not opposed to settled convictions.

Surely, the former holding may be used to solve a doubt, even as serious as the one now held concerning the right of the complainant to the relief now asked.

Pursuant to these views, the complainant should have a decree.

NEWHALL v. McCABE HANGER MFG. CO. et al.

(Circuit Court, S. D. New York. July 15, 1902.)

1. PATENTS—INFRINGEMENT—THERMAL DOOR-CLOSING APPARATUS.

The Kingsland patents, No. 680,415, claims 4 and 5, and No. 680,458, claim 20, each covering a thermal door-closing apparatus, *held* not anticipated, valid, and infringed on a motion for preliminary injunction.

In Equity. Suit for infringement of letters patent No. 680,415, granted August 13, 1901, to Oliver H. Kingsland, for a thermal door-closing apparatus, and No. 680,458, granted to the same patentee for a door-closing apparatus. On motion for preliminary injunction.

Frederick S. Duncan, for complainant.

Ewing, Whitman & Ewing, Thomas Ewing, Jr., and George H. Gilman, for defendants.

THOMAS, District Judge. The motion is to restrain the manufacture and sale by the defendants of a fire door lock, on account of alleged infringement of claims 4, 5, and 10 of complainant's patents No. 680,415, of August 13, 1901, on thermal door-closing apparatus, and claim 20 of patent No. 680,458, of the same date, on door-closing apparatus, both issued to Oliver H. Kingsland. The claims involved are as follows: Patent No. 680,415:

"(4) The combination, with a self-closing door, of a sliding bolt capable of being manually moved in the path in which it slides, and a device comprising a thermal fuse for holding it in that path, releasable by heat for permitting the movement of the bolt out of that path.

"(5) In a thermal door-closing apparatus, a self-closing door, a thermal fuse, a bar extending across the line of travel of the door and capable of being manually withdrawn out of said line of travel, a locking device connected with said thermal fuse for holding the bar in said path when the fuse is intact, and permitting the movement of the bar out of said path when the fuse is broken."

"(10) A manually movable bolt, a movable support upon which said bolt is movably mounted, a thermal fuse, retaining devices engaging said support, and means connected to said thermal fuse to releasably hold said support and said retaining devices in engagement, whereby, if said bolt is engaged by a self-closing door, the force of said door tends to disengage said support and said retainer."

Patent No. 680,458:

"(20) The combination, with a self-closing door, of a sliding bolt capable of being manually moved in the path in which it slides, and a device for holding it in that path, releasable by heat, for permitting the movement of the bolt out of that path."

The defendants' device is the subject of letters patent No. 703,347, issued June 24, 1902, to James T. McCabe. The following extract from the specification describes it:

"A represents a wall having therein the passage, B, which it is desired to protect by the door, C, the door sliding on the inclined track, D, which tends to throw the door to its closed position. A plate, E, is attached to the wall of the passage, and is provided with retainers, F, which normally hold the shell, G, inclosing the bolt, H, the bolt being capable of being manually slid in the shell (the latter being held by the retainers) to disengage it from the door. The bolt and shell together form what may be generically termed a 'latch.' The bolt-shell, G, has a hook, I, thereon, and to this hook is attached a cord, wire, or chain, J, which passes freely over a pulley, K, and is attached to a fixed support, as at L. Inserted in this cord is a piece, M, of any suitable construction, which will melt, or otherwise break the continuity of the cord, upon excessive heat, whereby, as the sleeve is held in the retainers by such cord, the sleeve and bolt will be released therefrom, and permitted to drop out of the retainers, whereby the door will be released, and permitted to close to protect the passage. It will be noted that the manual movement of the bolt disengages the latch from the door without affecting the fastening between the latch and retainers, while the automatic release effected by excessive heat frees the bolt and bolt-carrier from the sleeve without directly affecting the engagement between the latch and the door. It will be obvious, however, that the position of the plate, E, may be reversed between the wall and door without departing from the spirit of my invention.

"Having thus described my invention, what I claim, and desire to secure by letters patent of the United States, is: (1) The combination, with a self-closing door, of a detachable bolt-carrier, a retainer for said carrier, a bolt sliding in the carrier for holding the door in an open position, but capable of being manually moved to disengage it from the door, and a device, releasable by heat, for holding the bolt-carrier in the retainer, substantially as described. (2) The combination, with a self-closing door, of a bolt for holding the door in an open position, a fixed support, a bolt-carrier detachably secured to the fixed support, and a device releasable by heat for holding the bolt-carrier to the fixed support, substantially as described. (3) The combination, with a self-closing door, of a sliding bolt for holding the door in an open position, capable of being manually moved to disengage it from the door, a detachable carrier, in which the bolt is held for movement, and a device, releasable by heat, for holding the carrier in place, substantially as described. (4) The combination, with a self-closing door, a latch to hold the door in an open position, a retainer for the latch, normally holding it against movement with the door, the latch being capable of being manually moved in the retainer to disengage it from the door, and means releasable by heat for disengaging the latch from the retainer, substantially as described."

It is difficult to escape the immediate conclusion that the defendants' device falls within the language and meaning of claims 4 and 5 of patent No. 680,415, and claim 20 of patent No. 680,458. It is not apparent that it is within claim 10 of patent No. 680,415. This claim provides for an arrangement "whereby, if said bolt is engaged by a self-closing door, the force of said door tends to disengage said support and said retainer." In the defendants' device the bolt is released by the severance of the cord which sustains it. Thereupon it would drop away from the retainers, and there would be no resistance to this release were not the door pressing the bolt against the retainers, and thereby tending to hold it in place. It is to obviate the effect of this very tendency that the retainers are flared in such a way as to allow the bolt to be moved out by the pressure of the door. However, it is not primarily the pressure of the door that tends to disengage the bolt, but the release of the fuse. The pressure of the door is at this time an evil, which is overcome by the flaring

retainers. It is unnecessary to determine definitely this question at the present time.

There are some special equities urged in behalf of the complainant, which need not be considered. Both devices are quite simple, and it is concluded that defendants' apparatus falls within the complainant's rights. It is urged that the complainant's patents have been anticipated. This does not appear to be the case.

The motion for a preliminary injunction is granted as to claims 4 and 5 of patent No. 680,415 and claim 20 of patent No. 680,458.

CIMIOTTI UNHAIRING CO. v. AMERICAN FUR REFINING CO.

(Circuit Court, D. New Jersey. August 28, 1902.)

1. PATENTS—PRELIMINARY INJUNCTION—MACHINE FOR PLUCKING FURS.

Complainant *held* entitled to a preliminary injunction against infringement of the Sutton patent, No. 383,258, for a machine for removing the hairs from fur skins, on the strength of the showing made, and the numerous decisions of the courts of the Second circuit sustaining and construing the patent.

2. SAME.

The court may award a temporary injunction against infringement, even after the cause has been heard and submitted on the merits, where satisfied that complainant is entitled to such protection.

In Equity. Suit for infringement of letters patent No. 383,258, granted to John W. Sutton May 22, 1888, for a machine for removing the hairs from fur skins. On motion for temporary injunction.

L. C. Raegener, for plaintiffs.

H. C. Schreiter, for defendants.

ARCHBALD, District Judge (orally).¹ The impression left upon me at the former argument was that the only question was one of anticipation between the Lake and Sutton patents. But whether the case turns upon that, or on the question of infringement, on which the defendants seem now to particularly rely, both these questions have been passed upon and decided adversely to the defendants by the court of appeals of the Second circuit. *Cimiotti Unhairing Co. v. American Unhairing Mach. Co.* (C. C. A.) 115 Fed. 498; *Same v. Comstock Unhairing Co.* (C. C.) 115 Fed. 524. The case comes up in this circuit necessarily overshadowed by these decisions. I was very nearly ready to dispose of it at the hearing on the strength of them. There was enough, however, suggested to make me feel it to be my duty to look into the matter anew, and form an individual judgment of my own, which I propose to do. At the same time it is a question whether the plaintiffs are not entitled to an injunction solely on the ground of these decisions in their favor. It may be unusual to move in this way for a special injunction after the case has been heard upon the merits and is in the hands of the court for final disposition, but the practice is not so far out of course that I need hesitate if I am convinced that an injunction should be awarded.

¹ Specially assigned.

As to this it must be remembered that the litigation in the Second circuit has been very extended, involving every phase of the case, and passed upon, in one form or another, by almost every judge in that circuit. See (C. C.) 95 Fed. 474; (C. C.) 98 Fed. 297; (C. C.) 108 Fed. 82; (C. C.) 113 Fed. 588; *Id.* 698, 699. Without undertaking to conclude myself on the merits, I must say that the plaintiffs are more than ordinarily entitled to the fruits of this successful litigation, not only in their own circuit, but in others. The line which divides the two circuits in this instance is a narrow one, and there is much to suggest that the plaintiffs in the present case are dealing with the very same parties as before, under a new corporate name, and transposed to a conveniently neighboring locality (from New York to Hoboken). Under such circumstances I think they should be protected by the injunction asked for, based on the strong *prima facie* showing in favor of the validity as well as infringement of the patent which they make. The defendants, if injured thereby, can be secured by requiring of the plaintiffs a bond of indemnity, or, if they desire to go on undisturbed, I will withhold the injunction, provided they give a corresponding bond to pay whatever may be awarded by the final decree, if against them.

Let an injunction issue as prayed for until the further order of the court upon the plaintiffs giving bond in \$5,000, with proper security, with leave to the defendants to dissolve the same on filing a counter bond in a like sum to pay such sums, if any, as may be finally found against them.

NATIONAL PHONOGRAPH CO. v. SCHLEGEL et al.

(Circuit Court, S. D. Iowa, E. D. October 6, 1902.)

No. 245.

1. INJUNCTION—STIPULATION OF PARTIES—DISCRETION OF COURT.

An injunction is not granted as of course, but only in the discretion of the court, where it is necessary to prevent irreparable injury, for which there is no adequate remedy at law; and in the exercise of such discretion the court will refuse to award the writ where the cause has not been litigated on the merits, and it appears from the fact that defendant has interposed no defense, but has stipulated that a permanent injunction shall issue against him; that it is not necessary to protect any rights of complainant as between the parties, but is apparently sought solely for the effect it may have upon others with whom complainant has similar contract relations.

2. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE — RESTRICTIONS UPON SALES OF PATENTED ARTICLES.

Complainant alleged in its bill that it was exclusive licensee for the sale in the United States of Edison phonographs, blanks, and records, which were covered by patents owned by its licensor; that, in order to protect the public and dealers, it required all purchasers, whether jobbers or retail dealers, to sign a contract that they would not sell the instruments at less than the list prices furnished by complainant. *Held*, that such a contract was not one which a court of equity would enforce by an injunction restraining a purchaser from selling instruments which he had bought from complainant, and paid for, at less than the prices fixed by complainant.

In Equity. On application for a decree granting a perpetual injunction in accordance with a stipulation of the parties.

Robert W. Hayes and W. J. Roberts, for complainant.

McPHERSON, District Judge. In the month of May last I filed an opinion herein, but subsequently granted a rehearing. The case has been argued orally by counsel for complainant, and elaborate briefs for complainant have been submitted. I have given the case on rehearing full consideration, having considered not only all the cases cited by counsel, but have given the question an independent consideration, and for the second time present my views. On the former hearing I reached the conclusion that this is a collusive suit. In this I was mistaken, and I now ground my decision upon the facts pleaded in the bill. This is a bill in equity, praying for an injunction against the defendants. At this time I shall not order the writ, although a written agreement, signed by complainant and both defendants, has been filed and presented to me, in which it is agreed that a permanent injunction shall issue. In the face of such written agreement, as it may be thought that such a refusal is arbitrary, I now reduce the reasons of my refusal to writing, and file them in the case.

Complainant is a New Jersey corporation. It alleges that the Edison Phonograph Company, a corporation of New Jersey, is the owner of the patents of Thomas A. Edison covering phonographs, record blanks, and records, and that it has the exclusive license for the sale of such phonographs, blanks, and records. The phonograph machine for recording and reproducing sound is described at much length, and it is said to be of great commercial value, and that large numbers are being sold and in use. The complainant, under such license for the last three years, has been selling great numbers of these machines in all parts of the United States, including Iowa, and has built up a very remunerative business, and there is a great demand by the public for the machines. These machines and records are all made by the Edison Phonograph Works, a New Jersey corporation; and, as stated, complainant has the exclusive right to sell them. There are many types of the machines and records, but all are covered by the Edison patents. In order to protect the public and the dealers throughout the United States, complainant established a plan about May 1, 1900, by which every dealer, both jobber and retailer, should not sell such machines and records at prices less than the price established by complainant. In April, 1901, such a contract was entered into by complainant and the defendants. Defendants are dealers in such instruments and music in Davenport, Iowa. Price lists, both at wholesale and retail, were annexed to the contract, and were made a part thereof. These price lists and terms, forming part of the contract, are novel and curious. The machine must not be sold to any dealer who will not sign a like agreement. No machine must be sold if its number is erased, and to violate that is an infringement of the patent. The machine must not be exchanged for other property at any price. Machines shopworn must not be sold at any reduction. Jobbers must keep complainant ad-

vised of all persons in the business. One dealer cannot borrow from another, excepting in an emergency. He cannot pay for them, but must, as soon as possible, replace the goods by buying from complainant. No person can buy from a jobber unless he has an established place of business, and no jobber shall give any discount excepting as per agreement with complainant. From the date of the agreement in April, 1901, until March, 1902,—about eight months,—the defendants observed the agreement aforesaid in all particulars. But in March, 1902, defendants, having a large number of machines on hand, commenced to sell to parties who had not signed a like agreement, and defendants are selling at less than schedule prices. This, complainant says, interferes in keeping up prices with other dealers in Davenport and other points in Iowa and in the United States generally. The prayer is for an injunction enjoining defendants from selling goods they have bought and paid for at a less price than that fixed by complainants. The bill is verified by its president.

It will be observed that the grievances complained of commenced in April, 1902. This bill was filed April 18, 1902. No solicitor has appeared for defendants. April 29, 1902, the defendants signed a written stipulation agreeing that a perpetual injunction may be issued against them, and a few days later this was filed. On the bill and stipulation the case has been submitted on final hearing. On such papers the following matters occur to me: Why do defendants agree to be enjoined? Is it simply to save costs? Is not the contract one that stifles trade? And if it is such a contract, should this court enforce it by the great writ of injunction? Are the parties to the contract alone concerned in its enforcement? Aside from the patent laws, and the monopoly thereby created, no one would question for a moment that the contract above set out is one that no court of law would give damages for its breach, and that no court of equity would give a decree for specific performance, or enjoin the violation thereof. And counsel in oral argument did not with earnestness deny this. And even if it were a valid contract, if not controlled by our patent laws, it will be observed that after one or more violations of the contract the defendants have agreed, in effect, to in the future observe the contract. This agreement the complainant recognizes as valid, and now seeks its enforcement, although there is now no threatened repudiation either of the original contract or of this later agreement of acquiescence of the former contract. This of itself ought to defeat the prayer for injunction, because an injunction is to prevent the repetition of unlawful acts, or the invasion of complainant's rights; and on the record complainant is as secure without as with the writ of injunction. Injunctions are not granted as of course, and should not be granted when it is believed, as I do believe, that such a writ would be improperly used. As an injunction is not required to coerce the defendants in this case, they, in effect, having agreed to comply with complainant's demands, for what can the writ be used? Undoubtedly to intimidate or terrorize others engaged in the like business. It will be used to hold up to others that this court has recognized the validity of the contract. The decree of

this court will be used for advertising literature; and, before a decree should be so used, it should be quite certain that such a decree is required as between the parties to the record. Believing that such a decree is not required as between the parties to the record herein on such grounds, the writ, although agreed to by the parties, should be denied.

But in view of the arguments of complainant's counsel, the case calls for additional reasons on my part before denying the writ. It is urged that our constitution and laws recognize the validity of such a monopoly as pleaded, and that restraints and stifling of trade are all in harmony with our system of patent laws. It probably is true that a patentee, or licensee of a patentee, can sell or refuse to sell the article covered by the patent. It quite likely is true that he can sell to whomsoever, many or few, he pleases. And it seems to be true that by selling only to the selected few he can thereby create and control a monopoly, free from interference by the public, and subject to no control by the courts. All this may be granted, and, for the purposes of this case, is conceded. But the answer to this argument is that complainant, having, as it contends, the control of the patented articles, has sold them to the few, and these few of its own selection; and, having sold the articles at its own price, to the parties thus chosen, can it, by contract, control the sales, other than by limiting a prescribed territory? The issuance of writs of injunction is discretionary. They are to be issued when there is no adequate remedy at law. They are to be issued when irreparable injury will occur but for the writ. The public has no interest in having this writ issued. If the public has any interest in the matter,—and I think it has a very great interest,—it is in having competition, freedom of trade, and no stifling of business, and particularly as to those things of common use. And the bill alleges that the phonographs are of great and growing necessity. The argument of complainant's counsel is that, if the owner of a patent can refuse the right to any one to buy the object covered by the patent, why cannot he say that the rights of the purchaser to resell shall be covered by limitations and restrictions? The constitution provides that congress shall have the power to promote the progress of science and the arts by securing to the inventors the exclusive right of their discoveries; and this congress has provided for by giving to the patentee for a limited time a grant to make, use, and sell such articles covered by the patent; and such grants or letters of patent are assignable. Now, what has the patentee? The answer is the exclusive right to make, the exclusive right to use, and the exclusive right to sell the article covered by the patent. No one, as presented by the bill in this case, is seeking to interfere with complainant in the making or using, and all that is complained of is that complainant's exclusive right to sell is being interfered with. When, and by whom? There is not the pretense in the bill that by any act of defendants are the number of sales lessened, or that the price which complainant fixes is in any way cut down. All the phonographs covered by the Edison patents that the public want must come from and do come from complainant's warehouse. And they come from there at complainant's prices. But

because defendants, in selling them as leaders, or for some other reason, sell them at a less price than does complainant sell them for, is the only reason urged for an injunction. *Dickerson v. Tinling*, 28 C. C. A. 139, 84 Fed. 192, by the circuit court of appeals for this circuit, is cited as an authority. In that case one purchased in Europe a patented article from one other than the owner of the United States patent. It was held that such purchaser could not import the article to the United States and then resell it. That being the question decided, I am not able to consider the case as an authority. One can readily see that such acts amounted to an infringement, and the court of appeals so adjudged. *Dickerson v. Matheson*, 6 C. C. A. 466, 57 Fed. 524,—being a case by the court of appeals for the Second circuit,—is cited. In that case a patent had been issued in a foreign country and also in the United States; and the doctrine in the case announced was that one could not purchase the article in the foreign country, import it to this, and here sell, without the consent of the licensee in this country. The case of *Phonograph Co. v. Kaufman* (C. C.) 105 Fed. 960, is relied on. That case was decided by a trial court. An agreement had been made by the parties something like the agreement in the case at bar. But the acts complained of were that the defendant was buying his goods elsewhere than of complainant. Here the defendant has bought the goods of complainant at the agreed price, but is again selling them, not to objectionable parties, but at objectionable prices. I do not consider the case cited as in point, or controlling as an authority. It was said by Justice Swayne in *Densmore v. Schofield*, 102 U. S. 375, 378, 26 L. Ed. 215:

"Patents rightfully issued are property, and are surrounded by the same rights and sanctions which attend all other property. Patentees as a class are public benefactors, and their rights should be protected. But the public has rights also. The rights of both should be upheld and enforced by an equally firm hand, whenever they come under judicial consideration."

Tie Co. v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79, is relied on. But what that case holds is that, after a patented article consisting of two parts has been once sold and used, a party cannot take the one part not impaired by the use, attach it to another part of his own make, and then resell the whole, without being guilty of infringement.

I find no authority, and none has been cited by counsel, that, in my judgment, sustains complainant's contention; and, aside from the phases of the patent law that have been argued, in my judgment the contract in suit cannot be the basis of an action at either law or in equity. And it likewise is my judgment that the contract cannot be upheld even though the articles of merchandise are covered by patents.

The writ of injunction will be denied, and the bill dismissed.

GUNNISON et al. v. CHICAGO, M. & ST. P. RY. CO. et al.

(Circuit Court, W. D. Wisconsin. July 23, 1902.)

1. JUDICIAL SALE—DECREE FOR ENFORCEMENT OF JUDGMENT AGAINST RAILROAD—PROPERTY PASSING.

A judgment was obtained against a railroad company of Wisconsin, where, by statute, judgments are made liens on real estate. The holder of the judgment subsequently filed a bill in equity, and obtained a decree, ordering a sale of the company's road and its franchise to satisfy the judgment, and such sale was made and confirmed. *Held*, that the sale vested the purchaser with the entire title of the railroad company which it had at the date of the rendition of the judgment, not only to the physical property sold, but also to the franchise to operate the same as a railroad.

2. LIMITATIONS—ADVERSE POSSESSION—RAILROAD.

A railroad company which purchased a line of road, under a judicial decree ordering a sale of the road and its franchise to satisfy a judgment, and took and retained possession claiming title as against a mortgage executed subsequent to the judgment, which it refused to recognize or pay, held adversely to the mortgagees, and, under the statute of Wisconsin (Rev. St. 1898, § 4211), a suit by the mortgagees to enforce a lien upon the property was barred in 10 years.

3. EQUITY—LACHES—DELAY IN ENFORCING RAILROAD MORTGAGE.

Defendant railroad company purchased a line of road in 1867 under a decree ordering it sold to satisfy a judgment which was rendered in 1857. Defendant took possession, and thereafter retained and operated the road, incorporating it in its system, making large improvements, and paying off prior incumbrances to the amount of \$3,000,000. Subsequent to the judgment under which the sale was made, the road had been sold under a mortgage of later date, and the purchasing company had issued bonds secured by a mortgage thereon. In 1868 a suit was brought by the trustee in such mortgage against defendant to enforce the mortgage, but was dismissed in 1872 without trial. In 1898 complainants, claiming to be the owners of most of the bonds secured, brought the present suit to enforce the mortgage against the road. Defendant had never recognized the validity of such mortgage as against its own title, and no part of the bonds, either principal or interest, had ever been paid. *Held*, that there had been such gross laches on the part of the trustee and bondholders as to debar them from the right to maintain the suit.

In Equity. Suit to foreclose railroad mortgage.

The brief of defendants' counsel contains a statement of the principal facts of this case, so succinctly stated that I have copied it mainly into this opinion, having verified it in all things by the testimony and record, which are quite voluminous. In the year 1857, the La Crosse & Milwaukee Railroad Company, a corporation of Wisconsin, was the owner of a railroad and its franchises extending from Milwaukee to La Crosse by way of Beaver Dam and Horicon, subject to certain mortgage and judgment liens. The railroad was treated by the company as consisting of two divisions,—one called the Eastern Division, extending from Milwaukee to Portage, a distance of 95 miles, and the other called the Western Division, extending from La Crosse to Portage City, a distance of 105 miles. Stated in the order of priority, the mortgage liens were as follows: The Eastern Division: (1) The Palmer mortgage, to secure an issue of bonds to the amount of \$950,000 and interest; (2) the city of Milwaukee mortgages, to secure an issue of bonds to the amount of \$314,000 and interest; (3) the Bronson and Soutter mortgage, to secure an issue of bonds to the amount of \$1,000,000 and interest. The Western Division: (1) The Bronson, Soutter, and Knapp mortgage, known as the "Land Grant Mortgage," to secure an issue of bonds to the amount

¶ 2. See Adverse Possession, vol. 1, Cent. Dig. § 444.

of \$4,000,000 and interest; (2) the Helfenstein mortgage, to secure an issue of bonds to the amount of \$200,000 and interest.

Stated in the order of priority, the judgments which had been rendered against that company, and which were liens on both the Eastern and Western Divisions of the railroad, were as follows: (1) The Chamberlain judgment, recovered in the circuit court of the United States for the district of Wisconsin, on the 2d day of October, 1857, for \$629,089.72; (2) the Cleveland judgment, recovered in the circuit court of the United States for the district of Wisconsin, on the 7th day of October, 1857, for \$111,727.31.

The circuit court of the United States for the district of Wisconsin, on the 7th day of January, 1867, in a suit brought to enforce the lien of the Cleveland judgment, adjudged and decreed that judgment to be a lien upon the railroad, property, and franchises of the La Crosse & Milwaukee Railroad Company as and from the date of its rendition; and, on appeal to the supreme court of the United States, that court, in March, 1868, affirmed the decree. *Railroad Co. v. James*, 6 Wall. 750, 18 L. Ed. 854. See, also, *Howard v. Railroad Co.*, 101 U. S. 837, 25 L. Ed. 1081, and *Barnes v. Railroad Co.*, 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128.

On the 1st day of June, 1858, the La Crosse & Milwaukee Railroad Company placed another mortgage upon its entire railroad, property, and franchises, to secure the payment of \$2,000,000 of bonds, known as the "Barnes Mortgage." Default was made in the first installment of interest which became due on these bonds, whereupon a statutory foreclosure of the mortgage by advertisement was had, and on the 21st day of May, 1859, the property covered by the mortgage was purchased by Barnes, as trustee. Two days afterwards Barnes united with certain persons representing themselves to be the owners of certain of the bonds, and organized the Milwaukee & Minnesota Railroad Company, whereupon Barnes transferred his purchase to that company. On the 24th day of October, 1864, the last-named company executed a mortgage to James H. Fonda and G. Hilton Scribner, as trustees, to secure an issue of bonds to the amount of \$600,000, which, by their terms, became due July 1, 1884. It is this mortgage which is now in suit. It included only the 95 miles of railroad from Milwaukee to Portage, formerly the Eastern Division of the La Crosse & Milwaukee Railroad Company.

The La Crosse & Milwaukee Railroad Company was not in possession of its railroad at the time the Barnes mortgage was given, nor at any time subsequent thereto, but such railroad was in the possession of and operated by receivers under liens prior to the Barnes mortgage. The Western Division, covering the railroad from Portage City to La Crosse, was sold in April, 1863, under the foreclosure of the land grant mortgage, to purchasers who organized the Milwaukee & St. Paul Railway Company, now the Chicago, Milwaukee & St. Paul Railway Company; while the Eastern Division, embracing the railroad from Milwaukee to Portage City, was turned over to the Milwaukee & Minnesota Railroad Company on the 20th day of January, 1866, in pursuance of an order made by the circuit court of the United States for the district of Wisconsin in a suit to foreclose the Bronson and Soutter mortgage, which order provided that upon that company paying into court the interest due on the bonds issued under that mortgage, amounting to \$462,057.80, it would be let into possession of the railroad from Milwaukee to Portage.

On the 18th day of April, 1866, Frederick P. James, who by mesne assignments had become the owner of the Cleveland judgment, filed a bill of complaint in the circuit court of the United States for the district of Wisconsin, against the Milwaukee & Minnesota Railroad Company, to enforce the lien of that judgment, which bill prayed, among other things, that the Eastern Division of the La Crosse & Milwaukee Railroad Company, being the railroad from Milwaukee to Portage, might be decreed to be sold under the order and direction of the court, subject to the aforesaid Palmer, the city of Milwaukee, the Bronson and Soutter mortgages and the Chamberlain judgment. The Milwaukee & Minnesota Company appeared and filed its answer to the bill, and in due course of procedure a decree was entered on the 7th day of January, 1867, adjudging that there was then due on said Cleveland judgment the sum of \$98,801.51, and that said judgment was a lien,

charge, and incumbrance, as of the date of October 7, 1857, upon all the right, title, and interest which the La Crosse & Milwaukee Railroad Company had of, in, and to the railroad from Milwaukee to Portage City, together with its rolling stock, franchises, and appurtenances; that all and singular the railroad formerly known as the La Crosse & Milwaukee Railroad, from Milwaukee to Portage, its depots, station houses, and buildings, together with all its rolling stock, franchises, and appurtenances then in the possession of, or claimed by, the Milwaukee & Minnesota Railroad Company, be sold at public auction by the marshal of the district, unless prior to such sale said last-named company pay to the complainant or to said marshal the amount adjudged to be due on said judgment, with interest and costs; that the sale be made at the post office in the city of Milwaukee on the 2d day of March next ensuing, at 2 o'clock in the afternoon; that the marshal give public notice of the time and place of such sale, by publishing the same four weeks in some daily newspaper published in the city of Milwaukee; that the sale be made subject to the aforesaid mortgages and judgment liens; that the marshal, upon the confirmation of said sale by the court, execute and deliver a deed to the purchaser; that the Milwaukee & Minnesota Railroad Company, and all persons claiming or to claim from or under it, be forever barred and foreclosed of and from all equity of redemption, and claim of, in, and to the railroad, rolling stock, franchises, and appurtenances aforesaid; that the purchaser at such sale be let into possession thereof, and that said defendant company deliver possession thereof to such purchaser, on production of the marshal's deed for such property, and a certified copy of the order confirming the report of sale.

In pursuance of the aforesaid decree, a sale of the railroad property and franchises from Milwaukee to Portage was had on the 2d day of March, 1867, and said property was sold to the Milwaukee & St. Paul Railway Company for \$100,920.94, it being the highest and best bidder. The sale was confirmed, and on the 5th day of the same March the marshal's deed was delivered to the purchasing company; whereupon it entered into possession of said railroad property and franchises, claiming to be the owner thereof under said decree, sale, and deed, subject to the aforesaid Palmer, city of Milwaukee, Bronson, and Soutter mortgages and the Chamberlain judgment, and has ever since continued in possession thereof, which possession, it is claimed, has been actual, open, notorious, and adverse, without in any manner accounting to the trustees or bondholders under the Fonda and Scribner mortgage, or in any way recognizing said mortgage, or the debt secured thereby, as a valid or existing lien upon said railroad property or franchises; nor has it during such time in any form or manner recognized the trustees named in said mortgage, or those holding the bonds secured thereby, as having any interest in said railroad property or franchises.

On the 2d day of March, 1867, the complainants Albert C. Gunnison and Aaron S. Bright, claiming to be stockholders in the Minnesota Company, filed a sworn petition in the circuit court of the United States for the district of Wisconsin, in the James suit, praying, among other things, that an appeal be allowed from the decree in that suit to the supreme court of the United States, and that they be allowed to use the name of the Milwaukee & Minnesota Railroad Company in taking such appeal. The court granted their petition; whereupon an appeal was taken by said Gunnison and Bright, in the name of the Milwaukee & Minnesota Railroad Company, from said decree to the supreme court of the United States. This appeal came on for argument before the supreme court, and on the 16th day of March, 1868, that court rendered its decision, affirming said decree. *Railroad Co. v. James*, 6 Wall. 750, 18 L. Ed. 854.

On the 31st day of January, 1868, G. Hilton Scribner, as surviving trustee under the mortgage given by the Milwaukee & Minnesota Railroad Company to Fonda and Scribner, as trustees (the mortgage now in suit), filed his bill of complaint in the circuit court of the United States for the Eastern district of Wisconsin, making the Milwaukee & St. Paul Railway Company and the Milwaukee & Minnesota Railroad Company the parties defendant thereto. Subpoenas were duly served and jurisdiction acquired of each defendant. The bill, after setting forth the organization and powers of the

La Crosse & Milwaukee Railroad Company, the execution of the land grant and Barnes mortgages, their foreclosure, the organization of the Milwaukee & St. Paul Railway Company and the Milwaukee & Minnesota Railroad Company, the execution of the Fonda and Scribner mortgage by the last-named company, and the issuance of the bonds thereunder, proceeds to state: (1) That on the 7th day of October, 1857, Cleveland recovered a judgment against the La Crosse & Milwaukee Railroad Company, as hereinbefore stated; that Frederick P. James, as the assignee and owner of said judgment, on the 18th day of April, 1866, filed his bill of complaint in the circuit court of the United States for the district of Wisconsin, against the Milwaukee & Minnesota Railroad Company, sole defendant, praying that it be decreed by the court that the railroad of the Eastern Division of said La Crosse Company, with its rolling stock and franchises, be sold to pay that judgment; that afterwards, at the January, 1867, term of said court, a decree was rendered upon said bill adjudging said judgment to be a lien and incumbrance upon said Eastern Division, its station houses, buildings, rolling stock, and franchises, as of the date of October 7, 1857, and ordering the sale of said railroad property and franchises to pay the amount adjudged to be due on said judgment; that in pursuance of said decree said railroad property and franchises were sold by the marshal on the 2d day of March, 1867, to the Milwaukee & St. Paul Railway Company, for the sum of \$100,920.94; that on the 5th day of the same March the sale was confirmed by the court, and on the following day the purchasing company went into possession of the property so purchased, and had ever since remained in possession thereof. (2) That the Cleveland judgment, upon which said decree was rendered, was not then, and never had been, a charge or incumbrance upon the Eastern Division of the La Crosse & Milwaukee Railroad Company, and that that division could not lawfully be subjected to the payment of said judgment, and that the decree upon said judgment was of no force or effect as against the complainant, or the bondholders whom he represented, for the reason that they were not parties to said James suit, and that the right to contest said judgment, and to redeem said railroad property and franchises from any and all existing incumbrances thereon, remained unaffected by the decree and sale under said judgment. (3) That the Milwaukee & St. Paul Railway Company had been in the exclusive possession and control of said Eastern Division for 10 months then last past; had received all the earnings and income thereof; that, while the complainant had no means of knowing the exact amount of the net earnings, yet, judging from the amount of business done during that 10 months, he believed that such earnings had exceeded \$250,000; that said last-named company had not used or applied any part of said net earnings to the payment of the interest due on the bonds issued under the Palmer, City of Milwaukee, and Bronson and Soutter mortgages, but was converting said earnings to its own use; that it did not intend to apply said earnings towards the payment of said interest, or to pay said interest, but, on the contrary, it was the avowed and well-known purpose and intent of said company to suffer said interest to remain unpaid until successive defaults should so increase the amount due and unpaid as to render it impossible for the complainant or any person claiming under the Milwaukee & Minnesota Railroad Company, or any creditors thereof, to redeem said railroad or to save it from forfeiture,—all of which conduct on the part of said company was a fraud upon the complainant, and wholly destructive of the rights and interests of the bondholders under his trust deed. (4) That the complainant was advised and believed, and therefore insisted, that the Cleveland judgment, under which the Milwaukee & St. Paul Railway Company claimed to be a purchaser and owner of said Eastern Division, was not a lien upon said railroad, and could not lawfully be enforced against the Milwaukee & Minnesota Railroad Company; yet he insisted that, if said judgment should be adjudged a valid lien and incumbrance, the same had been fully paid and satisfied out of the net earnings which the Milwaukee & St. Paul Railway Company had received since it went into possession of said railroad; and if it should appear upon an accounting that the net earnings of said Eastern Division had been insufficient to pay the amount of the Cleveland judgment, with interest thereon,

the complainant was entitled to redeem said road by the payment to the Milwaukee & St. Paul Railway Company of the deficiency, and to have the possession of said road and property forthwith delivered to him upon paying such deficiency.

The bill prayed for relief, as follows: (1) That the Milwaukee & St. Paul Railway Company be enjoined from selling, mortgaging, or incumbering said Eastern Division, and the rolling stock and property belonging thereto; that an account be stated concerning the net earnings of said Eastern Division from the time that company took possession thereof under the marshal's sale, and of the amount paid that company, on the purchase of said Eastern Division with interest thereon; and that the amount of said net earnings be paid to a receiver, to be appointed, and applied to the payment of the interest accrued on the bonds secured by mortgages on said Eastern Division; or (2) that, in case it should be held that the Cleveland judgment was a valid lien and incumbrance upon the Eastern Division superior to the lien of the complainant's trust deed, it be adjudged that the Milwaukee & St. Paul Railway Company pay to such receiver the surplus of such net earnings which shall remain after full payment and satisfaction of the full amount of the Cleveland judgment, with interest and costs; and in case the amount of such net earnings should be found on accounting to be insufficient to pay in full the Cleveland judgment, with interest and costs, that the amount of such deficiency be ascertained, and, upon payment thereof by the complainant to the Milwaukee & St. Paul Railway Company, the possession, use, and control of the Eastern Division, with all the property, rights, and franchises, be forthwith delivered to the complainant as trustee for the bondholders under his mortgage.

After the filing of said bill, and the service of the subpoenas upon the defendants therein, on motion of complainant's solicitor an order was made by the court on the 2d day of March, 1868, that the defendants plead, answer, or demur to the bill on or before the first Monday of April, 1868, or the same would be taken as confessed against them. No further proceedings seem to have been taken in that suit until February 26, 1872, nearly four years after, on which day, on motion of complainant's counsel, it was ordered by the court that the bill be dismissed, and thereupon it was dismissed.

No further action on the part of the trustees under the Fonda and Scribner mortgage, or of the holders of the bonds pretended to have been secured thereby, was taken until May, 1893, about 21 years after the dismissal of the Scribner bill, at which time Richard Carmen Combes, under an arrangement with the aforesaid Albert C. Gunnison and Aaron S. Bright, who claimed to own and control \$336,000 of the bonds issued under said mortgage, attempted to bring an action at law against the Milwaukee & Minnesota Railroad Company in the circuit court of Milwaukee county, Wis., on \$332,000 of said bonds. Jurisdiction was attempted to be acquired by procuring an order for the publication of the summons under the state practice. Such an order was made by the court. Thereupon D. W. Keyes, upon the ground that he was a stockholder of the Milwaukee & Minnesota Railway Company, if it existed as a corporation, moved to set aside the order for the service of the summons. The motion was denied, and from the order denying the motion an appeal was taken to the supreme court of the state, and that court held that the Milwaukee & Minnesota Railroad Company had, long prior to the time of the commencement of the action, voluntarily surrendered all of its corporate franchises, that the same had been accepted by the state, and therefore no action could be brought against it.

No further action was taken respecting the Fonda and Scribner mortgage, or the bonds issued thereunder, until the 30th day of March, 1897, 25 years after the Scribner bill was dismissed, on which day the present suit was brought by the filing of a bill of complaint in this court, making Albert C. Gunnison and George A. Bright, as administrators of Aaron S. Bright, deceased, and Howard J. Forker, as trustee, complainants, and the Chicago, Milwaukee & St. Paul Railway Company and G. Hilton Scribner, as trustee, defendants.

The bill of complaint in the present suit sets forth: (1) The execution of the Fonda and Scribner mortgage, the recording of the same in the office of

the secretary of state of Wisconsin, the issuance of the bonds thereunder, and, that at the time of the execution of said mortgage the Milwaukee & Minnesota Railroad Company was seised and possessed of all and singular the railroad property and franchises described in the mortgage, subject to the liens mentioned therein, and to the lien of the Cleveland judgment. (2) That on the 7th day of October, 1857, Cleveland recovered a judgment against the La Crosse & Milwaukee Railroad Company in the circuit court of the United States for the district of Wisconsin, for the sum of \$111,727; that such judgment was a lien upon the railroad mentioned in the aforesaid mortgage from Milwaukee to Portage City; that James became the owner of said judgment, and on the 18th of April, 1866, filed a bill in the circuit court of the United States for the district of Wisconsin against the Milwaukee & Minnesota Railroad Company without making the trustees under the mortgage, or any of the holders of the bonds issued thereunder, parties defendant, for the purpose of establishing said judgment as a lien upon said railroad property and franchises, and obtaining a decree for the sale thereof to satisfy said lien; that such proceedings were had that on the 11th day of January, 1867, a decree was therein made adjudging that there was then due upon said Cleveland judgment \$98,801.51; that the same was a lien upon all the interest of the La Crosse & Milwaukee Railroad Company in its railroad, rolling stock, franchises, and appurtenances, from Milwaukee to Portage, as of the date of October 7, 1857; that said property should be sold by the marshal to satisfy said lien, and that the Milwaukee & Minnesota Railroad Company, and all persons claiming or to claim under them, should be barred and foreclosed of and from all equity of redemption and claim to said property, unless the amount of said judgment, interest, and costs should be paid before the day of sale; that on the 2d day of March, 1867, the marshal sold said railroad property and franchises to the Milwaukee & St. Paul Railway Company for the amount due on said judgment, interest and costs; that said sale was confirmed by the court; that the marshal thereupon made and delivered his deed to that company, whereupon it went into possession of said property, and has continued in possession thereof under said decree, sale, and deed. (3) That said Cleveland judgment was not a lien upon the franchises of the La Crosse & Milwaukee Railroad Company, and in no manner affected the same, notwithstanding that the decree entered on the Cleveland judgment adjudged it to be a lien upon such franchises; that such franchises were not sold by the marshal under said decree, nor conveyed by his deed to the Milwaukee & St. Paul Railway Company, nor has it ever enjoyed, held, or operated said road by virtue of said franchises, or any part thereof, or, if said franchises were sold and conveyed to that company, they were sold and conveyed subject in all respects to the prior lien on them of the Fonda and Scribner mortgage; that the sale of said franchises under said Cleveland judgment to the Milwaukee & St. Paul Railway Company did not and could not affect the priority of the lien of said Fonda and Scribner mortgage on said franchises, and that said mortgage has continued to be and still is a lien on such franchises in the hands and in the possession of the Milwaukee & St. Paul Railway Company (now Chicago, Milwaukee & St. Paul Railway Company), and that a sale of said franchises separate and apart from the railroad and fixtures covered by said mortgage would prove an inadequate remedy, and be wholly insufficient to satisfy the debt secured thereby. (4) That the reasons why the Milwaukee & Minnesota Railroad Company is not joined as a party defendant to the bill are that, for more than 29 years prior to the filing of the bill, that company has not owned or possessed any property in the state of Wisconsin or elsewhere, or been engaged in any business whatever, nor has there during that time been held any meeting of the shareholders, directors, or officers, nor has that company, or any officer thereof, had any office or place of business of the company, either in the city of Milwaukee or elsewhere, and at the time of the sale of the railroad property and franchises, and at the time of the marshal's sale to the Milwaukee & St. Paul Railway Company, the Minnesota Company was, and up to the time of its dissolution continued to be, very largely indebted, having no property of any kind with which to pay its debts, utterly without credit, means, officers, and corporate functions, and

absolutely disorganized and insolvent; that long before the filing of the bill said company had voluntarily surrendered to the state of Wisconsin all its corporate franchises, and such surrender had been accepted by the state, and such surrender and acceptance had been adjudged by the supreme court of the state of Wisconsin in the aforesaid Combes suit, reported in 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839. (5) That the complainants Albert C. Gunnison, and George A. Bright, as administrator of Aaron S. Bright, deceased, are the lawful owners and holders of 500 of said 600 bonds secured by said Fonda and Scribner mortgage; that the same are due and unpaid, together with all interest accruing thereon from the time of the issue, negotiation, and delivery of said bonds, and that no part of the principal or interest of said bonds has ever been paid; that said bonds were not presented for payment for the reason that the Minnesota Company was at the time disorganized, and had not then any office or place of business in the city of Milwaukee or elsewhere, and that there was no officer or person representing said company to whom said bonds could have been presented for payment.

The relief prayed for in the bill is as follows: (1) That the amount due and unpaid upon the bonds secured by the mortgage, principal and interest, may be found, adjudged, and decreed. (2) That said mortgage may be decreed a lien on the roadbed and fixtures, as well as on the franchises, of the railroad in the possession of the Chicago, Milwaukee & St. Paul Railway Company. (3) That said mortgage may be foreclosed, and the order of its priority as a lien upon said roadbed decreed and established, and that it be determined what liens, if any, are entitled to a priority or precedence over it. (4) That it may be decreed that the Chicago, Milwaukee & St. Paul Railway Company obtained its right, title, and interest in and to said railroad property and franchises, subject to said mortgage, as an actual subsisting lien thereon, and that the equity of redemption of the Milwaukee & Minnesota Company in said premises, existing upon the making and delivery of said mortgage, became and was vested in the Chicago, Milwaukee & St. Paul Railway Company under said decree, sale, and marshal's deed in the James suit, and that the complainants have the same right to have the said mortgage foreclosed as if said decree, sale, and deed had not been made, and as if the Milwaukee & Minnesota Railroad Company was still an existing corporation. (5) That it may be decreed that said railroad and its appurtenances be sold in order to pay the amount found to be due upon said bonds, and that the usual deed be made upon such sale and the confirmation thereof. (6) That all conditions which the court shall deem necessary to complainants' right to relief be imposed upon them.

The amended and substituted answer of the defendant company is as follows: (1) That whether the Milwaukee & Minnesota Railroad Company ever made, executed, or delivered the Fonda and Scribner mortgage, or issued its bonds for the amount of \$600,000, or any other amount, or caused said bonds, or any of them, to be negotiated or sold, or received the proceeds thereof, or whether the complainants, Gunnison and Bright, are the owners of 500 or any other number of said pretended bonds, the defendant company has no information save from said bill, and therefore denies the same, and calls for proof thereof. (2) It admits the recovery of the Cleveland judgment, and that it was a lien upon the railroad mentioned in the bill; that by mesne assignments, James became the owner thereof; that James brought suit thereon against the Milwaukee & Minnesota Railroad Company as sole defendant, to enforce the lien thereof; that a decree was entered in said suit resulting in a sale of said railroad property and franchises to the Milwaukee & St. Paul Railway Company; that said sale was confirmed; that said company went into possession of said railroad property, and the franchises under said decree, sale, and deed, and since then has continued in possession thereof; and that long prior to the bringing of this suit, to wit, in 1872, the Milwaukee & Minnesota Railroad Company voluntarily surrendered to the state of Wisconsin all of its corporate franchises, and that such surrender was in that year accepted by the state, as adjudged by the supreme court of the state of Wisconsin in the aforesaid Combes suit. (3) It denies that the Cleveland judgment was not a lien upon the franchises of the La Crosse &

Milwaukee Railroad Company, and alleges that it was a lien upon the franchises of that company to maintain and operate the railroad of that company, and that the decree in the James suit so adjudged the same, and that the railroad, franchises, and property were sold by the marshal, and conveyed by his deed in the James suit, and it denies that such franchises were in any way sold or conveyed subject in any respect to the Fonda and Scribner mortgage. (4) The answer also set up certain statutes of limitation. (5) It avers that it is true, as stated in the bill of complaint, that neither of the trustees under the Fonda and Scribner mortgage were made parties defendant to the James suit brought to enforce the Cleveland judgment, but that on January 31, 1868, G. Hilton Scribner, as sole surviving trustee under said mortgage, filed his bill of complaint, in the same court in which the James suit was brought and prosecuted to final decree, against the Milwaukee and St. Paul Railway Company and the Milwaukee & Minnesota Railroad Company; that jurisdiction of both defendants was acquired, and that under the allegations and prayer of said bill every question which could have been litigated or determined, and every right which could have been saved or protected, in said James suit, if the trustees had been parties thereto, could have been litigated, determined, saved, and protected in said suit brought by said Scribner, and that, said Scribner having voluntarily abandoned said suit and caused the same to be dismissed, the complainants are now estopped from claiming that they have not had their day in court in the James suit as fully as if they had been made parties defendant therein, or from having or claiming any of the relief prayed for in the bill of complaint herein. (6) It sets forth the recovery of the Cleveland judgment; the suit of James to enforce the same; the decree, sale, and deed therein; the possession of the railroad property and franchises by the defendant Chicago, Milwaukee & St. Paul Railway Company thereunder, all with the full knowledge of the trustees under the Fonda and Scribner mortgage, and of said Albert O. Gunnison and Aaron S. Bright; and avers that the title of the Chicago, Milwaukee & St. Paul Railway Company to said railroad property and franchises became effective as of the 7th day of October, 1857, and is full, perfect, and complete, and is exclusive of any right, title, claim, or interest under or by virtue of the mortgage or trust deed set out in the bill of complaint. (7) It avers that, by means of the deed resulting from the James suit, the defendant railway company acquired the legal title to the railroad and franchises in question, and went into possession thereof under said deed, and that at the time of such possession the same were incumbered by mortgages as follows, to wit: First. The Palmer mortgage to secure an issue of bonds to the amount of \$950,000 and interest, which bonds by their terms became due on the 30th day of June, 1874; that at the time of such possession there were still unpaid and outstanding \$875,000 of such bonds, which were paid by the defendant company during the years 1876 and 1877, the last payment having been made on the 25th day of April, 1877. Second. The city of Milwaukee mortgages to secure an issue of bonds to the amount of \$314,000 and interest; that \$200,000 of said bonds, by their terms, became due and payable September 1, 1873, and the remaining \$114,000 became due and payable on the 1st day of September, 1874; that after defendant railway company took possession of said railroad as aforesaid, and on the 26th day of July, 1876, it paid the full amount of said bonds, to wit, \$314,000 and interest. Third. The Bronson and Soutter mortgage to secure an issue of bonds to the amount of \$1,000,000 and interest, which bonds by their terms became due and payable September 1, 1870; that the full amount of said bonds were issued, and after said defendant railway company took possession of said railroad as aforesaid; and on the 3d of June, 1879, it paid the full amount of said bonds and interest. That the above mentioned mortgages have never been satisfied of record, and now stand open upon the records unsatisfied, and no instrument for the release of any of them has ever been made or executed; that when the defendant railway company paid the said bonds, as aforesaid, it was in the possession and use of the railroad property and franchises in question, and has ever since continued in the use and possession thereof; that it paid said bonds in the belief that it had acquired the legal title to the property and franchises in question,

and for the purpose of protecting and upholding its title and possession, and with the intention of keeping said mortgages alive, and not merging them with its title, and of becoming subrogated to the rights of the mortgagees in each of said mortgages; that the trustees in the mortgage in suit have not, nor has either of them, nor have the bondholders of the said mortgage, or any of them, redeemed any of said mortgages; that the complainants never had any right under their said mortgage that did not involve redemption of or from the aforesaid mortgages as an essential element; that such right of redemption accrued to said trustees and became complete in them more than 10 years before the bill of complaint herein was filed, and that the benefit of sections 4206, 4219, and subdivision 4 of section 4221, of chapter 177 of the Revised Statutes of Wisconsin for the year 1878, is claimed and pleaded in bar of the maintenance of this suit. (8) It avers that after the decree had been entered in the James suit, and on the 2d day of March, 1867, Albert C. Gunnison and Aaron S. Bright filed their sworn petition in the court in which said James decree was entered, setting forth, among other things, that they were the owners of over 7,000 shares of the capital stock of the Minnesota Company, and praying, among other things, for leave to appeal from that decree to the supreme court of the United States in the name of the Minnesota Company; that their petition was allowed, whereupon they took and prosecuted an appeal from said decree to the supreme court of the United States, and assigned the following errors, for which they asked a reversal of said decree, to wit: First. Because it (the decree) declares and decrees that the Cleveland judgment was a lien upon the franchises of the La Crosse & Milwaukee Railroad Company as of the date of the docketing of the judgment, October 7, 1857. Second. That the judgment of Cleveland against the La Crosse & Milwaukee Railroad Company never was a lien upon the property described in the decree. That said appeal was argued by counsel in their behalf, before said supreme court, and on the 16th day of March, 1868, that court rendered its judgment therein affirming said decree in all things; wherefore said defendant railway company says that the complainants herein, Albert C. Gunnison and George A. Bright, the administrators of the estate of Aaron S. Bright, deceased, are bound by the decree in said James suit, and are estopped from claiming or asserting, as against the defendant railway company, that the Cleveland judgment was not a lien upon the railroad and franchises of the La Crosse Company. (9) It avers that by lapse of time and laches on the part of the trustees and of said Gunnison and Bright the complainants have no standing in a court of equity, and no right to the relief prayed for in the bill as against the defendant Chicago, Milwaukee & St. Paul Railway Company, and that they are estopped and precluded from maintaining this suit, setting forth the facts in detail upon which the claim of laches is founded. (10) Further answering, it avers that it went into possession of the railroad property in question on the 6th day of March, 1867, under claim of title, exclusive of any other right, founding such claim upon a written instrument, to wit, the marshal's deed aforesaid, and has been in continuous occupation and possession of the property included in said marshal's deed under such claim for 30 years and upwards, prior to the commencement of this suit; that said premises have during said 30 years and upwards, and still are, held adversely to the complainants and all the world; that said occupation and possession have been open, notorious, exclusive, and adverse as aforesaid, and that such possession constitutes, under the statutes of the state of Wisconsin, a bar to this suit, and it insists upon the benefit of such statutes in that behalf, as a limitation and bar to this suit, with like effect as if the same had been set up by way of plea. A like claim is made by virtue of like possession of said railroad and property by the defendant company under a claim founded upon a judgment of a competent court, to wit, upon the judgment of the circuit court of the United States for the district of Wisconsin, and it is averred that such possession, under such claim under the statutes of the state of Wisconsin, constitutes a bar to this suit.

After replication to the answer was filed, the parties proceeded to put in their proofs, which are quite voluminous.

Spooner, Sanborn & Spooner (John C. Spooner, William F. Vilas, and Burr W. Jones, of counsel), for complainants.

Burton Hanson and C. H. Van Alstine (George R. Peck, of counsel), for defendant, Chicago, M. & St. P. Ry. Co.

Upon this statement of the case, BUNN, District Judge, delivered the opinion of the court.

This case was first before the court on demurrer to the bill some four years ago. Several days were consumed in the argument, upon which the demurrer was overruled, and the defendant required to answer. Now it is here upon the merits. Most of the witnesses who might know about the transactions of 40 years ago are dead. Several of those who have given their testimony have died since the suit was commenced. Much time has been consumed in the oral argument,—I believe some two weeks,—and elaborate briefs have been filed. I have given the case a careful and extended consideration, and the conclusion I have reached is that there is not much equity in the complainants' case. I think complainants' counsel have felt the difficulty all the way through of meeting the objections founded upon the great lapse of time since the bonds were issued and since suit might have been brought to enforce relief, with defendants all the time in possession claiming title. There is one consideration, and but one, that makes in favor of the complainants' case. The \$600,000 of bonds were issued by the Minnesota Company in 1864, and not a dollar of principal or interest has ever been paid. That company was of short life, and went out of existence soon after the bonds were issued, so that there was no legal responsibility anywhere for the payment of the bonds. But this fact of itself should have put the bondholders and their trustees on their guard to pursue with all the more vigilance any remedy in equity they might have against the property. They knew that the property was in the hands of the Milwaukee Company under claim of title by virtue of the sale under the Cleveland-James judgment, as against the mortgage in suit. They knew that the Milwaukee Company was making large improvements on the property, and incorporating the road into their general system, and that it was paying off large mortgages that constituted prior liens upon the road. Up to December, 1867, when the appeal in the James suit was decided by the supreme court (see 6 Wall. 752, 18 L. Ed. 885) adversely to their claim, it may be conceded that they did all that could be done to enforce their claim. But from December, 1867, the fight was practically relinquished, although the suit brought in the United States circuit court for Wisconsin was permitted to remain on the docket of the court for some four years, until 1872, but counsel for the Milwaukee Company was informed that he need not answer the bill unless notified to do so. From the time that suit in 1872 was dismissed nothing has been done by way of asserting any equitable claim under the mortgage. This is certainly a long time to wait, and if the equitable doctrine of laches has any application to this case there is no lack in the one element of time.

But perhaps the first question, as bearing upon the equities of the case, relates to the amount of bonds actually sold by the Minnesota Company; for it is only these that are entitled to any equitable consideration. The evidence on this subject is very interesting, and at the same time very shadowy. I cannot think it is at all satisfactory as to more than a very few of the bonds. Gunnison and Bright claim to own \$500,000 of the \$600,000 issued. \$350,000 of this \$500,000 are the bonds turned over as collateral security to the Philadelphia party. In 1865 the Minnesota Company was in hard straits for money to run the road. Indeed, it never had either money or credit. It had got possession, but it wanted money, and the bonds did not seem to bring money. It borrowed \$450,000 of Scott and Thompson, of the Pennsylvania Company, and as part security put up \$350,000 of the company's bonds, together with a majority of its capital stock and certain decretal orders amounting to \$300,000. After the Milwaukee Company was put in possession under the James decree, the Philadelphia parties became alarmed, and a settlement was made between them, the Milwaukee Company, and the Minnesota Company, as a result of which Scott and Thompson canceled the indebtedness of the Minnesota Company, and returned to it the 350 bonds, with the capital stock; Aaron S. Bright, as president of the Minnesota Company, receiving and receipting for both stock and bonds. This was in December, 1867. Bright was the president, and Gunnison vice president, of the Minnesota Company. There is no evidence that these bonds were ever sold. Complainant Gunnison testifies that, within a few years after they had been placed in the hands of Scott and Thompson as collateral security, he saw all of them in the hands of Aaron S. Bright, who made the settlement with Scott and Thompson, and that he then exchanged with Bright a half interest in the capital stock, which he claimed to own, for a half interest in the 350 bonds which Bright told him he had purchased from Scott. This is the rather unsatisfactory way in which Gunnison puts it in his testimony: "We just divided. Being old acquaintances, we just divided, and went into the thing. Whatever there was of it, we divided it." From this and the other testimony it would seem as though Gunnison and Bright looked upon themselves as the Minnesota Company, with full right to divide the stock and bonds between them. If they appropriated these bonds to their own use without authority of law, what equitable claim have they here after the lapse of 30 years? But it is said we should not look into this question now, but refer the case to a master to take testimony. But no doubt all the testimony is taken that could be on these questions, and more than could be taken now after Gunnison, Bright, and other witnesses have passed away since giving their evidence in this case. Besides, I only refer to the question of title as bearing on the equities of the complainants' claim. These bonds have never had any market value. The testimony shows that they have always been considered as worthless, and when 146 of them were found among the assets of the Griffiths estate they were not accounted worth inventorying, and were not inventoried or any value set upon them, although the estate was insolvent, and paid but 50 cents on the dollar of its debts. After lying in musty boxes and gar-

rets for 35 years, if they are now to be brought forth and made the foundation for a foreclosure and sale of the property covered by the mortgage then there should be some good showing as to the sale of the bonds to furnish an equity. The statement that Bright bought these bonds of Scott and Thompson has no foundation in fact. The testimony shows well enough what that transaction was. The bonds were turned over to Scott and Thompson as collateral, and when Scott and Thompson's claim was paid they were handed back to Bright, as president of the company, with other collaterals, including the capital stock of the company, Bright receiving and receipting for them as president of the company. I am satisfied that Gunnison and Bright took the bonds without authority, and divided them between them. According to Gunnison's testimony, when this division was made he took all the 350 bonds, and put them in a safe-deposit vault in New York, where they remained until 1896. Dwight W. Keyes was secretary of the Minnesota Company from its organization, in 1859, until 1865, on a salary, which was never paid, of \$500. In April, 1868, he obtained judgment against the company in the circuit court of Milwaukee county for \$3,300 for his services as secretary. He testified that he had known Gunnison well for a long time; that Gunnison, when he (Keyes) signed the bonds in 1864, promised that he would see him paid; that after he obtained his judgment he wrote to Gunnison if he could not find some way of satisfying his claim, and that Gunnison answered that the company had no money, but that they had some bonds and stocks that had been returned from Scott and Thompson, and if he would take some of them in settlement he would talk with Bright about it, and get the company to vote the allowance; that he (Keyes), who resided in Cleveland, was in Milwaukee shortly after, and went to see John W. Cary about it, who advised him that the stock and bonds were worthless and that he had better keep his judgment; that he afterwards garnished the Milwaukee Company, but that Cary knocked him out, and he never got anything for his services as secretary. The testimony shows that these 350 bonds were the only ones in the possession of Gunnison and Bright at the commencement of this suit, notwithstanding the allegations in the bill that they are the lawful owners and holders of 500 of said 600 bonds of the Minnesota Company. How they came to have these bonds in their possession, as well as the character of their title, has already been seen.

Now, as to the other 150 bonds to make up the 500 claimed by Gunnison and Bright, who were the promoters of this suit, though since deceased. These were sold soon after being issued, probably in 1865, to William R. Griffiths. According to Gunnison's first testimony, it was 200 bonds or a little less. Afterwards, when asked if he knew how many Griffiths did take, he answered, "between 150 and 175." This number is shown by the whole testimony to be an even 150. Griffiths was at that time a man of some means. He lived in New York, and died in 1876. Chas. E. Hackley, one of complainants' witnesses, testifies that he was sole executor of Griffiths' estate; that he returned and appraised everything that Griffiths left that could be found; that he found among his effects 146 of these

bonds, which were appraised at a nominal value; that in 1881 he rendered his final account to the surrogate court, and that these bonds were decreed to be worthless. The estate was insolvent, and paid less than 50 cents on the dollar, the legatees receiving nothing. This bill was filed on March 30, 1897. Hackley testifies that the 146 bonds remained in his possession up to September, 1898, some 18 months after this suit was commenced; this being the only thing, as he says, he could do with them, unless he burned them. Then, under the advice of counsel, he refuses to state what he did with them. There are many pages of the record made up of questions on cross-examination put to Gunnison, Bright, and Hackley as to these and the other bonds in suit, with refusals to answer. This may be one way to try cases. But the court in an equity case is desirous of finding the truth, and this mode of examination is not very conducive to such an end. All such questions as these the witnesses refuse, under advice of counsel, to answer: "Was Mr. Gunnison the party who obtained these bonds of you in 1898?" "Who purchased them?" "Did the party who took these bonds from you state that they had been put up as collateral for a loan to him and Aaron S. Bright from Griffiths?" Hackley testified, however, that at the time he disposed of the 146 bonds, in 1898, he did not regard them of any value; for, if he had, he would not have sold them.

Afterwards, however, when Dr. Hackley, in 1900, was called to further testify before the special examiner, he testified that on September 16, 1898, he sold the 146 bonds to Albert C. Gunnison for \$500. What title he had or what right to sell them is not apparent, as he had settled the estate, and was no longer administrator. And this about represents the percentage of equity that Gunnison and Bright have in this suit. They have bought \$146,000 of bonds for \$500, some 18 months after the suit was begun, in the spring of 1897. When suit was commenced, they had no interest whatever. They, after waiting 35 years, have paid \$500 on a mere speculative venture, and have got bonds in their possession amounting to \$496,000, with interest at 8 per cent. from 1864. Four of the 150 bonds sold to Griffiths he sold to Dr. Hackley, who still holds them, and these 4 bonds have, no doubt, the best standing of any in this court. Fifty other bonds Gunnison testifies were sold to Troy parties in 1865 for \$50,000. This seems somewhat incredible, and I think, considering the rather unsatisfactory nature of Gunnison's other testimony, may be taken with some grain of allowance. How one block of bonds should be sold for 50 cents on the dollar, and another at about the same time at par, is not very apparent. Gunnison testifies that he does not know what became of the other 100 bonds required to make up the 600. As late as June 2, 1899, he testified that the "about 500" bonds which he and Bright claimed, which included the 350 turned over as collateral to Scott and Thompson, and the Griffiths bonds, were all of the 600 that he knew anything about, and yet it is a significant circumstance that the persons in Troy who, for years, had these bonds in their possession, and from whom the parties who now hold them took them, were relatives and friends of Gunnison. These bonds, amounting to 51, are still in the hands of par-

ties residing at Troy. The remaining 49 bonds were never negotiated at all.

The question naturally arises at this point, without going further into the case, whether a court of equity, after such lapse of time and the great uncertainty of the testimony, will put forth its powers in aid of those who have ventured so small a sum to take the chances on so great a windfall as the foreclosure of this mortgage, with the accumulated interest, would be. In view of the maxims that "he who comes into equity must come with clean hands," and "he who hath committed iniquity shall not have equity," it would seem quite clear that there is not any very strong call on the conscience of the court to grant the relief sought. On the contrary, the court is asked to order the sale of property valued at several millions of dollars in order to enable Gunnison and Bright to realize upon a long standing venture of embezzlement and speculation.

But the great and controlling interest in the case centers about the question of the effect to be given to the sale under the decree rendered for a sale to satisfy the Cleveland judgment. Was the effect of that foreclosure like that of the foreclosure of a mortgage? Or when the sale was made had it the effect of a sale on the judgment? There are no authorities directly in point upon this question. But the supreme court, upon appeal in the James suit, held that the judgment became a lien on the railroad in question from the time of its rendition, and that the sale thereunder passed to the purchaser the whole of the interest which the La Crosse Company had in the road at the time of the rendition of that judgment. I see no reason for thinking there was anything extrajudicial about such language, or that the court did not mean to give full effect to what it said. And if what the court said is true, that the sale took all the title there was in the La Crosse Company at the date of the rendition of the judgment, then it took the title represented by the mortgage in suit. And I see nothing inconsistent in such a doctrine. It is only giving full effect to the judgment. The road could not be sold separate from the franchise. And execution could not issue upon the judgment for the sale of the franchise, which is an incorporeal hereditament. The judgment was worthless unless equity would overcome this technical rule of the common law, and allow a sale to satisfy the judgment. But equity does not do things by halves. When it steps in to do justice because of some imperfection or too great generality of the common law, it gives a full measure of relief, according to the nature of the case. But full measure in this case would mean that the judgment creditor should have what his judgment would give him if the law allowed a *fiery facias*. If it be equitable for a court to order a sale, why should it not afford a full measure of relief, and give the judgment creditor the full benefit of the principle of finality attaching to all judgments? When the sale takes place it is like a sale on the judgment with the like effect. There would seem to be no reason why, if equity will interfere at all to allow a sale, that when it is made it should be considered as a sale on an ordinary foreclosure of a mortgage. That would not give the measure of relief which equity always intends, but would convert the lien of the judgment into

something equivalent to the lien of a mortgage which has not the quality of finality attaching to judgment liens. Probably the supreme court meant all this when it said by Mr. Justice Nelson in the James Case that, "by the statute law of Wisconsin, judgments are liens on real estate, and we do not doubt but that this judgment became a lien on the road from the time of its rendition, and that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole of the interest of the company existing at the time of its rendition to the purchaser." *Railroad Co. v. James*, 6 Wall. 750, 18 L. Ed. 854.

And this was evidently the view taken by Judge Dyer when the question of the effect of the sale on the James decree came before him, in *Howard v. Railroad Co.*, 7 Biss. 73, Fed. Cas. No. 6,761. By the whole of the interest which the La Crosse Company had in the road at the time of the rendition of the judgment, no doubt the supreme court intended not alone the roadbed, rails, and right of way, but the right to maintain and operate the road. This franchise was inseparable from the ownership of the road, and without it a railroad would be of no value. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860. This incorporeal right or franchise could not be sold upon a common-law *feri facias*. Equity, therefore, stepped in and removed this technical objection in order to do justice, and allowed the franchise to run the road as well as the road itself to be sold to satisfy the judgment; so that the only equity that the Minnesota Company or any subsequent incumbrancer had after sale was to redeem from that sale. This there was never any attempt to do, although some 35 years have elapsed.

Besides this, so far as the principal claimants, Gunnison and Bright, are concerned, it seems quite evident that they are bound by the decision of the supreme court in the James suit. They were stockholders in the Minnesota Company, and as such prayed and were allowed an appeal in the name of the company. They litigated in the supreme court the right of the La Crosse & Milwaukee Company to the possession and ownership of this road under the decree and marshal's deed in the James suit. They were defeated in that litigation. Now, as bondholders after over 30 years of delay on their part and adverse possession on the part of the defendants, they propose to contest the company's right to the road. This, I think, they are estopped from doing. *Railroad Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *Jackson v. Lodge*, 36 Cal. 28.

The evidence, I think, also discloses at least two other complete defenses to this suit, both founded upon the delay which is so obvious a feature in this case. One of these defenses is founded upon the statutes of limitation, the other upon laches, and may be considered together.

The Wisconsin 10-year statute of limitations seems to me applicable to the case. That statute is as follows (Rev. St. 1898, § 4211):

"Where the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court,

and there has been a continual occupation and possession of the premises, included in such instrument or judgment under such claim, for ten years, the premises shall be deemed to have been held adversely."

It is difficult to see wherein the evidence in this case fails to satisfy every condition and requirement of this statute. The defendants went into possession under the decree of the United States circuit court for Wisconsin, and the marshal's deed made on the sale, on March 5, 1867, claiming title as against the complainants and all the world, subject to the several prior mortgages on the property, and have remained in possession continuously ever since. It was 30 years from the time defendants went into possession, in March, 1867, to the commencement of this suit, in March, 1897, and I think the evidence shows that the defendants have held the premises adversely all that time. There is every element of adverse possession in the case. The bondholders were not made parties to the bill in equity for a decree to sell on the judgment, because it was not considered necessary. The Milwaukee Company went into possession under the marshal's deed, claiming title as against the mortgagees. The supreme court affirmed its right by an affirmance of the James decree. That company has shown its good faith in its claim of title by paying off several millions of mortgage and judgment liens that were prior to its decree and prior to the claim of these mortgagees, by vastly improving the property, and incorporating it into its general system of railroads, constituting one of the great railroad systems of the country. The company has never paid any interest on the bonds in suit nor in any way recognized the existence of the mortgage as a claim against the property. Under these circumstances, to lie by and make no sign or claim for 30 years estops the bondholders from making the claim now.

Allowing for the moment that the sale under the James judgment did not take all the title of the La Crosse Company in the road from the day of its rendition, in 1867, as the supreme court said it did, still this is the claim that the company made when it went into possession, and has always made, and this was well known to Gunnison and Bright and Griffiths, and all who made any claim under the Minnesota Company. The appeal to the supreme court was taken to contest that claim. The suit by Scribner, brought by Mr. Stark in the United States court for Wisconsin in 1868, after the James decree was made by that court, was brought to contest the same claim of the Milwaukee Company. If there had been any intention to press the claim under the mortgage in suit after the decision of the supreme court in the James suit, it should not have been abandoned, but that suit in Milwaukee should have been pressed to hearing. But the case was allowed to remain on the calendar of the court for nearly four years, Mr. Cary, the counsel for the Milwaukee Company, being told that he need not answer unless required by notice to do so, until finally, in 1872, the suit was dismissed. After the dismissal of that suit, with the defendants in possession making valuable improvements and paying off prior liens, it was negligence for the bondholders to lie by for 25 years without pressing their claims. The fact, quite apparent from all the circumstances, is that, when the suit

in Milwaukee was dismissed by Mr. Stark, the Gunnison and Bright parties gave up the fight. They had been beaten at every point, and they were ready to throw up the sponge.

There is a bit of testimony by Mr. Stark, who had been the attorney for the Minnesota Company, and was the attorney for Gunnison and Bright in the litigation in Milwaukee and in the supreme court, that is quite significant. Speaking of the appeal in the James suit and in another case, he says:

"As those appeals resulted adversely to the Milwaukee and Minnesota Company, and resulted in the establishment of the title to the Eastern Division of the road which the Milwaukee and St. Paul Company claimed under the foreclosure of the Cleveland judgment in the James suit, it was very disconcerting to the parties interested."

This is, no doubt, the way his clients also felt, and no doubt furnishes a clue to the reason for not pressing the Scribner suit. If the decision of the supreme court in the James suit was disconcerting in 1867, it is perhaps quite as disconcerting now, after the lapse of 35 years.

A point has been made that there is not sufficient evidence that Joshua Stark had written authority from the trustees of the bondholders to commence that suit. But the presumption is strong that he had proper authority. He was then, and still is, an able and responsible attorney in high standing. The presumption is strong, and is not shaken by anything in the testimony, that he had authority. After instituting the suit at the instance of Gunnison and Bright, he wrote and telegraphed for written authority from the trustees. He thinks he had it, though after the lapse of 35 years he cannot find it amongst his papers, which is no great wonder. I think the above-named statute began to run on the complainants' claim when the Milwaukee Company went into possession, in March, 1867, and from that time the company has held the property adversely. See *Barnes v. Railway Co.*, 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128, where the supreme court, by Chief Justice Waite, says: "Under this decree the property was sold and conveyed to the St. Paul Company, March 2, 1867, for \$100,920.94, and from that time that company has been in possession claiming title adversely to the Minnesota Company and to the Barnes mortgage." *North v. Hammer*, 34 Wis. 425.

I also think that laches commenced to run from a time soon after the Scribner suit was begun at Milwaukee. All the relief could have been had in that suit which could be had in this, and it was great negligence, if they desired to make any further claim to the property after the decision of the supreme court, to allow the suit in the United States circuit court at Milwaukee to remain unmoved for four years, and then to have it dismissed. By the discontinuance of that suit the Milwaukee Company had grounds for believing that the trustees and bondholders had decided to acquiesce in the decision of the supreme court in the James suit, and make no further claim that the title of that company was subject to their mortgage. The Scribner bill attacked the Cleveland judgment, and the title which the St. Paul Company claimed under the sale and marshal's deed, averring that the judgment was never a lien upon the railroad and

franchises of the La Crosse Company, and that the mortgage in suit was not lawfully subject to the judgment thereof. The appeal in the James suit was pending in the supreme court when the Scribner bill was filed, and within two months the decision of the court was announced affirming the decree and the right of the Milwaukee Company to the road and franchise under the sale. The most natural thing to have done after that decree was rendered was to discontinue the Scribner suit, but instead of that the attorney advised Mr. Cary, counsel for the Milwaukee Company, that he need not answer the bill unless they gave him timely notice to do so, but kept the suit in court without further proceedings for nearly four years, when in 1872 the bill was voluntarily dismissed by complainants.

Again, at the time the Scribner bill was filed the Minnesota Company was in default for nonpayment of interest, aggregating \$144,000, and when the bill was dismissed the defaulted interest amounted to \$336,000; that is, supposing bonds were issued and sold as claimed by the complainants. A foreclosure may have been begun for default in the payment of interest, which might have resulted in the sale of the road. No such suit, however, was ever commenced. See *Toler v. Railroad Co.* (C. C.) 67 Fed. 181; *Railroad Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47; *Howell v. Railroad Co.*, 94 U. S. 463, 24 L. Ed. 254.

The doctrine in regard to laches is very clearly laid down by the supreme court in *Halsted v. Grinnan*, 152 U. S. 412; and by the same judge in *Naddo v. Bardon*, 2 C. C. A. 335, 51 Fed. 493, 14 Sup. Ct. 641, 38 L. Ed. 495; and by Chief Justice Fuller in *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; 2 Pom. Eq. Jur. § 816; *Simmons v. Railroad Co.*, 159 U. S. 278, 16 Sup. Ct. 1, 40 L. Ed. 150.

Furthermore, it seems a matter of much doubt whether the usual 20-year statute applicable to actions upon sealed instruments does not apply to this case. Though the principal of the bonds, by their terms, was not due until 1884, the Minnesota Company went out of existence as early as 1872; so that the only remedy the bondholders had was in equity against the property. That company surrendered its franchise to the state in 1872, or prior to that time, which surrender was accepted by the state, which surrender and acceptance constituted a dissolution of the corporation. The allegations of the bill in this case show that the company was dissolved more than 25 years prior to the filing of the bill, and, aside from the pleadings, the evidence shows a dissolution as early as 1869-72. The Milwaukee Company went into possession on March 6, 1867, under the sale upon the Cleveland judgment and James decree, and has remained in undisturbed possession ever since. There being no legal remedy of which the bondholders could avail themselves, it would seem a reasonable proposition that their remedy, whatever it was, against the property should be pressed within the 20 years from the time the cause of action in equity arose, without reference to the time the bonds fell due by their terms. But I am satisfied to place the decision of this case upon the grounds already discussed: (1) That the sale under the James decree took the entire title of the La Crosse

& Milwaukee Company which it had at the date of the rendition of the judgment on October 7, 1857, long before the Minnesota Company was formed or the bonds in suit issued; (2) that the 10-year statute of limitations provided by the laws of Wisconsin had run upon the claim long before the suit was begun, to wit, on or about March 6, 1877; (3) that the gross laches of the trustees and bondholders in not pressing the claim sooner, after full knowledge that the Milwaukee Company had gone into possession of the property under claim of title which was adverse to their interest, making large and valuable improvements, and paying off some \$3,000,000 of prior liens, are such as make a foreclosure at this late day unjust and inequitable.

The bill of complaint is dismissed for want of equity, with costs.

WETZELL v. CITY OF PADUCAH.

(Circuit Court, W. D. Kentucky. August 11, 1902.)

1. STATUTES—REPEAL BY IMPLICATION.

The General Statutes of Kentucky, adopted in 1873, did not repeal by implication Act March 17, 1870, in relation to submitting questions of taxation to a vote of the people, since it contains no provisions relating to the subject.

2. MUNICIPAL BONDS—ELECTION—CONSTRUCTION OF KENTUCKY STATUTE.

Act Ky. March 17, 1870 (1 Acts Ky. 1869-70, p. 102), which provides that it shall be unlawful for "any county judge, county court, police judge, justice of the peace or any incorporated company" to submit more than one proposition for taxation to the voters of a county, city, or town, or part thereof, at any one election held therein, and that any tax, subscription or donation, etc., voted at an election at which more than one such question was voted on shall be held null and void, applies only to the officers and tribunals specifically named therein, and does not affect an election ordered by a city council under power given by the city's charter, nor render bonds voted at such an election to be exchanged for stock in a railroad company void because two separate propositions were submitted at the same election, where there was nothing in the charter prohibiting such method of submission.

3. SAME—ESTOPPEL, BY RECITALS.

Where the officers and council of a city are given such powers by its charter that authority must be inferred therefrom to determine whether the necessary conditions precedent exist to authorize an issuance of bonds by the city, a recital by such officers in the bonds that all such conditions have been performed will bind the city, in favor of an innocent purchaser of the bonds for value and without notice.

4. SAME—EFFECT OF PAYMENT OF INTEREST—INNOCENT PURCHASERS.

The fact that a city for a number of years promptly paid the interest on an issue of bonds raises a strong equity in favor of a holder who purchased during such time, and even if it does not create an estoppel against the city, in a strict sense, is entitled to be considered by the court, in connection with the other facts, where the city subsequently denies the validity of the bonds.

5. SAME—VALIDITY—MATTERS CREATING ESTOPPEL.

The voters of a city by a nearly unanimous vote authorized a subscription to the stock of a railroad company which projected a line to the

¶1. Repeal of statutes by implication, see note to *Bank v. Weidenbeck* 38 C. C. A. 136.

¶3. Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

city, on certain conditions, and the issuance of negotiable bonds in payment therefor. The road was built, and all the conditions complied with, and the council, by a two-thirds vote, directed the issuance of the bonds, which contained recitals of such facts. They were issued and delivered to the railroad company in exchange for its stock, which the city received and retained. For more than nine years the city promptly paid the interest on the bonds, and during that time plaintiff purchased a number of them in the open market for full value. *Held*, that such facts, considered together, estopped the city to repudiate the bonds for any mere irregularity in the proceedings prior to their issuance; the subscription to the stock and the issuance of the bonds having been expressly authorized by its charter.

At Law. Action on coupons from municipal bonds.

John F. and Arthur B. Shepley and Campbell & Campbell, for plaintiff.

R. T. Lightfoot and J. M. Worten, for defendant.

EVANS, District Judge. For several years previous to 1887 the people of Paducah, believing it would greatly promote the prosperity and growth of their city, were anxious to obtain direct railroad facilities northwardly; and doubtless this desire upon their part induced the legislature of Kentucky to insert in the act to revise the charter of that city, approved May 12, 1884 (2 Acts Ky. 1883-84, p. 1080), the provisions of section 59 thereof, in this language:

"The council, in the name of the city, shall have power to subscribe for and hold and sell stock in any public corporation for the building of roads and bridges in the commonwealth of Kentucky, and in one or more railroad companies for the building of railroads on the northwest side of the Ohio river, terminating in Paducah, to be paid by the bonds of the city, bearing interest not exceeding five per cent. per annum, the subscription not to exceed one hundred thousand dollars to any one road; and to purchase and hold any personal or real estate within or without the limits of the city; and to borrow money, subject to the following qualifications: The council shall not have the power, on behalf of the city, to create any new debt or liability exceeding twenty thousand dollars for one object or purpose, nor subscribe for stock in any incorporated company, or give the bonds of the city therefor, in amount exceeding the sum of twenty thousand dollars; nor shall the council have power to appropriate money, directly or indirectly, for any object or purpose in amount exceeding the sum of twenty thousand dollars, unless said council shall first cause an election to be held by the qualified voters of the city, and submit to a vote the question as to the propriety of creating such new liability, the subscription of stock or appropriation of money for the object or purpose proposed; and said proposition shall be voted for affirmatively by a majority of all the qualified voters of the city, which majority shall be ascertained by the assessor's book made at the last assessment next previous to the holding of such election; and it shall be the duty of the assessor, in his assessments of property, to diligently inquire of all persons assessed, and ascertain whether they are qualified voters, and to list in a column upon his book all qualified voters of the city; and if, upon taking such vote, there should be a majority of all the qualified voters of said city in favor of the proposition submitted to them, and the council thereafter, by a vote of two thirds of all the members in office, evidenced by the records of the council upon a call of the yeas and nays, shall pass an ordinance in favor of, or directing such a subscription of stock, the creation of such new debt or liability, or the appropriation of money exceeding twenty thousand dollars: provided, that the council shall have the power, without submitting the question to a vote of the people, to execute the bonds or obligations of the city renewing any existing liabilities of the city. Said council may give the bonds of the city in such sums, and payable at such times, as they shall deem most expedient."

It may be remarked that the power to subscribe for stock in two or more Illinois railroad companies originated in the act of January 24, 1872, amending the charter of the city. See Acts Ky. 1871-72, p. 186.

From this legislation, and from the ordinances passed by the council of the city, shown in evidence, it is fair to assume that several plans to secure the desired end offered themselves in 1887. One of these was through the Chicago, St. Louis & Paducah Railway Company, and another, apparently, was through the Paducah & Mt. Vernon Railway Company and the Paducah, St. Louis & Chicago Railway Company jointly. By ordinances passed by a two-thirds vote of the council a proposition to subscribe for \$100,000 of the capital stock of the Chicago, St. Louis & Paducah Railway Company was submitted to a vote of the people of the city at a special election held on May 14, 1887. At that election, as was ascertained in due form, 1,807 votes were cast in favor of the proposition, and 22 votes against it. By other ordinances passed by a two-thirds vote of the council a proposition to subscribe for \$50,000 of the capital stock of the Paducah & Mt. Vernon Railway Company and \$50,000 of the capital stock of the Paducah, St. Louis & Chicago Railway Company was likewise submitted to a vote of the people of the city at a special election also held on the 14th day of May, 1887. At that election, as was ascertained in due form, 1,805 votes were cast in favor of the proposition, and 21 votes against it. Doubtless the two propositions were voted upon at the same election. After the results of the election as above stated were properly ascertained and certified to the council, that body, by an ordinance passed May 23, 1887, by a "vote of two-thirds of the members in office, evidenced by the records of the council upon a call of the yeas and nays," authorized and directed the mayor of the city to subscribe on its behalf for \$100,000 of the capital stock of the Chicago, St. Louis & Paducah Railway Company upon the terms and conditions contained in the ordinance submitting the proposition to the vote of the people. On the same day and in the same way the council passed another ordinance authorizing and directing the mayor to subscribe, on the same conditions, for \$50,000 of the capital stock of the Paducah & Mt. Vernon Railway Company, and for \$50,000 of the capital stock of the Paducah, St. Louis & Chicago Railway Company. Each of the three named railway companies was organized under the laws of the state of Illinois, and the subscription of the city of Paducah for shares of the capital stock of each was, under the ordinances referred to, made upon certain very express conditions as to the completion of all or certain parts of the work of construction stipulated for before the stock was to be paid for in bonds of the city. It is quite fair to presume that if either one of the two lines of railroad, to wit, either that of the Chicago, St. Louis & Paducah Railway Company, or that of the other two railways jointly, was completed, the other would not be so much, if at all, needed, and probably this was not an unimportant consideration affecting the interest and conduct of all the parties. At all events, nothing adequate was done by either the Paducah & Mt. Vernon Railway Company or by the Paducah, St. Louis & Chicago Railway Company to comply with the terms and

conditions specified in the ordinances providing for subscriptions to their capital stock, respectively; and consequently the city of Paducah did not take or pay for any stock in either of those companies, and did not issue any bonds or incur any obligations on account of any subscription for the stock of either. In due time and order, however, the Chicago, St. Louis & Paducah Railway Company did construct its railroad, and did fully comply with all the terms and conditions prescribed in the ordinance under which the people voted to subscribe for \$100,000 of its capital stock. These facts being duly ascertained by the council, as appears from the testimony, the \$100,000 of the bonds of the city of Paducah, due in 30 years, and bearing interest at the rate of $4\frac{1}{2}$ per cent. per annum, payable semiannually, were delivered to the Chicago, St. Louis & Paducah Railway Company, and in turn that company delivered to the city certificates for \$100,000 of its capital stock on the 23d of January, 1889. The bonds thus delivered were in denominations of \$1,000 each, were numbered serially from 1 to 100, inclusive, and 60 semiannual interest coupons were attached to each bond, payable, respectively, on June 1st and December 1st of each year. Each of the one hundred bonds was in the following form, to wit:

"\$1,000.

State of Kentucky.

\$1,000.

"City of Paducah.

"Know all men by these presents that the city of Paducah, in the county of McCracken and state of Kentucky, for value received, promises to pay to the bearer of this bond, thirty (30) years from the date hereof, the sum of one thousand dollars, with interest thereon at the rate of four and one-half per cent. per annum, payable semiannually upon the presentation and surrender of the annexed coupons as they become due, and for the payment of the principal and interest of this bond the faith and credit of said city of Paducah is irrevocably pledged. Payable at the fiscal agency of said city of Paducah, in the city of New York. It is provided that said city of Paducah reserves the right to pay this bond, with accrued interest thereon, before maturity, at any time after ten (10) years from the date hereof. This bond is one of a series of one hundred (100) bonds for one thousand dollars each, of like date, tenor, and effect, issued by the city of Paducah in payment of one hundred thousand dollars on the capital stock of the Chicago, St. Louis & Paducah Railway Company, subscribed for and delivered to said city, and is issued under and in pursuance of the provisions of the general charter of said city authorizing the same, and an ordinance of said city adopted April 25th, A. D. 1887, amended April 30th, A. D. 1887, and ratified by a majority of the qualified voters of said city at an election duly held for that purpose on the 14th day of May, A. D. 1887, and also by the affirmative vote of two-thirds of the members of the common council of said city voting in favor of and authorizing the same. The said Chicago, St. Louis & Paducah Railway Co. having duly complied with all the terms and conditions imposed upon said company as conditions precedent to the execution and delivery of this bond, the said city council has ordered the execution and delivery of the same, signed by the mayor, and attested by the clerk of the city council, and the seal of said city, and has caused the interest coupons hereto annexed to be signed by the city clerk. Done in the city of Paducah on the 1st day of December, A. D. 1888.

"Chas. Reed,

"Mayor of the City of Paducah.

"Attest: W. H. Patterson, Clerk of City Council.

"[Seal.]

"Audited January 23rd, 1889.

"D. O. Sweatman, Auditor."

The interest on each bond was regularly and promptly paid by the city up to and including that due June 1, 1889, and on July 6, 1889, the plaintiff, in open market and for full value, purchased and paid for 25 of the bonds, the serial numbers of which were 36 to 60, inclusive, and thereafter the city regularly and promptly paid all the interest coupons on said bonds accruing up to and including the one due June 1, 1898. Afterwards this ceased, and this suit was brought to enforce the payment of the coupons subsequently accruing, up to and including those due on December 1, 1900. By a stipulation in writing, the issues involved have been submitted to the judgment of the court without the intervention of a jury; and, while I do not formally yield to the request of counsel to find the facts, in the technical sense, I have set out above those upon which I think the judgment of the court must turn.

1. It must be observed that those of the pleadings which succeed the petition are quite unsatisfactory. Instead of containing statements of fact, or traverses thereof, they are mainly and at considerable length filled with statements of mere legal propositions or conclusions on one side, and a denial thereof on the other; but it is apparent that the only serious defense made in behalf of the defendant is that the provisions of the act entitled "An act in relation to submitting questions of taxation to a vote of the people," approved March 17, 1870 (1 Acts 1869-70, p. 102), requires that the bonds shall be held to be null and void because there were two propositions to make subscriptions to the capital stock of different railroad companies voted upon at the same time and at the same election. That act is in the following language:

"An act in relation to submitting questions of taxation to a vote of the people.
"Be it enacted by the general assembly of the commonwealth of Kentucky:

"Section 1. That it shall be unlawful for any county judge, county court, police judge, justice of the peace, or any incorporated company in this commonwealth, to submit more than one proposition for taxation, direct or indirect, to the voters of a county, city, or town, or part thereof, at any one election held therein.

"Sec. 2. Any tax, subscription or donation, or any authority to tax, make subscriptions or donations, or otherwise, directly or indirectly, to impose a tax upon the people of such county, city or town, or part thereof, voted or granted by the voters at an election at which more than one such question was voted upon, shall be held null and void.

"Sec. 3. All acts and parts of acts, public or private, inconsistent with the provisions of sections one and two of this act, are hereby repealed.

"Sec. 4. This act to take effect and be in force from and after its passage.
"Approved March 17, 1870."

As this statute declares that any "subscription" or "authority to tax" contrary to its provisions shall "be held null and void," the defense certainly presents a question of grave importance, particularly as this court would feel bound to follow the interpretation and construction of a statute of the state of Kentucky if one has been definitely settled by the court of appeals, although under the ruling in cases like that of *Thompson v. Lee Co.*, 3 Wall. 327, 18 L. Ed. 177, and others which followed it,—notably that of *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359,—it is undoubtedly true

that if such construction appears to be settled in one way, and persons contract on the faith of such settled construction, the courts of the United States will not permit the persons thus contracting to be injured, by yielding to an entirely different but later ruling of the highest court of the state. In the case of *Broadus' Devisees v. Broadus' Heirs*, 10 Bush, 299, the court of appeals of Kentucky, in harmony with generally accepted principles, held that the object of the then recent revision of the statutes of Kentucky was to enact a system of laws, in a condensed form, embracing all statutory enactments of a general nature other than those excepted in the act adopting the General Statutes; that the General Statutes must be regarded as containing all the statute law on the subjects indicated by the titles therein, and that, therefore, when a section in the Revised Statutes has been omitted in the General Statutes, or any change made, however slight, in a general law, the whole law as found in the Revised Statutes on that subject must be considered and treated as repugnant to the provision of the General Statutes. It is insisted upon the part of the plaintiff that, under the operation of the rule thus settled in the *Broadus Case*, the act of March 17, 1870, was not in force after the adoption of the General Statutes in 1873; but the court has searched those statutes in vain for any title, section, or provision of law therein which fairly pertains to the subject of legislation covered by the act of 1870, and for that reason is of opinion that that act was not repealed by the adoption of the General Statutes. It is also insisted that the doctrine of the *Broadus Case* was the settled law of Kentucky, and that the supposed attempt to change it by the court of appeals in its opinion in the officially unreported case of *Christian Co. v. Smith (Ky.)* 12 S. W. 134, 13 S. W. 276, and wherein it was held that the act of March 17, 1870, was not repealed by the adoption of the General Statutes, should not alter or affect the rights of the plaintiff accruing before that decision, and while the rule theretofore established by the *Broadus Case* was in force. As already indicated, the court does not think that the *Broadus Case* applies to this one, because there is no provision in the General Statutes which covers the subject-matter of the act of March 17, 1870, and, for reasons which will soon appear, the court is of opinion that the ruling in the case of *Christian Co. v. Smith* can have no effect on what should be the ruling in this case. Shortly stated, that reason is that the act of March 17, 1870, by its terms, does not apply to the action of a "city council" at all. On reading the first section of that act, it will be seen that it only makes it "unlawful for any county judge, county court, police judge, justice of the peace, or any incorporated company" to submit more than one proposition for taxation to the voters at any one election. The legislature doubtless had a reason satisfactory to itself, and into which we cannot inquire, for limiting the prohibition to those officers and tribunals specially named in the act, and this reason may have been its knowledge that the larger cities, at least, were generally elaborately equipped with machinery and safeguards in respect to such matters; and it seems to the court to be entirely clear that the second section of the act must be held to relate only to what is referred to in section 1, and as be-

ing intended only to make null and void any act done in violation of that section by any officer or tribunal named therein. In short, by section 1 certain expressly specified acts done by certain explicitly named and described officers and tribunals are prohibited and declared to be unlawful; and, in order to leave no doubt as to what shall be the effect of a disregard of those prohibitions, the second section requires that anything done in violation thereof "shall be held null and void." This seems to the court to be the entire scope and object of the act of 1870. If section 2 stood alone, it might be different; but the court is not at liberty to do otherwise than construe the whole act together, and, in endeavoring to ascertain the legislative intent it must look at it all, and limit the general language of section 2 to the narrow and special context and purview indicated by section 1. The numbering of the clauses of a legislative enactment in many instances is for convenience and reference, rather than for interpretation (End. Interp. St. § 70); and in this case if we eliminate the section figures, and in lieu of the period at the end of section 1 insert the word "and," and then read the two sections as one sentence, we shall clearly get the exact legislative meaning. It will be observed that the phrase "county, city, or town, or part thereof" first appears in section 1 of the act; and for that reason its appearance in section 2 in no wise weakens the proposition just stated, and especially as this court judicially knows that under the laws of Kentucky there are many cases in which, for public purposes, the county court or county judge or the justices of the peace (as a fiscal court) may submit propositions for taxation to the people of a territory which would embrace a city or a town, or a part thereof. And it may be added that by no possible construction could it be held that the words "incorporated company" meant a municipal corporation. The charters of the cities of the state being usually very explicit as to the manner of authorizing subscriptions by them to desired public improvements, the general assembly did not embrace city councils in this legislation, and it is not within the power of the court to put them into it in the absence of express legislative warrant. Over this subject the legislature, whatever its reasons, had exclusive control, and the court has none. The language of the act is clear, and the court cannot add to it. The following authorities seem clearly to vindicate this construction of the act: *In re Rouse, Hazard & Co.*, 33 C. C. A. 360, 91 Fed. 100; *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566; *Barbour v. City of Louisville*, 83 Ky. 100; *City of Covington v. McNickle's Heirs*, 18 B. Mon. 286; *Brooks v. Cook*, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282; *Board of Education v. City of Detroit*, 30 Mich. 505; End. Interp. St. §§ 38, 70; *Suth. St. Const.* §§ 215, 218, 268, 279, 300; *Sedg. St. & Const. Law*, pp. 360, 361; *Black, Interp. Laws*, p. 141. In the case of *Christian Co. v. Smith* the county judge submitted two propositions for taxation to be voted upon at one election; and, that particular officer being one of those prohibited by the act of 1870 from doing so, his action was expressly declared to be unlawful, null, and void; and the reasons why that case does not control this appear to be obvious. The exact case then decided was as above stated, and its scope cannot

be expanded by expressions broader than the facts warrant. It may also be observed, as in large measure strengthening these conclusions, that while section 59 of the city's charter, enacted in 1884, gives the council the power to subscribe for stock "in one or more railroad companies for the building of railroads on the northwest side of the Ohio river, terminating in Paducah, to be paid for in bonds of the city," but requiring the question of doing so to be first submitted to the qualified voters of the city, it does not in any way require that such questions shall be voted for at separate elections; and by section 207 of the charter, approved May 12, 1884, it is provided that "all laws and parts of laws in conflict with this act are hereby repealed." The court, upon these grounds, and especially in connection with the considerations now to be stated, is constrained to hold that the bonds of the city are not null or void by reason of anything contained in the act of 1870. As that act did not apply, a purchaser of the bonds was not bound to take notice of its provisions, nor inquire whether they had been pursued.

2. While the court has already indicated that it regards as unmaintainable the one substantial defense presented by the answer of the defendant, it may be well, inasmuch as they may be thought to bear strongly upon the general result, to consider, at least briefly, the other questions raised by the pleadings or the contentions of counsel. It is urged by the plaintiff that the defendant is estopped from making any defense by the recitals in the bonds, which, it is contended, are sufficient to show an innocent purchaser that the laws under which they were issued, and all the terms and conditions prescribed in the ordinance, were duly performed and complied with. The law upon the subject would seem very clear, unless, contrary to what has already been said, the act of 1870 applies and controls. If that act, by construction, must be held to embrace the case of a submission of two propositions for taxation at the same election by a "city council," although that body is not named in the act, then, if nothing else appeared, it might be somewhat difficult to distinguish this case, in principle, at least, from those of which the case of *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519, may be cited as a type; but the court is of opinion that it must be inferred from other provisions of the city charter (sections 4, 46, 59, 77, 88, 179, 189, 190) that the council, the mayor, and the other officers of the city who acted in this case, lawfully constituted a tribunal duly authorized and empowered, on behalf of the city, to ascertain and certify the facts recited in the bonds, including the question of whether all the laws under which the bonds were issued had been complied with; and the court is of opinion, under these circumstances, that those recitals are sufficient to estop the city from asserting that all those conditions had not been fully met. *Knox Co. v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; *Provident Life & Trust Co. v. Mercier Co.*, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156; *Waite v. City of Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed.

552; and other cases too numerous to name. The evidence offered shows that the subscription for the stock of the Chicago, St. Louis & Paducah Railway Company was made after a duly authorized election had shown that a majority of all the qualified voters of the city were in favor of it, and that, in the language of the charter, "the council thereafter, by a vote of two-thirds of all the members in office, evidenced by the records of the council, upon a call of the yeas and nays," passed the ordinance directing the subscription for the stock. Upon the case as presented, and holding that the act of 1870 does not apply nor control it, the court is of opinion that the city of Paducah is bound by the recitals in the bonds, as between it and an innocent purchaser thereof for value and without notice; and the court has ascertained from the evidence that the plaintiff was such.

3. It is also contended that the city is estopped from any defense, as against the plaintiff, because of the payment of the interest on the bonds for over nine years, covering a period both before and after the plaintiff purchased. If the bonds, under the Kentucky law, were "null and void" *ab initio*, it is possible, if nothing else appeared, that the city would not be estopped from so pleading. This would seem to result from the ruling of the supreme court in the case of *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044, where it was claimed and shown that the bonds then in contention were issued in disregard of the limits clearly fixed by the constitution of Iowa. But unless they were absolutely void, strong support to the claim of estoppel in this case is found in the opinion of the court in the case of *Ray Co. v. Vansycle*, 96 U. S. 687, 688, 24 L. Ed. 800, where the court lays particular stress upon the fact not only that several installments of interest had been paid, but also that certificates of stock in the railroad company were delivered to the county in payment of the bonds; that the certificates were still held by the county; that they had never been tendered back for cancellation; and that when the county refused to further pay interest no intimation was given of its willingness to cancel the certificates of stock. The county was held to be estopped under all the facts in that case, which, in many of its features, is strikingly like the one now being considered. Equally strong is the case of *Clay Co. v. Society for Savings*, 104 U. S. 590, 591, 26 L. Ed. 856. When a person desires to invest in municipal bonds, it is a most important matter to him to obtain those upon which the promised interest has been promptly paid, and for the payment of which he may fairly assume that taxes have been levied and collected. This state of fact brought about by a municipality will be a strong inducement to purchase, because such levying and collection of taxes, and the payment of interest on the bonds, must necessarily induce an innocent intending purchaser to conclude that the municipality regards the bonds as valid and binding upon itself. Coupled with such recitals as are contained in the bonds in this instance, the long-continued payment of interest after the plaintiff purchased its bonds, as well as before, even if not amounting to matter of estoppel, in the strict sense (upon which the court at this point expresses no positive opinion), is certainly, to say the least,

not without much weight with the court, when viewed in connection with all the other facts of the case.

4. Stress is also laid upon other grounds of estoppel in conjunction with those already mentioned. It clearly appears from the evidence (1) that the people of Paducah well-nigh unanimously voted in favor of subscribing for the stock of the railway company,—a vote which they must have known and intended would almost necessarily lead to the issuing of the bonds of the city to pay for the stock; (2) that, at least in some measure, upon the faith of that vote the much-desired railroad was built, and, it is fair to assume, at great cost to the company; (3) that, all the terms and conditions precedent being fully performed by the railroad company, the city council, in the exact manner prescribed by the charter, passed an ordinance directing the mayor to subscribe for the stock; (4) that the bonds of the city to pay for the stock, and containing all the pledges, recitals, and assurances embraced therein, were issued, payable to bearer, and duly delivered; (5) that certificates for \$100,000 of the stock of the railway company were issued and delivered to the city, and there is no intimation that this stock is not still owned by it; (6) that the interest coupons on the bonds were regularly and promptly paid by the city for over nine years, thus affording by these acts of the city additional inducements to purchase the bonds, and further assurance of their validity; (7) that the city in these ways got the desired railroad facilities north of the river, which are permanent and enduring; and (8) that though resolving no longer to pay the interest on the bonds, which they now insist are illegal, there has been no intimation of any purpose or desire upon the part of the city to return or cancel the certificates of stock, nor of any purpose or desire otherwise to return the money, or its equivalent, obtained for the bonds. All the benefits derived from the transaction are retained by the city, but the consequent obligations are not to be met or discharged; and it must be apparent that the unanimity with which those obligations were assumed by the city gave no indication of such a course of conduct on the part of the municipality, whose credit had stood high, if the price paid in the open market by the plaintiff for its bonds affords a true test for determining that question. While probably some and certainly others of the alleged grounds would not of themselves afford adequate support to a plea of estoppel, combined they constitute such a vindication of plaintiff's demand to relief that it is difficult to suppose that any court of justice would deny it. The council of the city, when it passed on December 5, 1898, the resolution offered in evidence by the defendant in regard to an ordinance declining further to pay interest on the bonds, must have felt the pressure of the obligations resulting from the facts of this case, and apparently sought to embody in the resolution some apology for its passage, by avowing therein "that said council was not actuated or in any manner prompted by any spirit or motive of a repudiation or a rejection of the justice, morally, of the claims of the bondholders in question upon the city," but, while recognizing the "justice, morally," of the claim of the bondholders, declared that its action was based

upon what a majority of its members had concluded at that late day were the demands of the constitution and laws of Kentucky. It seems to the court to be matter of congratulation for the city itself, under all the circumstances of the case, that neither the laws nor the constitution of Kentucky make any "demand" nor afford any countenance for such a disregard of those obligations, and that the members of the council were mistaken in the view they took of it. On the contrary, these bonds and their validity seem to be most strongly buttressed, not only by those laws and by the facts proved, but also by the "justice, morally," and the right of the case. The court is not unmindful of the observations of Mr. Justice Harlan, in rendering the opinion of the court in the case, cited in argument of *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138, upon the subject of considerations merely moral in their bearing upon the decision of causes, where those considerations apparently come in collision with positive and well-established principles of law; but it must be remembered that moral obligations always play a most important part in questions of estoppel, for generally, the main, if not the only, support of such a plea is a moral obligation. Such pleas are generally upheld, if at all, upon the ground that it is against equity and good conscience for a party to insist upon a given claim or defense. Besides, it might also be suggested by that opinion of Mr. Justice Harlan that, if the bonds in this case are held to be null and void, then the city holds the value received for them as money which, *ex æquo et bono*, it should not retain, and which after demand might possibly be recovered from it by the parties entitled. In view of what has been stated, it appears to the court, after a very full and laborious consideration of all the facts and the law of the case, that the bonds from which the coupons sued on were taken are valid obligations of the city of Paducah, and consequently that the plaintiff is entitled to payment of the interest demands evidenced by those coupons.

5. And lest there might be some uncertainty upon one point, it may be well to add that, in the opinion of the court, the bonds are perfectly valid independently of any recitals they may contain, and independently of all matters of estoppel pleaded by the plaintiff. In the opinion of the court, they are valid because the testimony shows that they were duly and properly issued, upon good consideration, by the proper authorities of the city, for a lawful and beneficial purpose, and after the qualified voters, in proper manner and form, had authorized it.

The judgment of the court will therefore be that the plaintiff recover as prayed in his petition.

Ex parte RICHARDS et al.

(Circuit Court, S. D. West Virginia. August 13, 1902.)

1. EQUITY—INJUNCTION—VIOLATION—SERVICE OF PROCESS.

The violation of an injunction is punishable as a contempt, though at the time of the violation no process had been served on defendants in the bill.

2. SAME—PLEADING—ALLEGATIONS.

In answer to rules in contempt proceedings for the violation of a restraining order in the district court for the Southern district of West Virginia, defendants in the rules, who were residents of West Virginia, and not named in the bill, stated that they were advised that they were parties to the original bill. The bill stated that it was brought against the defendants named, "their confederates, associates," etc., whose citizenship and residence were unknown. *Held*, that such defendants in the rules were not parties to the bill, since the allegation must be treated as referring to defendants who could be made parties, and so could not refer to any resident of West Virginia, and no defendant can be made defendant to a bill save by name.

3. SAME—JURISDICTION—COLLATERAL ATTACK.

The question of jurisdiction to entertain a bill cannot be made by persons not parties to it, in a collateral proceeding to punish them for violation of a restraining order in the suit.

4. SAME—EVIDENCE.

Evidence considered, and *held* to show defendants in contempt proceedings for violation of an injunction to have been "confederates and associates" of defendants in the bill on which the order was issued.

5. SAME—SERVICE OF INJUNCTION—ABSENCE OF SERVICE.

It is not necessary that a person be served with an injunction, in order to render him amenable to its provisions, if it appears that he had reasonable notice of it.

6. SAME—INJUNCTION—CONSTRUCTION.

An injunction restrained defendants, their associates, etc., from congregating in or about the premises of plaintiff for the purpose of inducing its employes to quit work; from conducting or leading any body of men up to or upon the premises of plaintiff; from interfering with plaintiff's employes on its land or premises; from interfering with the plaintiff's employes, or with any person desiring to enter its employment, by the use of threats, personal violence, or intimidation, or by any other means whatsoever calculated to intimidate, terrorize, and alarm or place in fear any of the employes of the plaintiff in any manner whatsoever at or upon its premises; and from in any unlawful manner interfering with the plaintiff's employes while they might be passing to and from their work on and near the plaintiff's premises. *Held*, that the meaning of the order was that the defendants and all persons subject to it were inhibited from personal violence or intimidation of any sort towards the employes of plaintiff, even though such acts of intimidation were not performed on plaintiff's premises.

7. SAME—INJUNCTION—VIOLATION—EVIDENCE.

Evidence considered, and *held* to show a violation of an injunction restraining defendants from intimidating or interfering with plaintiff's employes.

In Equity. Upon rules and attachments for contempt.

Geo. W. Atkinson, Dist. Atty., Elliott Northcott, Asst. Dist. Atty., J. W. St. Clair, C. W. Dillon, and C. R. Summerfield, for the United States.

S. C. Burdett, J. W. Linn, and Adam Littlepage, for defendants.

KELLER, District Judge. On the 27th day of June, 1902, Collins Colliery Company filed its bill of complaint against Joe Crisco, Paul Dufait, "Mother" Jones, Mike Miller, who were alleged to be citizens and residents of the state of Pennsylvania, W. B. Wilson, a citizen and resident of the state of Indiana, Chris. Evans, a citizen and resident of the state of Ohio, and certain other defendants, whose citizenship and places of residence were alleged to be unknown to the plaintiff. The plaintiff is a corporation created and organized under the laws of the state of West Virginia, and in its bill alleged these facts, and that its place of business is in the county of Fayette, in the state of West Virginia, where it is engaged in the operation of a coal plant giving employment to about 600 laborers; that it produces from 1,200 to 1,500 tons of coal per day, for which it finds market and sale in many different states in the Union; that it has expended the sum of \$250,000 in the construction and erection of its plant; that it is operating under lease a tract of coal land containing about 1,300 acres, for which it must pay a minimum royalty of \$10,000 per year, whether it operates the coal tract or not, and that if it should not operate this coal plant the payment of the royalty would be an actual loss to it; that it is under contract to furnish large quantities of coal for the markets aforesaid; that it is operating its plant to about one-half of its capacity, and using the output therefrom in the fulfillment of its said contracts, and that it will be able to fulfill the said contracts and properly conduct its business if not hindered or delayed in the operation thereof; that about one-half of the miners engaged for it, and other employes, are working under contract in the matter of mining and producing coal, and are receiving wages with which they are satisfied and in all respects contented; that the remainder of the miners and employes engaged as such at its mines are willing to work and continue their employment, but that they have been and are partially idle because they have been intimidated and put in fear on account of the actions of the defendants and their confederates; that there has been and is in existence what is called a "miners' strike" in the region in which the complainant's mine is situated, and that in pursuance of the said strike and its promotion there is a confederation, combination, and association of men organized to that end, and that the defendants named in the bill are among the men so organized, and for that reason came into the state of West Virginia, and have gone among the coal miners and other employes engaged in mining coal and laboring in the plaintiff's plant for the sole purpose of inducing and persuading the plaintiff's miners and other laborers to quit work, and have indulged in threats, menaces, inflammatory speeches, and demonstrations; and complainant avers that, if this course is pursued, its employes who are now at work will be intimidated and coerced from mining coal and the performance of all other labor; that the said actions of the defendants have already been the means of causing a large number of complainant's employes to quit mining and laboring for the complainant; that the defendants named in the bill are insolvent, as complainant is advised and alleges, upon information; and that therefore they will be wholly unable to respond in damages for the injuries thus done,

and complainant will be irreparably damaged, which injury and damage, it is alleged, will largely exceed in amount the sum of \$2,000. Complainant further alleges that there are others associated with the named defendants, whose names are unknown to the complainant, and are confederating with the said defendants for the purpose of aiding and promoting the acts aforesaid, and for the purpose of intimidating and coercing the employes of the complainant to cease their work; that the defendants are leaders in different labor organizations, and are engaged in the business and occupation of creating agitations and disturbances among the coal miners of this and other states; and that they are now engaged in the work of endeavoring to organize the employes in the employment of the complainant. Complainant further alleges that under the leadership, control, and management of the defendants there are large bodies of men who congregate near complainant's coal plant; that they have been in close proximity to complainant's employes, making inflammatory speeches, and that they have threatened to march with said bodies of men through and over the premises of the complainant, which, it is alleged, is for the purpose of intimidating, scaring, and coercing the men who are now engaged at work for complainant, and for the purpose of causing them to stop their employment; and complainant avers that unless the defendants and such agents and confederates are inhibited from further conducting such meetings, and from marching through complainant's premises, the defendants, through this agency and by this means, will intimidate complainant's said coal miners and other employes, and thereby indirectly coerce them to quit their labor and employment, to the great loss and damage of complainant; that the defendants and their said agents and confederates have made violent threats against the employes of complainant, should they continue in their employment; that such threats have been to the effect that complainant's employes would be "killed and riddled with bullets" if they continued in complainant's employment; and that by such threats and the other means aforesaid the defendants, or some of them, their associates and confederates, are about to cause complainant's employes to cease work. The bill contained a prayer for an injunction restraining and inhibiting the defendants hereinbefore named, their confederates, and all others associated with them, from in any manner interfering with complainant's employes by the use of threats, personal violence, or intimidation, or by any means whatsoever calculated to terrorize or alarm the employes of the complainant, etc.

Upon the filing of this bill a temporary injunction was granted, restraining the defendants named in the bill, their confederates, and all others associated with them, from interfering with the plaintiff's employes now in its employ at or upon its premises, or from interfering with any person in or upon its premises who may desire to enter its employment, by the use of threats, personal violence, or intimidation, or by any other means whatsoever calculated to intimidate, terrorize, and alarm or place in fear any of the employes of the plaintiff in any manner whatsoever, at or upon its premises. And the defendants and all other persons associated with them were

further enjoined from undertaking, by any of the means or agencies mentioned in the plaintiff's bill, from going upon the plaintiff's land or premises to induce or cause any of the said employes to quit or abandon work in the mines of the plaintiff or upon its premises, and from congregating in or about the premises of the plaintiff for the purpose of inducing the employes in said mines to quit and abandon work in them. And the defendants, their confederates and associates, were further restrained from conducting or leading any body or bodies of men up to or upon the premises of the plaintiff for the purpose of inducing or causing the plaintiff's employes to quit and abandon working for the plaintiff, or from in any manner interfering with, directing, or controlling plaintiff's employes on its land or premises, or from interfering in the business of the plaintiff upon its land or premises. The defendants, their associates and confederates, were further enjoined from going upon any part of the plaintiff's land and premises for the purpose of intimidating, coercing, or endeavoring to procure and induce the plaintiff's employes to cease working in its mines and upon its premises, by any improper threats, unlawful means, or agencies whatsoever, and from in any unlawful manner interfering with the plaintiff's employes while they may be passing to and from their work in the said mines, on and near the plaintiff's premises.

A hearing upon a motion for a permanent injunction was by error set down for the 16th day of July, 1902, at the United States court room at Bluefield, and upon that day, it appearing that the plaintiff's bill would not be matured until September rules, an order was entered continuing the hearing upon said motion to the first day of the September term of the court at Huntington. In the meantime, on the 19th day of July, 1902, the plaintiff presented to the judge of this court, sitting in chambers, its petition setting forth that since the issuance and service of the said injunction order, to wit, on the 17th day of July, 1902, certain persons named in said petition, who in said petition are alleged to be agents and confederates of the defendants named in the original bill, together with other persons, making in all a body of about 400, were conspiring and confederating together for the purpose of causing petitioner's employes to quit their employment, and for the purpose of intimidating and coercing the miners and other employes who were engaged at work for petitioner from continuing their work and labor; that in pursuance of said combination and conspiracy the parties named therein, together with the unknown persons making up the said body of men, gathered upon a certain level piece of ground lying adjacent to petitioner's premises, and that John Richards, who is alleged in the said petition to be the leader of said body of men, made a speech to them that was calculated to incite disorder and breaches of the peace; that large portions of said body of men (those named in the petition being a part thereof) marched up to petitioner's premises in a threatening and violent attitude, and while there cursed, abused, and threatened petitioner's employes, calling them "scabs," "thieves," etc.; that the said body of men are still camping upon and holding meetings upon said piece of land near said petitioner's mines, and continuing their interruptions and

menacing noises, etc. This petition was duly sworn to, and thereupon, by direction of the court, the rules and attachments which are the subjects of the present inquiry were directed to be issued.

Prior to the hearing upon the rules a motion was made to quash the rules and attachments awarded herein on the ground that the court had no jurisdiction to issue the same, the defendants being all citizens of the state of West Virginia, and by reason of the citizenship of the plaintiff could not have been made parties to the original suit, and that therefore the court is without jurisdiction to award a rule against them for violation of its injunction issued in said suit. The argument upon this point was ingenious and able,—particularly that portion insisting that jurisdiction of the original suit is acquired only by service of process, and that process was not served on any of the defendants to the bill until after the alleged violations of the preliminary restraining order; but if, as is conceded, the court has power to issue a temporary and preliminary restraining order, it is not perceived upon what theory it is denied the power to punish violations thereof merely because process has not yet been served in the suit. This motion is overruled on the authority of the following cases: *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *U. S. v. Agler (C. C.)* 62 Fed. 824; *American Steel & Wire Co. v. Wire Drawers' and Die Makers' Unions (C. C.)* 90 Fed. 598; *U. S. v. Sweeney (C. C.)* 95 Fed. 435; *Conkey Co. v. Russell (C. C.)* 111 Fed. 417.

In the *Lennon Case* the supreme court of the United States said:

"To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

In the case of *Conkey Co. v. Russell* it was held that:

"Where a federal court has issued an injunction directed against the defendants in a suit, and which has been served upon them, such court has jurisdiction to punish for contempt any person who, with actual knowledge of the injunction and of its scope and effect, combines and confederates with defendants who were enjoined, for the purpose of violating and resisting it, and who, in pursuance of such conspiracy, aids and assists in the commission of acts which were enjoined. This jurisdiction exists by reason of the conspiracy to defeat the process of the court, and although such person is a stranger to the suit, and, by reason of his citizenship, could not have been made a defendant therein."

Upon the authority of these and the other cases above cited, I have overruled the motion to quash the rules and attachments.

Answers were filed by the several defendants to the rules, which answers deny in most instances the acts charged in the petition, but admit that a meeting of striking miners was held on the 17th of July, 1902, on a certain property in the Glen Jean bottom, in which meeting the defendants participated; but they deny any intentional violation of the injunction order of the court, and, in effect, deny all of the other allegations of the petition. The answers are both numerous and voluminous, and it can serve no purpose to here attempt to set forth in detail the allegations contained therein. In each of these answers there was a statement that the defendant in the rule

is advised that by the bill and process issued thereon he is a party to the original suit of Collins Colliery Company v. Joe Crisco and others, and therefore insists that upon the face of the bill the court has not jurisdiction of the said cause. To these allegations in the answers the government, by its counsel, excepted, and said exceptions are sustained. I cannot hold that these defendants, or any of them, were, or were attempted to be, made parties to the original suit. The only language in the original bill that could give color to any such claim is the statement contained therein that it brings its suit against the defendants named, and against their "confederates, associates, agents, and promoters, whose citizenship and places of residence are to your orator unknown." In the prayer the bill asks for the process of subpoena against the defendants named in the bill, and "against their confederates and associates, when their names shall have been discovered." The court is bound to treat this allegation in the bill and this prayer for process as referring to defendants who could properly be made parties, and therefore that allegation in the bill could not have referred to any resident of West Virginia. Moreover, no defendant can be made a defendant to a bill except by name, and before any of these parties could have been made a party to this bill a proper order of the court, upon petition of the plaintiff, would have to be entered. Holding as I do, that these persons are not parties to the bill, I must further hold that the question of jurisdiction to entertain the original bill cannot be raised by persons not parties to it, upon a collateral proceeding. *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *Conkey Co. v. Russell* (C. C.) 111 Fed. 417.

Upon the hearing of these rules voluminous testimony was offered on both sides, and it now devolves upon the court to determine in each case the following two questions: (1) Does the defendant in the rule stand in the relation of a confederate and associate of the defendants to the bill, or any of them? (2) If so, has he violated the restraining order of the court? Both of these questions must be answered in the affirmative before the court can punish these defendants, because it is only as confederates (that is, aiders and abettors) with the defendants in the bill, or some of them, that the court has any jurisdiction of the defendants to the rules.

The testimony upon the first point develops that most of the defendants to the bill, and, I believe, all of the defendants to the rule, except C. F. Stewart, are members of a secret labor organization known as the United Mine Workers of America, which national order is divided into what are known as "districts," and these districts subdivided into local unions; that district No. 17 comprises the states of West Virginia and Virginia, and that there are local unions at practically every colliery where a sufficient membership can be obtained; that there are numerous local unions in the neighborhood of the plaintiff's mine, and that there is one, at least, at Glen Jean; that W. B. Wilson, defendant to the original bill, is secretary and treasurer of the National Organization of United Mine Workers, and that defendant Chris. Evans is a member of its national executive board; that, of the defendants to the rules, John Richards is president of district

No. 17, and that the others, except C. F. Stewart, are members of various local unions within said district; that on June 7, 1902, a strike was inaugurated in obedience to the order of a district meeting held at Huntington, W. Va., at which meeting some five or six members of the national executive board of United Mine Workers were present, and that the national organization has recognized and aided said strike by furnishing funds for carrying it on, counsel, advice, etc.; that G. W. Purcell, a member of the national executive board of United Mine Workers of America, and a resident of Indiana, has been sent into West Virginia to conduct the strike, and that he has been advising, aiding, and directing Richards in that behalf; that funds were placed to his credit in the Montgomery Bank by means of drafts signed by John Mitchell as president and W. B. Wilson as secretary and treasurer of the United Mine Workers of America; that he paid for provisions and supplies of various kinds purchased of local merchants by checks upon this fund, and that these provisions and supplies were distributed to the local members of the order at their various camps, including the one hereinafter more particularly referred to; that Chris. Evans, another of the defendants to the original bill, and a member of the national executive board, residing at Nelsonville, Ohio, has been and is making purchases of provisions from a firm in Cincinnati, Ohio, for shipment to the mine workers in district No. 17 to the value of about \$5,000 daily; that these purchases were shipped in car-load lots and distributed to the members of the local unions, and that about $2\frac{1}{2}$ car loads had been shipped to Glen Jean, where plaintiff's works are located, and were placed in a storehouse rented for the purpose, and daily distributions were made therefrom among the members of the local unions attendant upon the meetings at Glen Jean, and the members living there, during the continuance of the "protracted meeting" at Glen Jean, hereinafter referred to; that J. W. Carroll, another member of the national executive board, and a native of West Virginia, also consulted with John Richards, president of district No. 17, as to the management and conduct of the meetings hereinafter referred to, at Glen Jean, and advised with him in regard thereto; that about July 16, 1902, men from places as far away as seven, eight, or nine miles from Glen Jean began to gather there at a point very near to where the employes of the plaintiff lived and worked, and that John Richards appeared there also on the evening of the 16th of July; that on July 15th he made a speech at a place called "Lookout," where he said he had gotten out the men at Ansted, and that he was going to Cliff Top to get out the men there, and from there to Loup Creek (Glen Jean); that when he got to Glen Jean he made a speech in which he said they were going to hold a protracted meeting until the plaintiff's men came out; that in another speech to the workmen of the plaintiff he told them that "the time is approaching very rapidly when our union will be recognized, and when this union is recognized I want to say to you, my brethren, that I have a list of the men who are here in front of me, and that this list will be placed in the hands of every local union, and that you will not be able to get any work in the United States. If you will come forward as men, and attach

yourselves to the Union, you will be all right"; that these meetings continued from day to day, many of the men from a distance sleeping in a pavilion on the premises and on the ground, and getting their meals at the camp, where there were a number of cooks, or getting supplies from the storehouse before referred to; and that at the date of the hearing the meetings were still going on.

These being the facts, or some of them, disclosed by the evidence, I am forced to the conclusion that the acts done and the things said at Glen Jean on the 17th day of July, and the days immediately preceding and following that day, were done in confederation with the defendants in the original bill, or some of them, at least. It is clear to my mind that this strike, and the method of its conduct, had the approval and support of the National Organization of United Mine Workers of America, and that it was the work of the order at large, of which the defendants in the bill are officers and organizers, and, under the facts shown as to support, assistance, and direction by members of the national executive board, it is not at all too much to say that the statement made by John Richards, the district president, that he had a list of the nonunion men at Glen Jean, and that when the union was recognized they would be unable to get work anywhere in the United States, was authorized by the defendants, and that in making it he was aiding and abetting them in their purposes,—purposes declared by the means and agencies employed, and emphasized by the actions and words of the local members of the order of which the original defendants are leaders.

We now come to the second question, namely, have these defendants violated the restraining order of this court? The evidence in the case is voluminous and conflicting. The sworn answers of the defendants, supplemented by their oral testimony, deny that they ever intentionally violated the injunctive order issued herein. It is in evidence that some of them were not served with the restraining order, but it is also in evidence that the order was posted in many conspicuous places; that it was freely and largely talked about, and that the United Mine Workers had several retained counsel, who were appealed to for information and advice respecting the court's order; and that they gave it as counsel for the order, etc. It is not necessary that a person be served with an injunction in order to render him amenable to its provisions, if it appears that he had reasonable notice of it. *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110. Most of the defendants to these rules have admitted that they were perfectly aware of the existence of the restraining order in this case, that they had seen copies of it and had heard it discussed, and that they placed an interpretation upon it which prevented them from going upon the premises of the plaintiff company; but they claim they thought they could go up to its line, and within those limits do as they pleased. A very few of the defendants do not appear to have been served with or to have had knowledge of the restraining order. Some of them cannot read, and the court is loath to attribute a knowledge of the contents of the restraining order to them, in the face of their denial that they knew of it, although the great weight of the testimony is to the effect that it was constantly

talked about; and that the leaders, John Richards and others, in their speeches, cautioned all these people not to violate the terms of the injunction. The court not only does not desire, but would be extremely sorry, to punish any one who, without a knowledge of its restraining order, did acts which with knowledge of the same would be violations of the order; and therefore, reviewing the evidence in this case, the rules heretofore issued against Sam Washington, Joe Smith, R. L. Bess, James McIvor, and Joe Prenosel are ordered to be discharged, as is also the rule against C. F. Stewart, who was not shown to be a member of the United Mine Workers, or to have acted in confederation therewith.

With regard to all the other defendants, it has been shown either that they have been served with the restraining order of the court, or that they had information as to its existence and contents. Have they been guilty of its violation? The order of the court restrained these parties from "congregating in, on, or about the premises of the plaintiff for the purpose of inducing the employes in said mines to quit and abandon work in them"; from "conducting or leading any body or bodies of men up to or upon the premises of the plaintiff for the purpose of inducing or causing the plaintiff's employes to quit and abandon working for the plaintiff, or from in any manner interfering with, directing, or controlling plaintiff's employes on its land or premises, or from interfering in the business of the plaintiff upon its land or premises"; from interfering with the plaintiff's employes, or with any person who may desire to enter its employment, "by the use of threats, personal violence, or intimidation, or by any other means whatsoever calculated to intimidate, terrorize, and alarm or place in fear any of the employes of the plaintiff in any manner whatsoever, at or upon its premises"; and from "in any unlawful manner interfering with the plaintiff's employes while they may be passing to and from their work in said mines, on and near the plaintiff's premises." The true meaning of this injunction is that these defendants, and all other persons who are subject to it, are inhibited from personal violence or intimidation of any sort of the employes of the plaintiff. As to what constitutes intimidation, and consequently, acts violative of the court's order, the answer will largely be governed by the circumstances. The following are some of the cases in which injunctions have been sustained, and violations thereof held to have occurred:

"A simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employes in the performance of their duties, is not less obnoxious than the use of physical force for the same purpose. A 'request' under such circumstances is a direct threat and an intimidation, and will be punished as such." In re Doolittle (C. C.) 23 Fed. 545.

"Where employes of a railroad company that is in the hands of a receiver appointed by the court are dissatisfied with the wages paid by the receiver, they may abandon the employment, and by persuasion or argument induce other employes to do the same; but if they resort to threats or violence to induce the others to leave, or accomplish their purpose, without actual violence, by overawing the others by preconcerted demonstrations of force, and thus prevent the receiver from operating the road, they are guilty of a con-

tempt of court, and may be punished for their unlawful acts. Where a party of men combine with intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party, and does acts which the balance do not themselves perform, all are responsible for what the one does. It is essential, however, that there should be a concert of action,—an agreement to do some unlawful thing." U. S. v. Kane (C. C.) 23 Fed. 748.

"We can go to any friend and urge him to do this or do that. That is a part of the common liberties of every man in this country. And the question is not whether these gentlemen went there in a pleasant way, and stated reasons, or urged their friends to quit work, but, did they go with such an intended demonstration of power, and in such an attitude, that though, as they have stated here, they simply requested these engineers and employes to quit, they did it under circumstances that the engineers and the trainmen were intimidated, and quit because they felt compelled to? * * * It is not necessary that there should be actual violence. As my Brother Treat said in a similar case (In re Doolittle [C. C.] 23 Fed. 544) that we had before us in St. Louis, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass on facts as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention." U. S. v. Kane (C. C.) 23 Fed. 750, 751.

"A writer, signing himself 'Chairman,' sent the following notice to the various foremen of the shops of the Wabash Railway Company during a strike organized to resist a reduction of wages; the railroad being at that time in the hands of a receiver appointed by the United States circuit court: 'Office of Local Committee, June 17, 1885. ———, Foreman: You are hereby requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employes. But in no case are you to consider this an intimidation.' Held, that this was an unlawful interference with the management of the road by the receiver, and a contempt of court, for which the writer should be punished." In re Wabash R. Co. (C. C.) 24 Fed. 217.

"An injunction was granted and served on defendants, restraining them and all others from in any way interfering with the management, operation, or conducting of the mines named in the bill, either by menaces, threats, or intimidation of any character used to prevent the employes of said mines from going to or from the same, or from engaging in their usual business of mining. Defendants joined a body of over 200 striking miners in marching, with music and banners, past one of said mines and the homes of the miners working therein, marching and countermarching for three days along the public highway between the mine and the homes of the miners, halting in front of the mine, and taking positions on each side of the road which the miners must cross in going to and from the mine, before daylight and late at night, at the time when such miners were going to and from their work. The avowed object of the strikers was to influence the miners to join in the strike, and this marching and halting in front of the mine were with the evident intent to accomplish this object by intimidation, and some of the miners were thereby intimidated and kept away from their work. Held, that defendants were guilty of contempt. Any use of a public highway which prevents its reasonable, seasonable, and ordinary use by the general public or by citizens for purposes connected with their regular business is unlawful, and in a proper case the continuance of such use may be enjoined. The owner of a mine is entitled to the aid of the courts to protect him against the unlawful interference of others in the continued enjoyment of the right to operate his mine, the right to employ the labor of those willing to work, and his right to the use of the highway leading to his mine, for himself and his employes." Mackall v. Ratchford (C. C.) 82 Fed. 41.

"An injunction will be granted where members of labor organizations conspire unlawfully to interfere with the management of the business of a corporation, and to compel the adoption of a particular scale of wages, by con-

gregating riotously and in large numbers at and near the works of the corporation for the purpose of preventing persons not members of said organization from entering the employ of the corporation or remaining therein, by intimidation, consisting in physical force, or injury, actual or threatened, to person or property. The jurisdiction of equity is not ousted because the acts complained of may also be the subject of indictment." *Wire Co. v. Murray* (C. C.) 80 Fed. 811.

The supreme court of the United States, in the case *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, in summing up its conclusions, stated, among other things, that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of an injunction is no substitute for, and no defense to, a prosecution for any criminal offense committed in the course of such violation; that, an injunction having been issued and served on defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and, when they found they had been, then to proceed under section 725, Rev. St., which grants power to punish, by fine or imprisonment, disobedience by any party or other person to any lawful writ, process, order, rule, decree, or command, and enter the order of punishment complained of; and finally that, the circuit court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus.

"If the object of a labor union is unlawful, or if the methods employed by it, either to induce acquisitions to its ranks or to accomplish its ulterior purposes, are unlawful, all persons who combine in such efforts are conspirators." *U. S. v. Weber* (C. C.) 114 Fed. 950.

The case just cited is peculiarly important, because it was a case recently decided in this circuit, and upon which Judge Simonton, a learned and able circuit judge, sat with Judge McDowell, and concurred in the decision, and because it establishes the principle that, where unlawful acts are done by a labor union, the members thereof who take part in such acts are all conspirators.

The evidence in this case is conflicting as regards the acts of many of the individual defendants, but there is no denial of the fact that the men under the leadership of Mr. Richards congregated at Glen Jean for the purpose of holding meetings with the avowed object of getting the men then at work for the plaintiff company to quit; that Mr. Richards, in one of his speeches there, made use of the language heretofore quoted, and that his utterances were applauded by the men gathered there; and that the epithets "scabs" and "black-legs" were hurled from time to time at the men who were at work and were not members of the Union, although more particularly addressed to men who were at work and had formerly been members of the Union; that these meetings and marches were attended by large numbers of men, greatly exceeding those who were at work for the plaintiff; that the men so at work, or at least some of them, were intimidated and rendered uneasy, and that, had it not been for the presence of armed guards, they would not have felt it safe to work at all; that, as it was, they were rendered so uneasy that they habitually quit work at about the time when the full crowd of strik-

ing miners had gathered, that period usually being at or a little after noon; that at several times small bodies of men separated themselves from the rest of the meeting and called for volunteers to aid them in going into the mines and forcibly taking out the men at work; that individual striking miners were heard to curse and abuse the men at work, and to use contemptuous language regarding the court and its injunctions; and that, in the marches up to the property line of plaintiff, the body of marchers endeavored to induce plaintiff's employés to join them. On the other hand, it has been shown that the leaders of this movement in their speeches counseled obedience to the law; that they believed they were not violating the injunction of this court in holding the meetings and marchings which they held; and the court does not doubt that the men under their direction, and in attendance upon the meetings of which they were the chiefs, believed, as they believed, that in what they were then doing they were not violating the orders of the court. Of course, this statement is subject to a few exceptions, as it has been shown that several of the men were guilty of violent expressions and of a rather contemptuous attitude when served with copies of the injunctive order; but these acts were not set forth in the petition herein, and have not been considered by the court in arriving at its judgment. Upon the whole, the court is of opinion that, considering the exculpatory oaths of the defendants themselves, and their solemn asseverations that they intended no violation of the order of the court, this is a case calling for justice tempered with mercy; but, if the evidence had shown that these men had intentionally and willfully violated the order of the court, it would have become its duty to have made the punishment adequate to such intentional and willful violation. It is therefore adjudged, ordered, and decreed that the rules heretofore awarded against John Richards, Jim Sizemore, H. A. Moseby, George Holcomb, M. W. Ratliff, H. D. Hutchinson, C. Totten, C. W. Stewart, Vint Miller, Wm. Snyder, John Uposky, Bert Campbell, Jas. Hager, M. M. Mason, H. F. Hawks, J. W. Ewing, Ed. Scott, Robt. Mason, Anderson Allen, and T. R. De Long be made absolute. The court does not find that all of these men have been equally guilty of violating its injunction, but is impressed with the idea that, although technically guilty, perhaps none of the men have intended to put themselves in the attitude of disobedience to the court's orders, and will therefore not attempt to draw any fine distinctions between those who have been adjudged guilty, and will inflict as mild a penalty as, in its judgment, could be done, with the hope and in the belief that both those so held guilty and others who may know of this proceeding will in the future endeavor to keep themselves within lines of safety in regard to these orders; and the court desires now to make it known to all and sundry who may be affected by the injunction orders entered in the several cases now before it that any future violations of those orders, if proved, will be severely dealt with. The only reason that the court does not now inflict a severe punishment is because it gives credence to the sworn answers and testimony of defendants that in what they did they were ignorant that they were violating the court's order.

The sentence of the court is that you, John Richards, Jim Sizemore, C. W. Stewart, Vint Miller, Wm. Snyder, John Uposky Bert Campbell, Jas. Hager, M. M. Mason, H. F. Hawks, J. W. Ewing, Ed. Scott, Robt. Mason, Anderson Allen, and T. R. De Long, and each of you, be fined the sum of \$5, to be paid into the treasury of the United States, together with the costs of the rule and attachment issued herein, and that you stand committed until this sentence is complied with, or bond, with good security, is entered into before the clerk of this court for the payment of said fines and costs.

UNITED STATES v. BEEBE et al.

(Circuit Court, D. Massachusetts. September 4, 1902.)

No. 1,200.

1. CUSTOMS DUTIES—LIQUIDATION—VALUATION OF FOREIGN COINS.

In reducing foreign standard coins to United States currency for the assessment of duties, the basis in all cases is the value of the pure metal in such coins, and not their exchange value.

2. SAME—RELIQUIDATION.

This rule is not changed by the proviso to section 25 of the tariff act of 1894, which authorizes the secretary of the treasury to order a reliquidation of any entry upon satisfactory evidence that the value in United States currency of the foreign money specified in the invoice was at the date of certification at least 10 per centum more or less than the value proclaimed during the quarter in which the consular certification occurred. The word "value," as used in such proviso, means the pure-metal value, and it confers no power upon the secretary to order a reliquidation of an entry on the basis of the exchange value of the coins specified in the invoice, as shown by the consular certificate, because such value varies more than 10 per centum from the proclaimed value for the quarter.

3. SAME—CONCLUSIVENESS OF RELIQUIDATION.

An order for reliquidation of an entry, made by the secretary of the treasury under the proviso of section 25 of the tariff act of 1894, upon evidence satisfactory to him, based on the required difference between the pure-metal value of the foreign money specified in the invoice and the proclaimed value, is conclusive, and the action of the collector thereunder is not reviewable by the board of general appraisers or the courts; but where the secretary acts under an erroneous construction of the statute, and beyond the scope of the authority conferred on him by the proviso, by adopting as the basis of the reliquidation the exchange value of the foreign coin, instead of the pure-metal value, whereby the duties are increased, the question arising upon such reliquidation is one of law, and not of fact, and upon seasonable protest by the importer the action of the collector is reviewable by the board of general appraisers and the courts, under sections 14 and 15 of the customs administrative act of 1890.

On petition by the United States for a review of the decision of the board of general appraisers in the matter of certain merchandise imported by Lucius Beebe & Sons into the port of Boston and Charlestown.

¶ 1. See Customs Duties, vol. 15, Cent. Dig. § 190.

Henry P. Moulton, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

Whipple, Sears & Ogden, for Lucius Beebe & Sons.

COLT, Circuit Judge. This is a second petition for review, relating to the same entry of merchandise. The decisions of the circuit court of appeals and of the circuit court on the first petition are found in 45 C. C. A. 230, 106 Fed. 75, and 103 Fed. 785. While the specific questions now presented may differ in form, the principles which underlie and control both these petitions were carefully considered by this court in *U. S. v. J. Allston Newhall & Co.* (C. C.) 91 Fed. 525. That case involved the construction of section 25 of the tariff act of 1894, and especially the proviso thereof (28 Stat. 552); and this is true of both these petitions. In *U. S. v. J. Allston Newhall & Co.* this court said:

"This section, until we reach the proviso, is substantially a re-enactment of the previous law. The contention of the government rests upon the proposition that the word 'value' in the proviso is not limited to the value 'of the pure metal,' but extends to other methods of valuation, never before adopted with respect to specified foreign standard coins. To adopt this construction is to hold that congress intended to depart from the long-established rule, and to introduce a new and uncertain mode of valuation in cases coming within the terms of the proviso. The result is that the body of the section provides one way, and one way only, for estimating the value of foreign standard coins, while the proviso covers other ways in conflict with former well-settled principles. Certainly, the court should not adopt such a construction, if it be at all doubtful. To hold that, where the value of the foreign coin during the quarter varies less than ten per centum from the value proclaimed, the pure-metal value is to govern, and that when it exceeds ten per centum the secretary of the treasury may adopt any standard of valuation he sees fit, based upon rate of exchange, trade conditions, or financial reports, would result in the introduction of those elements of uncertainty and confusion which the law has aimed especially to prevent. The purpose of the proviso, in our opinion, was, not to change the principle in estimating the value of foreign coins, but rather to permit of a different estimate on the same principle, if it should appear at any time during the quarter that the proclaimed value was to a considerable degree at variance with the actual fact existing at the time of any given importation. While the standard of valuation should be fixed and based on intrinsic value, the whole legislation on this subject shows an effort on the part of congress to provide speedier means for correcting the valuation when it is shown to be wrong. Until 1873 any change in the valuation of specified foreign standard coin required a special enactment. By the statute of 1873 the proclaimed estimate must be made annually. By the statute of 1890 it must be promulgated quarterly. The proviso, in section 25 of the act of 1894, was simply another step in the same direction, and was intended to permit a new estimate of valuation at any time during the quarter, where there was found to be an error of at least ten per centum. This is the natural construction and evident intent of the whole section, and is in harmony with previous legislation. * * * The second question raised by the government under the assignment of errors is that the board of general appraisers had no jurisdiction to review the action of the collector in estimating the value in United States money of foreign coin. This case is not one of disputed appraisement of the value of imported merchandise, as to which the decision of the board of general appraisers is made final under section 13 of the customs administrative act of June 10, 1890. *U. S. v. Klingenberg*, 153 U. S. 93, 102, 14 Sup. Ct. 790, 38 L. Ed. 647; *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83. The dutiable value in rupees of the merchandise in this case is admitted under the agreed statement of facts; the

only issue being whether this court or the board of general appraisers has jurisdiction to review the action of the collector in reducing to United States currency the value of the rupees. Such jurisdiction, if any, must be found in sections 14 and 15 of the act of June 10, 1890. The jurisdiction conferred upon the circuit court by section 15 is coextensive with the jurisdiction conferred on the board of general appraisers by section 14. This was so held by the supreme court in the *Klingenberg Case* (153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647) in the following words: 'The subjects of review by the circuit court, provided for by section 15, extend to all questions of law and fact in respect to which the board of general appraisers have appellate jurisdiction, except the decision of that board as to the dutiable value of merchandise, which is provided for by section 13, and is made conclusive against all parties interested.' In construing section 14, the court says: 'By section 14 the collector's decision on rate and amount of duties, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), may be the subject of appeal to the board of general appraisers.' The *Klingenberg Case* decided that, where the collector was simply called upon, under the statute, to follow the estimate of value made by the director of the mint and proclaimed by the secretary of the treasury, his action was not subject to review by the board of general appraisers. If, for example, in the present case, the collector had adopted the proclaimed rate for the rupee on January 1, 1896, of \$.233, his decision would have been final. This conclusion of the court was based upon the rule laid down in *Collector v. Richards*, *Cramer v. Arthur*, *Hadden v. Merritt*, *ubi supra*. These authorities show the absolute conclusiveness of the value estimated by the director of the mint and proclaimed by the secretary of the treasury of the standard coin of foreign countries. After holding that the collector's construction of the value as proclaimed was correct, the court said: 'This being the proper construction to be placed upon the proclamation of July 1, 1892, we are of the opinion that the collector's action in adopting the value of the gold florin at the estimate fixed therein was not subject to review by the board of general appraisers, under the principle laid down in the authorities already referred to.' All the *Klingenberg Case* decided was that, when the collector followed such proclaimed value, his action was not the subject of appeal under section 14. The present case is the reverse, for here the collector refused to be governed by the proclaimed value. * * * The question in this case has reference to the 'amount of duties,' and is, therefore, reviewable under sections 14 and 15 of the act of June 10, 1890, by the board of general appraisers and by the circuit court. The amount of duties liquidated at the proclaimed value of the rupee would have been less than the amount liquidated at the exchange value. The *Klingenberg Case* is not an authority upon the proposition that, where the collector declines to accept the proclaimed value of a foreign standard coin, and adopts another standard, thereby increasing the amount of duties upon imported merchandise, his action is not the subject of review, under the act of 1890. Our conclusion is that the board of general appraisers and this court have jurisdiction, and that the decision of the board reversing the action of the collector should be affirmed."

Following the conclusions in *U. S. v. J. Allston, Newhall & Co.*, this court, on the first petition in the case at bar, held:

(1) In reducing foreign standard coins to United States currency for the assessment of duties, the basis in all cases is the value of the pure metal in such coins, and not their exchange value.

(2) This long-established rule was not changed by the proviso to section 25 of the tariff act of 1894 (28 Stat. 552), as to reliquidations, where it appeared that the value of the foreign money specified in an invoice had varied at the time of the invoice more than 10 per cent. from that proclaimed by the secretary of the treasury for that quarter.

(3) A collector is not authorized, because the consular certificate accompanying an invoice shows the current exchange value of the

money of the invoice to be more than 10 per cent. greater or less than the proclaimed value for the quarter, to depart from such proclaimed value, and adopt, for the assessment of duties, the exchange value shown by the certificate.

(4) The action of a collector in declining to accept the proclaimed value of a foreign standard coin, and in adopting another standard, thereby increasing the amount of duty on the imported merchandise, does not relate to a disputed appraisement, but to the amount of duties; and, under Customs Administrative Act June 10, 1890, §§ 14, 15, is reviewable, on the protest of the importer, by the board of general appraisers and the circuit court.

(5) The collector, in adopting the exchange value of the rupee as certified by the United States consul, and in not adopting the proclaimed value for the rupee, in liquidating the entry in question, acted illegally, and the board of general appraisers had jurisdiction to order a reliquidation at the proclaimed value.

(6) The decision of the board of general appraisers must be sustained unless it is shown that there has been a valid reliquidation of the entry in question under the authority conferred upon the secretary of the treasury by the proviso of section 25 of the tariff act of August 27, 1894.

(7) A valid reliquidation under this proviso is a reliquidation based upon the required difference between the pure metal value of the foreign coin and the proclaimed value, and is as conclusive as the proclaimed value under the preceding part of the section.

(8) The note appearing at the foot of the quarterly estimate of coin value on July 1, 1898, "The value of the rupee to be determined by consular certificate," gave no right, power, or authority to the collector to liquidate the entry in question at the value of the rupee stated by the United States acting consul in the certificates attached to the two invoices.

Upon further consideration, the court sees no reason to change or modify the views expressed or the conclusions reached in these opinions. On the former petition, concerning the entry under consideration, the importers contended: First, that there had been in fact no reliquidation of the entry; and, second, that the reliquidation of the entry on any other basis than that of the pure-metal value of the foreign coin was unauthorized. The circuit court considered both these propositions, and decided both questions in favor of the importers. On appeal the circuit court of appeals properly only considered the first question, and, having determined that there had been in fact no reliquidation, affirmed the judgment of the court below on that ground, but "without prejudice to the right of either party to proceed further, after a proper liquidation by the collector of customs at the port of Boston, in accordance with section 25 of the tariff act of August, 1894, including the proviso therein." After the decision of the circuit court of appeals, the collector liquidated the duties on the merchandise at the value of 19.9 cents for each rupee, in accordance with the proclaimed value of the rupee in pure metal, as set forth in the treasury circular of July 1, 1898. Thereupon the secretary of the treasury in-

formed the collector that "satisfactory evidence" had been produced to him "showing that the value in United States currency of the foreign money of the invoice, namely, the rupee of India, was 32.11 cents at the dates of certification, which is ten per centum more than the value proclaimed during the quarter in which the consular certification occurred"; and in view of this fact he directed the collector "to reliquidate the entry hereinbefore mentioned on the basis of this latter value [32.11], under the authority conferred upon the secretary of the treasury by the proviso to section 25 of the act of August 27, 1894." The collector accordingly reliquidated the duty by taking the rupees of the invoice at the value of 32.11 cents each. By the agreed statement of facts it appears that this order for reliquidation was not based upon any difference between the pure-metal value of the rupee on August 11, 1898, and September 1, 1898, the dates, respectively, of the consular certificates of the invoices, and the proclaimed value for the quarter beginning July 1, 1898; that the pure-metal value of the rupee, in terms of United States gold dollars, on the dates of consular certification, was substantially 19.9 cents, being the value contained in the proclamation; and that the value of 32.11 cents was not intended to be the pure-metal value of the rupee on the dates of certification. The importers duly protested against this reliquidation, the board of general appraisers sustained the protest, and the United States has brought this petition for review in the circuit court.

In view of the decisions of this court, there is only one point now urged by the government which calls for serious consideration. It is contended that the action of the collector cannot be impeached, because the power vested in the secretary of the treasury, under the proviso of section 25 is absolute, and that his order for reliquidation, whether justified or not by the proper construction of the proviso, is not subject to judicial review. This argument is based on the ruling of the supreme court that the proclaimed value of foreign coins estimated by the director of the mint is final, and cannot be reviewed by the board of general appraisers or the courts, and the ruling of this court on the first petition for review in the present case, that a valid reliquidation under the proviso of section 25 is as conclusive as the proclaimed value under the preceding part of the section. *Collector v. Richards*, 23 Wall. 246, 257, 259, 23 L. Ed. 95; *Cramer v. Arthur*, 102 U. S. 612, 619, 620, 26 L. Ed. 259; *Hadden v. Merritt*, 115 U. S. 25, 27, 5 Sup. Ct. 1169, 29 L. Ed. 333; *U. S. v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647. To determine the weight and force of this argument, it is well to point out the issue before the supreme court in those cases, and the scope of the ruling on the question of conclusiveness.

In *Collector v. Richards*, the director of the mint, acting within the terms of the act of March 3, 1873, and in conformity with the powers conferred thereunder, estimated the pure-metal value of the franc of France at 19 cents and 3 mills, and this value was proclaimed by the secretary of the treasury on January 1, 1874. The court held that the act of March 3, 1873, repealed former acts relating to the value of the franc, and that the collector's action in following the proclaimed value was correct. In construing the act of 1873, which in this part is identi-

cal with section 25 of the act of 1894, Mr. Justice Bradley, speaking for the court, said:

"The important words of the first section are as follows: 'The value of foreign coin, as expressed in the money of the account of the United States, shall be that of the pure metal of such coin of standard value.' The plain meaning of this language is that the value of foreign coins in United States money shall be measured by the amount of pure metal contained therein when of standard value; that is, when of the weight and fineness required by the laws and regulations of the country where they are produced. * * * The true method of comparing their money of account with ours, when both are based on actual coin, is to compare the standard coins of the two countries in a perfect state, and to ascertain the actual amount of pure metal in each. This is the result at which congress seems to have arrived, and, as we think, wisely." 23 Wall. 257, 259, 23 L. Ed. 95.

Cramer v. Arthur also arose under the act of 1873. The director of the mint, in conformity with the statute and the method therein prescribed, estimated the values of foreign standard coins in United States money, and these values were duly proclaimed by the secretary of the treasury. The pure-metal value of the Austrian florin was fixed at 47.60 cents. The importer sought to go behind this value, and show a different value. This was refused on the ground that the proclaimed value was conclusive. In the opinion of the court Mr. Justice Bradley said:

"The plaintiff seeks to go behind this valuation, and to show that at the time of the purchase of the goods the value of the silver florin in Vienna, as quoted in the papers, and as exhibited by the actual rate of exchange, was less than 47.60 cents, namely, 45.60 cents, and that the value of the paper florin was 43.71 cents. This, we think, the plaintiff cannot be allowed to do. The proclamation of the secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties there must be an end to controversy somewhere. When congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these, and allow an examination by affidavits in every case, would put the assessment of duties at sea. It would create utter confusion and uncertainty. * * * It is of the utmost consequence to the government, and it is, on the whole, most beneficial to importers, that the value of foreign moneys should be officially ascertained, and that they should be fixed by a uniform method or rule." 102 U. S. 619, 620, 26 L. Ed. 259.

Hadden v. Merritt likewise arose under the act of 1873. Here, also, the director of the mint had estimated the pure-metal values of foreign standard coins, which were duly proclaimed by the secretary of the treasury. The invoices of the merchandise were made out in Mexican dollars. It was held that the proclaimed value was conclusive upon custom-house officers and collectors, and could not be impeached by evidence showing that the director of the mint had made a mistake or miscalculation in his estimate by expressing the value of the Mexican dollar in the silver dollar of the United States, and not in the standard gold dollar. In that case Mr. Justice Matthews, speaking for the court, said:

"The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the secretary of the treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the treasury department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision. If any error in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute as serves to limit the discretion of the treasury department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty, and their action cannot be otherwise questioned." 115 U. S. 27, 28, 5 Sup. Ct. 1170, 29 L. Ed. 333.

U. S. v. Klingenberg arose after the passage of the customs administrative act of June 10, 1890 (26 Stat. 131). The director of the mint, in conformity with the act of 1873, had estimated the pure-metal value of foreign standard coins, and such values were duly proclaimed by the secretary of the treasury on July 1, 1892. In reducing the currency of the invoices into United States money, the collector estimated the florin at \$0.482, which was the proclaimed value of the gold florin. The importer protested against this action, insisting that the collector should have adopted the silver florin as the standard value, it having been referred to in the proclamation as the "nominal standard." Having first determined that the proper construction of the proclamation required the collector to adopt the gold florin as the pure metal and better standard, rather than the silver florin, or "nominal standard," the court held that "the collector's action in adopting the value of the gold florin at the estimate fixed therein was not subject to review by the board of general appraisers, under the principle laid down in the authorities already referred to." 153 U. S. 100, 14 Sup. Ct. 793, 38 L. Ed. 647. These authorities were Collector, etc., v. Richards, and the other cases already discussed.

In all these cases it will be observed that the director of the mint, acting within the scope of the powers conferred by statute, made his estimates on the pure-metal basis. It is manifest, therefore, that the rule of conclusiveness laid down in these cases goes to this extent, and no further: Where the pure-metal values of foreign standard coins as provided by the statute have been estimated by the director of the mint and proclaimed by the secretary of the treasury, such values are conclusive, and cannot be impeached by evidence of mistake or miscalculation. In other words, the pure-metal estimate by the director of the mint, as a fact found, is final, and the collector's action in conformity with such finding is not subject to judicial review, either under the old law, where the importer brought suit against the

collector in the circuit court to recover the excess of duties paid, or under the customs administrative act of 1890, where an appeal is taken from the collector's decision to the board of general appraisers. Assuming the word "value" in the proviso of section 25 to mean "value in pure metal," as the court has already determined, the doctrine of conclusiveness applied to reliquidations goes to this extent, and no further: The order for reliquidation of an entry by the secretary of the treasury upon evidence satisfactory to him, based on the required difference between the pure-metal value of the foreign money specified in the invoice and the proclaimed value, is conclusive, and the action of the collector thereunder is not reviewable by the board of general appraisers or the courts.

But this is not the issue presented in the case at bar. The importers are not seeking to impeach the order for reliquidation by evidence that the secretary's finding of fact respecting the difference between the pure-metal value of the rupee and its proclaimed value at the date of the consular certifications was erroneous. There is no such question involved in the present case. On the contrary, it is stipulated that the order for reliquidation was not based upon any difference in metal values, and that the pure-metal value of the rupee on the dates specified was substantially the same as the proclaimed value. The case now presented raises no question of fact, but only questions of law. The fundamental inquiry has reference to the power of the secretary, under the proviso, to make the order in question; and this court having determined that the proviso does not authorize him to make such an order, the specific question under discussion is whether, under such circumstances, the order is unimpeachable. Is an order for reliquidation, founded upon a wrong interpretation of the statute, conclusive, and the collector's action thereunder not subject to review? Can the secretary choose any standard of value for the foreign coin he pleases,—as, for example, the exchange value,—and will such action be final, although it is outside of the authority and jurisdiction conferred upon him by the proviso? Can the secretary first adopt an illegal standard of value, and then make an order or finding based upon such illegal standard, which cannot be impeached? If the doctrine of conclusiveness goes to this extent, then the importer is no longer governed by the laws which congress enacts, but by the secretary's interpretation of them; and the result might be that under the form of reliquidation the pure-metal rule of value in the assessment of duties, which has prevailed since the origin of the government, may be to a large extent nullified. In *Greely v. Thompson*, 10 How. 225, 234, 13 L. Ed. 397, the supreme court said:

"The orders as well as the opinions of the head of the treasury department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them; and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of those laws, rather than by the views of the department."

Alleged errors of judgment or of fact, or alleged mistakes or miscalculations, committed by a government officer when acting within

the authority conferred by law, are very different in principle from alleged errors springing from a misinterpretation of the law and the adoption of a principle which is contrary to law. The finding by the director of the mint of the pure-metal value of foreign coins, as authorized by section 25, or the finding by the secretary of the treasury of the requisite difference between the pure-metal value of a foreign coin and the proclaimed value, as authorized by the proviso, is a very different thing from the finding by the director of the mint of the exchange value of foreign coins, not authorized by section 25, or the finding by the secretary of the difference between the exchange value of a foreign coin and the proclaimed value, not authorized by the proviso. Suppose, for example, the director of the mint, in his estimate of July 1, 1898, in evidence in the present record, had said: "In pursuance of section 25 of the act of August 27, 1894, I present in the following table an estimate of the values of the standard coins of the nations of the world for the next quarter. These estimates are not, as heretofore, based on the pure-metal value of such coins, but on their exchange value, as certified by consular certificate. This estimate is in accordance with the provisions of section 25 as I interpret them." And suppose these exchange values had been duly proclaimed by the secretary of the treasury, "to be followed in estimating the value of all foreign merchandise exported to the United States on or after July 1, 1898, expressed in any of such metallic currencies." Can it be presumed for a moment that such proclaimed values would be binding and conclusive upon all importers of foreign merchandise? In such a case the director of the mint manifestly has transcended the powers conferred upon him by section 25, which declares "that the value of foreign coin * * * shall be that of the pure metal value." There is here a plain violation of the terms of the statute. The estimate has proceeded on a principle contrary to law. In attacking such an estimate the issue is simply one of law involving the power of the director of the mint under the statute. It is a question of illegal action, arising outside of authorized powers, and not of error or mistake committed within the scope of lawful authority. So in the case at bar, assuming the word "value" has the same signification in the proviso as in the body of the section, when the secretary ordered the reliquidation of the entry in question on a basis other than the pure-metal value of the rupee, or the difference between its pure-metal value and the proclaimed value, he exceeded the powers conferred by statute. He adopted an unauthorized standard of valuation. He proceeded on a wrong principle, contrary to law. The secretary of the treasury, the collector of customs, the commissioner of patents, the officers of the land department, and all officers of the government charged with official duties, must proceed according to law. Within the scope of their statutory powers their acts may be final and conclusive, but acts which are based upon a wrong construction of the statute, or which proceed from following a wrong principle, contrary to law, or which flow from an assumption of authority or jurisdiction not conferred by statute, have never been held to be conclusive and unimpeachable. Some of the authorities are reviewed

in the able opinion by Judge Somerville, speaking for the board of general appraisers, in the case at bar. The principle is so clear upon reason, and has been so often recognized, that it is unnecessary to refer to numerous cases. Under section 13 of the customs administrative act the decision of the board of general appraisers is made "final and conclusive as to the dutiable value" of imported merchandise. But in respect to such conclusiveness Mr. Chief Justice Fuller, speaking for the court, in *U. S. v. Passavant*, said:

"While the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle, contrary to law, or has transcended the powers conferred by statute." 169 U. S. 16, 21, 18 Sup. Ct. 219, 42 L. Ed. 644.

In *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 24, 10 Sup. Ct. 5, 7, 33 L. Ed. 236, the court said:

"But it is contended that the act of the appraiser in making, or requiring to be made, the additional charges for transportation and labor, was final and conclusive, and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from, to merchant appraisers, is conclusive. But whilst this is the general rule, it is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable. This qualification applies to the acts of many other officials charged with duties of a similar character."

In *Muser v. Magone*, 155 U. S. 240, 247, 15 Sup. Ct. 77, 80, 39 L. Ed. 135, the court said:

"Yet, though the valuation is final, and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack for want of power to make it; as where the appraisers are disqualified from acting, or have not examined the goods, or illegal items have been added independent of the value. The principle applied in such cases is analogous to that by which proceedings of a judicial nature are held invalid because of the absence of some strictly jurisdictional fact or facts essential to their validity."

In *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. Ed. 424, Mr. Justice Field, in the opinion of the court, when speaking of the decisions of the land office, said:

"The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them the only remedy is by appeal from one officer to another of the department."

See, also, *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 535, 24 L. Ed. 848; *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 15 Sup. Ct. 779, 39 L. Ed. 931; *Railroad Co. v. Forsythe*, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71.

The point now taken for the first time by the government that the action of the collector is not a "decision" within the meaning of section 14 of the customs administrative act is untenable, because the

"ascertainment and liquidation of duties" is plainly a "decision" within the meaning of the section.

With respect to section 2652 of the Revised Statutes, it may be observed that, although the collector must carry into effect all instructions of the secretary of the treasury relative to the execution of the revenue laws, yet as to third persons the legality of the collector's action is open to judicial review. *Greely v. Thompson*, 10 How. 225, 234, 13 L. Ed. 397; *Tracy v. Swartwout*, 10 Pet. 80, 95, 9 L. Ed. 354.

In conclusion, it would seem that this whole controversy must turn on the true construction of the word "value" in the proviso. If the interpretation by the government be correct, and the word signifies exchange value, or any standard of value the secretary may adopt, then the order for reliquidation, and the action of the collector thereon, were legal, and conclusive on the importers. If, on the contrary, as we hold, the word "value" signifies pure-metal value, then the secretary's order for reliquidation was beyond the scope of his authority, and contrary to law, and the action of the collector was appealable to the board of general appraisers, and reviewable by this court, under sections 14 and 15 of the customs administrative act.

For these reasons the decision of the board of general appraisers must be affirmed. Decision affirmed.

In re FREEMAN et al.

(District Court, N. D. New York. October 7, 1902.)

No. 669.

1. BANKRUPTCY—JUDGMENTS IN STATE COURT—EFFECT.

Judgments obtained by a creditor of a bankrupt in a state court were not final and conclusive prior to the expiration of the time to appeal therefrom, either on the federal courts or on the trustee in bankruptcy, either as to the existence or amount of the creditor's claim.

2. SAME—JUDGMENTS—ACCORD AND SATISFACTION.

Accord and satisfaction may be pleaded as a defense to a judgment, notwithstanding it is a debt of specialty and record.

3. SAME—CONSIDERATION—ENFORCEMENT.

Creditors of a bankrupt recovered judgment in a state court, and thereafter, before the expiration of the time to appeal, and in consideration of the trustee's promise not to appeal, the creditors agreed to accept in settlement two-thirds of the damages fixed by the judgments, together with the costs, to be paid on the trustee's settlement with certain transferees of the property in suit. The trustees did not appeal, and, after the time limited to appeal had expired, the creditors repudiated the compromise, and refused to accept a tender of the amount stipulated. *Held*, that such compromise was not nudum pactum, but that on the expiration of the time to appeal without the trustees appealing, it became executed in part, and a valid accord and satisfaction.

In Bankruptcy.

W. F. Canough, for judgment creditors.

L. L. Waters, for trustee.

† 2. See Accord and Satisfaction, vol. 1, Cent. Dig., §§ 15, 25, 32, 33.

RAY, District Judge. J. Irving Freeman and Frank E. Freeman composed the firm of Freeman & Freeman. The firm and the individual partners were adjudged bankrupts. Edgar F. Brown was appointed trustee, and thereafter two actions were brought in the supreme court of the state of New York against said trustee to recover certain property, with damages for the detention thereof, sold by the plaintiffs in said actions to said firm shortly before its bankruptcy. The plaintiffs succeeded in such actions, and judgments were rendered, and entered in the Onondaga county clerk's office February 26, 1902, viz.:

In favor of Henry H. Roelof against said trustee for the value of certain property and damages for the detention thereof...	\$654 84	
Costs	120 30	
	<hr/>	\$ 775 14
In favor of Espenscheid Hat Co. for the value of certain property and damages for the detention thereof.....	\$192 78	
Costs	117 00	309 78
	<hr/>	<hr/>
Total		\$1,184 92

The defendant had the statutory time—30 days—in which to appeal from these judgments, and appeals were contemplated, and the advisability of such proposed action was discussed by the defendant Brown, as trustee, his attorney, L. L. Waters, and the referee in bankruptcy for that district, D. W. Cameron. The validity of the demands was still in dispute, and an appeal was advised by Mr. Waters, who asserted that such judgments could not be sustained. Of these facts said plaintiffs were advised. On the 15th day of March, 1902, at the suggestion of such referee, who was evidently acting in the interest of the creditors of the estate, the trustee and his said attorney and Mr. Canough, the attorney for the plaintiffs in such actions, met with the referee, and the question of the validity of such judgments, the propriety of appeals therefrom, and the chances of success therein, the cost of such action to the estate, etc., were discussed. As the result of this conference, a verbal agreement was made, whereby the said trustee, with the assent of his attorney and the approval of the referee, promised not to take an appeal from said judgments, or either of them, and to pay to the attorney for such plaintiffs in the case wherein Henry H. Roelof was plaintiff two-thirds of the damages fixed by said judgment, or \$436.56, and the full bill of costs, \$120.30,—total, \$556.86; and in the case wherein said Espenscheid Hat Company was plaintiff two-thirds of the damages as fixed by the judgment, or \$128.52, and the costs, less \$30, or \$87,—total, \$215.52,—unless the defendant, said trustee, should be unable to effect a settlement with one Schafer, who had purchased said goods, or a part thereof, of such trustee, subject to such suits in replevin, and who, as the plaintiffs in such judgments assert, had brought an action against said trustee, Brown, which was then pending and undetermined, in which case the defendant Brown, as trustee, was to pay the full amount of the said judgments, and the plaintiffs were to hold one-third thereof and the sum of \$30 pending the result of the action of Schafer against said trustee; and, in case said action was determined in favor of said trustee, then the plaintiffs in such judgments

were to retain the full amount thereof, but, in case Schafer succeeded, then plaintiffs were to return said sum so paid over to the defendant on said judgments. It was also agreed, as the plaintiffs in said judgments assert, that this sum should be paid in two or three days. They also assert that their attorney, Mr. Canough, called for the money several times, but that payment was refused. It is plain that the statement or understanding of the attorney for the plaintiffs in such judgments that an action was pending between Schafer and Brown, as trustee, was an error. The truth is that Schafer purchased the title or interest of the trustee in said goods from him with knowledge of the claims of the plaintiffs in said judgments, and subject thereto, and had sold said goods to one Vinney, and the trustee had notified Schafer of the actions above referred to, and had a claim against him for the amount of such judgments in case they were sustained on appeal. This difference of statement is not very material, as the fact is that, as a part of the settlement, the trustee was to see Schafer or Vinney or both, and settle with them, if possible; and the payment by the trustee to Canough for said plaintiffs, and the amount thereof, depended on the settlement to be made or that might be made with Schafer. This explains the delay in making payment and completing the settlement. These demands and so-called refusals to pay were not regarded or treated as a repudiation of the agreement of settlement, for the said plaintiffs, by their attorney, continued to call for the money, and did not, because of nonpayment, declare the agreement of settlement broken by the trustee, and therefore at an end. Before any repudiation of the agreement by said plaintiffs (they always acting by their attorney, Canough), the trustee effected his settlement with Schafer or Vinney, or both, and pending such settlement allowed his time in which to appeal from said judgments to expire, having no notice of any purpose of the plaintiffs in said judgments to repudiate or disclaim the settlement on any ground or for any reason. Such time expired on the 28th day of March, 1902. On the 17th day of April, 1902, the said trustee, defendant in said judgments, tendered to the plaintiffs in said judgments the amount he had agreed to pay, and which they had agreed to accept in full payment and satisfaction of said claims or judgments, both damages and costs, if the defendant would not appeal. Said plaintiffs then refused to accept such money so tendered, and refused to carry out the said agreement. One of the plaintiffs repudiated the agreement soon after the time to appeal expired; the other not until after the tender of payment was made. Motions were then made for leave to issue executions on said judgments, and for orders directing the trustee to pay same in full. These orders were denied by the referee, who made an order or orders directing the trustee to pay the plaintiffs in said judgments, or their said attorney, the said amounts of money agreed upon, to wit, \$772.38, on demand, in full payment and satisfaction of said demands represented by said judgments. The matter is now brought before the court for its decision and the opinion of the judge.

It cannot be disputed that the settlement was one proper to be made, was in the interest of the estate and of all concerned, and fair

and equitable. It was made in the presence of the referee, who had the matters in charge, and was approved by him. It was a contract made in open court in settlement of a pending contested claim, and approved by the court. The referee directed that no appeal be taken by the trustee, and directed him to compromise with said Schafer and Vinney. However, this agreement was not reduced to writing, and it may be that it might have been repudiated by either party before the trustee, relying thereon and acting in execution thereof, lost his right of appeal, or surrendered his claim against Schafer or Vinney. Up to that time it was unexecuted, except so far as the trustee had proceeded to effect a settlement with Schafer or Schafer and Vinney. But the moment the time to appeal expired the plaintiffs in the judgments had received the full consideration for their agreement to accept the sums mentioned in full payment and satisfaction of the claims then represented by the judgments, and the agreement became valid and binding, and specific performance might have been enforced. It was the equivalent of a payment made and accepted. The trustee, an officer of the court, acting in the interest of the estate and all creditors, had kept his agreement, waived a right of great value (one that he could not regain), and this he had done without notice or intimation that he was not to receive the full consideration agreed to be paid or given for its surrender. The plaintiffs in such actions had then received their benefit,—one of great value to them,—exoneration from the dangers and expense of appeals. It was not the payment of a lesser sum in satisfaction of a greater, conceded to be due and unpaid, but the surrender of a valuable right,—the right to contest the disputed claims in the appellate courts in the mode and manner prescribed by law,—in consideration that the claimants would accept a sum in money less than that claimed in full satisfaction of the original demands. The trustee also made a compromise settlement with Schafer and Vinney in execution of such agreement with the plaintiffs in such judgments, and surrendered a claim against them. In short, the trustee, acting in behalf of all creditors, and bound by law to protect the estate, with the approval and pursuant to the direction of the referee performed his part of the agreement, and, in effect, surrendered the right to further contest the claims in the courts, and also surrendered a material part of his remedy or cause of action over against Schafer and Vinney, or one of them, in reliance on the promise of the plaintiffs in such actions that, if he would so do, they would accept the sum of \$772.38 cash in full payment and satisfaction of such claims and demands then in judgments. The said plaintiffs in such actions then repudiated the agreement, and assert: (1) That "the agreement of March 15, 1902, never having been executed, was nudum pactum, and not binding on either party." (2) That "there can be no accord without satisfaction. Payment of a part for the whole, or an agreement to pay part in satisfaction of the whole, is nudum pactum, and void, unless the amount agreed upon is actually paid and accepted in satisfaction." (3) That "to a debt of specialty and record accord and satisfaction cannot be pleaded." (4) That "the agreement of March 15, 1902, was nudum pactum, not binding, and could not be enforced

by the judgment creditors." (5) That "the judgment of the state court is conclusive upon the federal court as to the existence and amount of the claim. The only jurisdiction of the federal court is to decree the time and manner of payment." The agreement of March 15, 1902, related to two claims asserted by the plaintiffs in the actions referred to against the estate of the bankrupt represented by the defendant, and the validity and justice of which were then disputed by said defendant. These claims had not ripened into final and conclusive judgments, but were still open to the decision of the courts of the state of New York. Whether or not there should be further litigation and consequent expense, was a matter of moment to both parties, and those whose interests were represented by the defendant. The defendant had the right of appeal, and the right to be heard in the courts as to the validity of such claims, both on the law and facts. Therefore the claims, although in judgments, were debts of specialty and record in a limited sense only. At that time these judgments were not conclusive on the federal courts any more than upon the defendant, an officer of that court. They were not final and conclusive so long as the right to appeal therefrom remained. Counsel for the judgment creditors have cited three cases holding that to a debt of specialty and record, such as a judgment, accord and satisfaction cannot be pleaded. This was once the rule, but it is so no longer in the courts of the United States. *Bofinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. Ed. 649. Says the court, per Matthews, J., page 205, 120 U. S., and page 533, 7 Sup. Ct., 30 L. Ed. 649:

"The technical difficulty that there can be no satisfaction and discharge of a judgment or decree, except by matter of record (*Mitchell v. Hawley*, 4 Denio, 414, 47 Am. Dec. 260), cannot be interposed. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned why an accord and satisfaction should not have the same effect."

In the above case a decree had been entered against the defendants. Says the court (page 205, 120 U. S., and page 533, 7 Sup. Ct., 30 L. Ed. 649):

"The right of the defendants to appeal from the decree, and the fact that they had declared their intention to do so, created such a dispute in respect to their liability as made it a proper subject of compromise."

So in the case now before this court the trustee had declared his purpose to appeal, and apprised the plaintiffs of his intention; and that they made the agreement to accept the sum mentioned as a compromise to avoid the appeal cannot be doubted. That such was the purpose is not denied. Hence, within the case cited, it was a proper case for a compromise. It is also substantially beyond dispute that no money was to be paid until a settlement was made with Schafer and Vinney, or had failed, for until that was done the trustee could not know how much he was to pay over. This is clear from the statement of Mr. Canough. There may have been, and probably was, talk of payment within two or three days; but this depended on the settlement with Schafer and Vinney. But delay in the payment or settlement, or both, was assented to, and not made

the basis of a justification for repudiating the agreement, until after the time to appeal had expired. Even after that time had expired, Mr. Canough offered to carry out the agreement so far as the small claim was concerned. To this the trustee could not properly assent, as the agreement was an entire one. It is plain from the case cited that these claims reduced to judgment were the proper subject of a compromise agreement, and that any lawful compromise made should be upheld and enforced by the court, if partly executed by either party; and such party cannot be restored to his rights as they existed at the time the agreement was made. To hold otherwise would be to assist in the perpetration of a great wrong on the creditors of the bankrupts, whose interests are confided to the protection of the courts. That this trustee cannot be restored to his rights is self-evident. The right of appeal and the right to test the liability of the defendant in the tribunals provided by law and the right to proceed against Schafer and Vinney, one or both, are gone. Is there any legal obstacle in the way? The agreement made was lawful, its obligations mutual, and the consideration good, valuable, and beneficial. The trustee performed fully as to one part (the doing of acts), and in due time tendered performance as to the other part of the agreement (the payment of money). The plaintiffs have secured all the advantages and benefits they contracted for in consideration of accepting a lesser sum in money than claimed, and the money they agreed to accept is in court ready to their hand. Performance may be compelled in equity. *Phillips v. Berger*, 2 Barb. 608; *Id.*, 8 Barb. 527; *Wat. Spec. Perf.* §§ 43, 107.

This court is not powerless in the premises, and the plea that the judgment creditors are not bound because they refused to accept the money when tendered, after having accepted the benefits which they sought, and in consideration of which they agreed to accept such sum of money, cannot avail them. In the eye of equity the money is now in their possession. The agreement was to accept \$772.38, and the waiver and abandonment by the defendant of his right to appeal from the judgments and further contest the claims in payment and satisfaction of the amount specified in the judgments, and by such agreement the value of the waiver and surrender of the right to appeal was fixed at \$412.54; and, as the trustee performed to the extent of abandoning the right to appeal, and tendered the balance of the consideration, the plaintiffs' claims were extinguished, except as to the money consideration, and all they can claim is the balance, or \$772.38. *Kromer v. Heim*, 75 N. Y. 578, 31 Am. Rep. 491. Says the court:

"It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim is extinguished. So far as it was unexecuted, the judgment remained in full force."

That sum was duly tendered and no execution should issue.

The value of the surrender of the right to appeal was fixed by the parties, and that much the plaintiffs have had. Suppose the agreement had been to deliver to plaintiffs one specified horse, and pay \$772.38 cash, and the horse had been delivered and accepted, could the plaintiffs demand more than the \$772.38? Clearly not. Then,

having had the benefit of the act done by the defendant, who was acting for all the creditors, can the plaintiffs now say, "Such act was of no benefit or value to us, or of less value to us than fixed by the terms of the settlement?" It is clear that, the parties having measured the value of the act done and the value of the benefit received by the performance of such act, the plaintiffs in such judgments are estopped from denying such value or its receipt, and therefore the total amount due and unpaid when the tender was made was the exact amount of the tender which has been kept good. No objection was made as to the form of the tender, and refusal to accept was not placed on the ground that it was by check. In no view of the case can the plaintiffs demand more, and they are not entitled to an execution for the collection of money tendered them, now in court for them, and which they have refused to accept. That the agreement made was valid cannot be doubted. This is true whether we treat these claims as liquidated or unliquidated. If liquidated, the acts to be done and the money to be paid were to be accepted in full payment and satisfaction, and part payment has been made and accepted by the performance of such acts, and an order made by the referee for the payment in full of the balance due, which amount has been tendered, and is waiting acceptance. If unliquidated, before the agreement was made the amount was liquidated by the agreement, and the consideration to be paid in satisfaction fixed, and the defendant trustee has paid and plaintiffs have accepted all but \$772.38, and this is all they are entitled to. The original demand is satisfied except that amount, and the court has already directed payment of the balance of the amount originally claimed. In either case the court will not direct, and the plaintiffs in such judgments have no legal or equitable right to demand, double payment of the full amount claimed, or of any part of it. "The giving and acceptance of anything which can be considered of value or benefit to the judgment creditor is a good payment, and a satisfaction to that extent." *Douglas v. White*, 3 Barb. Ch. 621-624; *Foakes v. Beer*, 9 App. Cas. 605; *Watson v. Elliott*, 57 N. H. 511-513. "It is enough that something substantial, which one party is not bound by law to do, is done by him; or something which he has a right to do he abstains from doing at the request of the other party is held a good satisfaction." 57 N. H. 511. The well-settled principles that an accord and satisfaction requires a new agreement, and the performance thereof,—an executed contract founded upon a new consideration; that, if the claim is liquidated, the mere acceptance of a part, with the promise to discharge the whole debt is not enough, for there is no new consideration; that, if the claim is unliquidated, the acceptance of a part and an agreement to cancel the entire debt furnishes a new consideration, which is found in the compromise,—are fully recognized and applied here. *Nassoy v. Tomlinson*, 148 N. Y. 329, 330, 42 N. E. 715, 51 Am. St. Rep. 695; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.

But it must be remembered that a creditor with a judgment from which the defendant has the right and power to appeal, the validity and justice of which the defendant disputes, may compromise on any

terms he sees fit, and accept part of his claim in full satisfaction, and be bound thereby. So he may accept a benefit or personal property in full or part payment of the whole amount, or of the amount agreed upon. If he agrees to accept property or a benefit of value, and the remainder in cash, and no value is fixed for the property or benefit conferred, and that part is executed, he must be content with the cash agreed to be paid, for the satisfaction is good and complete so far as executed, so far as performance has been made and accepted, and so far the claim is extinguished (*Kromer v. Heim*, 75 N. Y. 578, 31 Am. Rep. 491); and, while the whole claim is not extinguished, and there is no satisfaction, except in part, the court will not undertake, and has no power, to put a value on the property delivered or the benefit conferred and accepted in part payment different from that fixed by the parties themselves. *Howard v. Norton*, 65 Barb. 161. Says the court (pages 169, 170):

"It is only when property is received in satisfaction without any price being agreed upon at which it is to be estimated between them that it becomes a valid accord and satisfaction. Such a delivery and acceptance is held to be binding on the creditor, because the parties have the right to determine for themselves the value of property transferred from the one to the other; and, when once it is determined, they are, in the absence of fraud, bound by such agreement. There is no reason why, if parties so agree, a horse intrinsically worth but \$50 may not be received in satisfaction of a debt of \$1,000. No tribunal is authorized to repudiate the arrangement and fix a price on the animal for them."

If a judgment creditor accepts delivery of one cow (no value agreed on) in execution of an agreement that he will take such animal in full satisfaction of a judgment for \$500, it is an accord and satisfaction,—payment of the judgment. He had the right to exact money in legal tender, but there is no law forbidding him to accept property, much or little, or work or labor, or lawful benefits of any description, at such valuation as the parties place upon them; and, in the absence of an express agreement as to the price, the presumption is that it is the amount of the debt. See *Weeks v. Zimmerman*, 15 Daly, 226, 4 N. Y. Supp. 609; *Pinnel's Case*, 5 Coke. 117. So sacred and valuable is the right of appeal from a judgment that it is not abandoned or waived or extinguished by paying the judgment. *Hayes v. Nourse*, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. Rep. 891. See, also, *In re New York, W. S. & B. Ry. Co.*, 94 N. Y. 287, and *Schermerhorn v. Wheeler*, 5 Daly, 472.

Again, it is not at all clear that this tender of performance was not all-sufficient in this case, and equivalent to payment and acceptance. The defendant is a trustee appointed to represent all the creditors of the bankrupts' estate. If he succeeded in the actions on appeal, and retained the proceeds of the property to recover which the actions were brought, such proceeds would go to the creditors (less expenses, etc.) He made this composition agreement for the benefit of all, and the creditors assented, and knew the fiduciary relation and representative character occupied by the defendant. It has been held that, where a debtor made a composition agreement with three creditors, and one refused to accept payment according to its terms, there could be no rescission by one without the consent of the debtor,

and that tender of performance by the debtor was, in effect, good performance. *Bank v. Kohner*, 85 N. Y. 189-195. In *Fellows v. Stevens*, 24 Wend. 294, it was held that, "as between a debtor and creditor, an 'accord' to accept a less sum than the whole debt is no bar, though satisfaction be tendered; but, if the accord extend to all the creditors of the debtor, it is otherwise." This accord was not made in terms with all the creditors of the bankrupt, but it was made between two creditors of the trustee and the trustee, and he represented all, and these creditors of the bankrupt were, in effect, debtors of the plaintiffs in such actions. In effect, it was a compromise agreement between two creditors on the one part and all their debtors on the other part. Again, as both plaintiffs (creditors) entered into the agreement with the defendant, and both had received the benefit contracted for, it is difficult to see how one alone could withdraw, as he attempted to do, without the consent of the trustee (see *Bank v. Kohner*, 85 N. Y. 194, and cases there cited), or how the other could withdraw after tender.

There is no evidence of laches on the part of the trustee. The agreement was made March 15th, and on or before the 17th day of April he had effected his settlement with Schafer, and on that day he tendered the plaintiffs the money due them. That the trustee was dilatory in effecting this compromise with Schafer is not shown. Nor does it appear that the plaintiff suffered any loss or inconvenience from the delay. The parties must have contemplated that it would take time to effect that settlement. Neither plaintiff shows any good reason for repudiating the agreement of March 15th, and, as there was no fraud or sharp practice in securing the same, there was no excuse for noncompliance.

The orders of the referee are approved and affirmed.

In re SLOMKA et al.

(District Court, S. D. New York. October 9, 1902.)

1. BANKRUPTCY—CLAIMS—PRIORITY—WAGES.

Bankr. Act, § 64 B (4), relating to the priority of claims, authorizes priority for wages due to workmen, clerks, or servants, earned within three months before the date of the commencement of the proceedings; and subdivision 5, for debts owing to any person who by the laws of the states or United States is entitled to priority. *Held* that, where wage claimants were entitled to liens by virtue of state law, they were entitled to priority under subdivision 5, though the wages were not earned within three months before the date of the commencement of the bankruptcy proceedings.

2. SAME—WAGES—LIENS—STATE STATUTE.

Laws N. Y. 1897, c. 624, § 29, declares that, in all distributions of assets under all assignments made in pursuance of the act, wages owing to employes of the assignor at the time of the execution of the assignment, or wages for services rendered within a year prior thereto, shall be preferred before any other debts. *Held*, that such statute created a lien in favor of wage claimants on the fund in the hands of the assignee produced from the assigned property, which lien attached to the fund when transferred by the assignee to a trustee in bankruptcy.

In Bankruptcy.

Joab H. Banton, for trustee.

Isidore Witkind, for labor claimants.

ADAMS, District Judge. A question whether certain labor claims should be allowed priority is certified for my opinion.

The facts had been agreed upon as follows:

"I. On the 14th day of April, 1900, and for some time prior thereto Jacob Slomka, Max Slomka and Adolph Slomka, as partners in business under the firm name of S. Slomka's Sons & Company, were engaged in the manufacture of sporting goods, at the City of New York, Borough of Manhattan.

"II. On said 14th day of April, 1900, said firm of S. Slomka's Sons and Company, executed and delivered a general assignment for the benefit of creditors to one Louis Stern, as assignee, without preferences, in accordance with the laws of the State of New York, and the deed of assignment was regularly filed, and recorded on said day in the office of the Clerk of the County of New York.

"III. Said assignee immediately thereafter took possession of the firm's assets and converted the same into cash in accordance with orders from the New York Supreme Court.

"IV. At the time of the suspension of business by said firm in said month of April, there were due to a number of the employes of said firm two weeks' wages earned within two weeks next preceding the execution, and filing of said deed of assignment, that is, from April 1st to April 14th, 1900, inclusive, aggregating about Two hundred (\$200.00) dollars.

"V. That prior to the filing of the petition in bankruptcy hereinafter stated said labor claimants and each of them filed with said assignee an itemized and duly verified statement of their said account for allowance and payment by said assignee as preferred labor claims under the provisions of Section 29, Chapter 624 of the New York Laws of 1897. And that said claims were passed upon by said assignee and allowed in full as preferred labor claims.

"VI. That on the 16th day of July, 1900, a petition in involuntary bankruptcy was filed against said partnership as well as against the individual members of said firm and on the 4th day of October, 1900, said firm and the individual members thereof were adjudicated bankrupts; a trustee was appointed, and the assignee under the orders of this Court returned to the trustee herein the sum of about Twelve hundred (\$1,200) dollars then in his possession and realized from the sale of the assets of said bankrupts and from collections of outstanding accounts due said bankrupts.

"VII. That during the month of December, 1900, the labor claimants herein filed with the Referee in Bankruptcy proofs of debt of their respective claims, for amounts set opposite their names to wit:

"Adolph Rosenberg, \$6.00; Louis Slomka, \$26.00; Louis Brisman, \$20.84; Jacob Lowenthal, \$8.33; Lena Frank, \$9.33; Samuel Richter, \$38.28; Freda Slomka, \$8.00; Samuel Lebin, \$10.85; Joseph Adler, \$6.67; Pinkus Ginsberg, \$10.00; Alter Friedman, \$5.88; Israel Schorr, \$10.00; Max Gutman, \$3.37 and a few others, and claim preference therein under the U. S. Bankruptcy Law.

"VIII. That Section 29, Chapter 624 of the New York Laws of 1897, is in words as follows:

"In all distribution of assets under all assignments made in pursuance of this Act, the wages or salaries actually owing to the employes of the assignor or assignors at the time of the execution of the assignment for services rendered within one year prior to the execution of such assignment, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same pro rata to the amount of each such claim."

"IX. That said firm was on the 14th day of April, 1900, in fact, insolvent.

"X. That all the claims of the above named creditors have been proved against the bankrupts' estate, and that the trustee herein now has in his

possession the sum of about Nine hundred sixty-two and ⁰³/₁₀₀ dollars (\$962.03).

"XI. That the wages upon which said claims are based were not earned within three months before the date of the commencement of this proceeding in bankruptcy.

"Dated September 26, 1902."

The Referee has reported as follows:

"As Referee I find that the wages were earned prior to the 14th of April, 1900; that the bankruptcy proceeding was instituted July 16th, 1900, more than three months subsequent thereto; that the wages were not earned within three months before the date of the commencement of the proceeding.

"As a matter of law I conclude that Section 64b (4) is exclusive of Section 64b (5) and these creditors have no lien under Section 67 of the Bankruptcy Law, and the claims should not be allowed in full as debts having priority but that these creditors should take pro rata with the other creditors of the bankrupts.

"Annexed hereto is the order which has been entered in this proceeding controlling the above claims.

"And the said question is certified to the Judge for his opinion thereon. See 1 Am. Bankr. R. 234.

"Dated, at the City of New York, the 27 day of September, A. D., 1902."

In re Rouse, Hazard & Co., 1 Am. Bankr. R. 234, 33 C. C. A. 356, 91 Fed. 96, relied upon by the Referee, decided by the Circuit Court of Appeals, for the Sixth Circuit, Jan. 3, 1899, was a case where a priority for labor claims was allowed by the District Court but disallowed on appeal for the reason that Congress having provided for wages earned within three months before the date of the commencement of the proceedings, not to exceed \$300 in amount to each claimant (section 64b [4]) there could be no enlargement, either as to time or amount, notwithstanding the same section, in the next paragraph, provided for an allowance of debts owing to any person who by the law of the states or the United States should be entitled to priority (section 64b [5]).

The claimants here insist that the case is governed by the principle of the case In re Coe, 6 Am. Bankr. R. 1, 48 C. C. A. 538, 109 Fed. 551, decided by the Circuit Court of Appeals of the Sixth Circuit June 4, 1901. That was a case where the Ohio Statute, which was in force at the time, provided:

"In all cases where property of an employer is placed in the hands of an assignee, or receiver, or trustee, claims due for labor performed within the period of three months prior to the time of such assignee, receiver or trustee is appointed shall be first paid out of the trust fund in preference to all other claims against such employer, except claims for taxes and costs of administering the trust."

There the wages were earned within three months preceding the 27th day of August, 1898. The petition in bankruptcy was filed on the 24th day of December, 1898, therefore the wages were not earned within three months before the date of the commencement of the proceedings in bankruptcy. The District Court (Northern District of Ohio) disallowed priority of the claims. The court on appeal reversed the decision and allowed the claims on the ground that the liens were not obtained through legal proceedings and therefore not avoided by the proceedings under section 67c nor were they null and void

under section 67f, but liens created by the state statute upon the performing of the labor and the placing of the employer's property in the hands of a receiver, not divested by the bankruptcy proceeding, leaving the fund turned over by the receiver in the state court to the bankruptcy court, chargeable with the liens which should be recognized and enforced in the bankruptcy court. In support of the decision, the court cited *In re Kerby-Dennis Co.*, 2 Am. Bankr. R. 402, 36 C. C. A. 677, 95 Fed. 116, decided by the Circuit Court of Appeals for the Seventh Circuit, June 14, 1899, where it was held that labor liens created under a Michigan statute would be sustained in the bankruptcy court and given a preference over equally meritorious labor claims which had not been established in the state court, notwithstanding the claims were all covered by section 64b (4) of the Bankruptcy Act. In *re Kerby-Denis Co.* (D. C.) 94 Fed. 818. The court in *Re Coe* also cited *In re Emslie*, 3 Am. Bankr. R. 282, 516, 42 C. C. A. 350, 102 Fed. 291, decided by the Circuit Court of Appeals for this Circuit May 24, 1900, affirming a decision of this court holding that mechanics' liens, duly filed, were not dissolved by section 67 of the Bankruptcy Act. It will be seen that the cited cases do not decide the controversy here and *In re Rouse, Hazard & Co.* and *In re Coe* stand apparently opposed to each other on the question involved. The former case was followed in the Eastern District of Pennsylvania by Judge McPherson in *Re Shaw* (D. C.) 109 Fed. 782, decided June 22, 1901, where the direct question now involved was before him and he held that to allow the wages claimed as debts under section 64b (5) would in effect either wipe out section 64b (4) or furnish two rules of construction for deciding how much should be allowed to a claim for wages in priority and that therefore the word "debts" in paragraph 5 should be held not to cover wages claims. This ruling is inconsistent with *In re Coe*, which sustained, under paragraph 5, a wages claim more than three months old. The latter case was apparently not reported at the time of Judge McPherson's decision and not before him.

There being no direct authority in this Circuit, I am inclined, if these claims are liens, to follow *In re Coe*, for the reason that wages claims are, with certain limitations, universally protected by legislation in this country and I am not satisfied that Congress by the provisions of section 64b (4) intended to exclude such claimants from availing themselves of the benefits of section 64b (5). In the absence of liens under the State laws, paragraph 4 would afford a just and equal remedy for the prior allowances of wages claims under the bankruptcy law, but I find nothing therein which contemplates the disallowances of wages claims which have become liens by virtue of the State laws and impressed upon the fund when turned over to the bankruptcy court. It will be noted that in the construction of the law adopted in *Re Kerby-Dennis Co.* the statutory liens under paragraph 5 were preferred to allowances under paragraph 4, evidently because they were established as liens under the State law, though the other claims were in time to be established as wages claims under paragraph 4 of the Bankruptcy Law. This seems to me to be entirely consistent with the general purpose of the Bankruptcy Law.

Liens intended to be excluded from preference were carefully described under section 67 and a lien for wages was, to my mind, no more intended to be excluded than mechanics' liens, for example, which have been held in this circuit not to have been excluded. (In re Emslie, *supra*.) The same reason given for the sustainment of a mechanic's lien would apply here in full force. A lien for wages is based upon a present consideration and there is no equitable consideration in favor of general creditors which should defeat such a lien.

The question remains, were these claims liens? It is contended by the trustee that the law of the State of New York does not create a lien in such a case but only provides for one as long as the artisan has the article he improved in his possession. This, however, is not a claim of lien upon the article but upon the fund. The language of the New York statute is similar in effect to that of the Ohio statute, which was under consideration in *Re Coe*, and the design of the legislature was apparently the same. The claims are made charges upon the fund and I see no practical difference between sustaining the right of wage earners to resort to a fund in preference to other creditors and allowing mechanics to assert a lien upon real estate, which they have benefited, in preference to other creditors. The presumption is, under the statute, that the wage earners were instrumental in producing the fund and should be entitled to payment out of it. The claims should be deemed as equivalent to and in fact liens, so as to entitle them to priority in this court upon a fund which was received subject to the charges impressed upon it by the law of the State.

The order of the Referee is reversed and the claims will be allowed.

In re GOLDBERG.

(District Court, N. D. New York. October 14, 1902.)

1. BANKRUPTCY—INJUNCTION—PLEADING—JURISDICTION.

Where an application for an injunction in bankruptcy proceedings described the proceeding as: "In the District Court of the United States for the Northern District of New York. In Bankruptcy. No. 1,141,"—and stated that the petition in bankruptcy was filed August 7, 1902, and a writ of subpoena issued "herein," such application contained a sufficient showing that the proceeding in bankruptcy was pending in the Northern district of New York to give the United States district court of such district jurisdiction.

2. SAME—VERIFICATION BY ATTORNEY.

Where the papers on an application for injunction in bankruptcy proceedings disclosed that the moving creditors lived at a distance, and that the application was made by their attorney in their behalf and for their benefit, and stated why it was made by the attorney, and not by the creditors, an objection that the application was verified by the attorney, and not by the creditors themselves, was untenable.

3. SAME—ATTACHMENT—SALE—VALIDITY—INJUNCTION.

A creditor of a bankrupt attached certain of his property, and thereafter procured an order for the sale thereof. The sale was had, without a proper or sufficient notice, to the creditor's son, for one-tenth of the appraised value of the property. An application was made in the state

court to set the sale aside, in which an order was made restraining further proceedings by the plaintiff in attachment, the purchaser, and the sheriff pending such application. *Held*, that such facts were sufficient to entitle creditors in an involuntary bankruptcy proceeding to an injunction against such attaching creditor, the sheriff, and the purchaser, to restrain them from selling or disposing of the property so attached pending the bankruptcy proceeding.

In Bankruptcy.

This is an application for an injunction restraining Jonathan Levi and Edward F. Cohn from taking further proceedings in an attachment action brought by them against the alleged bankrupt, Harry Daniel Goldberg, until an adjudication or dismissal of the petition, etc., and also restraining the sheriff of Warren county, N. Y., from selling or disposing of the property of said Goldberg now in his possession or under his control, seized by virtue of an attachment issued in such action, and also restraining one Albert Levi from receiving or interfering with certain of the property of said bankrupt attached and alleged to have been sold by the sheriff pursuant to an order of the county judge. A temporary injunction, with an order to show cause why a permanent injunction should not issue, was granted August 16, 1902, by Hon. E. B. Thomas, returnable September 2, 1902, and, having come down under the rules, was argued September 30, 1902, at the Utica term of this court.

Walter A. Chambers, for the motion.
Ashley & Williams, opposed.

RAY, District Judge (after stating the facts as above). On the 7th day of August, 1902, Eli M. Woodard, William S. Banker, Wilber W. Chambers, and Simon Lavine filed in this court their petition to have Harry Daniel Goldberg adjudged a bankrupt. The alleged bankrupt left the district before the subpoena was served, and, his whereabouts being now unknown, service by publication will be necessary. On or about July 19, 1902, Jonathan Levi and Edward F. Cohn commenced an action in the supreme court of the state of New York against said Goldberg, in which a warrant of attachment was issued, under which the sheriff of Warren county seized certain of Goldberg's property, and caused an inventory to be made. The appraisal fixed the value at \$1,548. The plaintiffs claim \$335.33 and interest from July 10, 1902. August 1, 1902, the county judge of said county directed the sale of a portion of said property, marked "Perishable," which was appraised at more than \$500, and a sale was made August 8, 1902. One Albert Levi, son of the plaintiff Jonathan Levi, became the ostensible purchaser thereof for the sum of \$50. It appears that no proper or sufficient notice of such sale was given; that only one bidder was present,—he the son of one of the plaintiffs,—and that the only other persons present were the deputy sheriff making the sale and one of the attorneys for the plaintiffs; and that such property was purposely sacrificed. An application to set aside said sale has been made in the state court, and an order made restraining further proceedings by the plaintiffs, the purchaser, and said sheriff pending the decision of such motion. That Albert Levi is a bona fide purchaser or owner of the property cannot be maintained. The said action is founded on a claim from which a discharge in bankruptcy will be a release, and is still pending. The

property so attached, or the major part of it, is in the possession of the sheriff, although Albert Levi says a large part of that sold as above stated has been delivered to the Delaware & Hudson Railroad Company to be transported to him, and is held subject to his orders. Henry S. Williams, one of the attorneys for said plaintiffs, says:

"It is the intention of the plaintiffs in said action to retain possession of said goods, and have the sheriff refuse any demand which may be made upon him by a trustee in bankruptcy for possession of said property, and to oppose any legal action which may be brought by said trustee against them or the sheriff either for said goods or their value."

The papers show that there are several creditors of said Goldberg. A purpose to defeat the bankrupt act is substantially confessed. The object of that law is to prevent forbidden preferences, secure a fair and equitable distribution of the proceeds of the property of the bankrupt among his creditors, and then discharge the debtor, if entitled to a discharge. This court will neither aid nor permit a violation of the spirit and intent of the law, but will take such action, within its power, as will carry it into full force and effect. It is evident from what has been done and is being done that the injunction demanded must be granted, if the law is to be sustained and made effective in this case, and the creditors protected. No court should permit such a sale as has been described to stand, and there is no reason why the plaintiffs shall be permitted to proceed and gain a preference or an advantage over the other creditors. The amount due the plaintiffs is conceded, and there is no pretense of any equity in favor of these particular creditors.

The plaintiffs raise two preliminary objections to the granting of the relief asked: First, that the petition is made and verified by Walter A. Chambers as attorney for the petitioning creditors in this proceeding, and not by the creditors themselves; and, second, that it does not appear from the moving papers that this bankruptcy proceeding is pending in the district court for the Northern district of New York, and therefore jurisdiction is not shown.

This is an application to the court in a pending proceeding which is described in the moving papers as follows: "In the District Court of the United States for the Northern District of New York. In Bankruptcy. No. 1,141." The petition then states that the petition in bankruptcy was filed August 7, 1902, and a writ of subpoena issued "herein." This is a sufficient showing that the proceeding in bankruptcy is pending in the Northern district of New York, aside from the fact that this court will take judicial notice of its own proceedings and records in a particular case, so far as such an application as this is concerned.

The other preliminary objection is equally untenable. The papers show that the moving creditors live at a distance, and that the application is made by their attorney in their behalf and for their benefit. The petition states why it is made by the attorney and not by the moving creditors. It is presumed he is acting with authority. There is no rule or statute requiring the petition to be made in form by the moving parties, although that would be a better prac-

tice. It would have been better practice, perhaps, had the petition stated specifically that the petition in bankruptcy was filed "with the clerk in said district," or "with the clerk of the court in the Northern district of New York." It is not pretended, however, that the plaintiffs have been misled, or that this proceeding in bankruptcy is not pending in the Northern district of New York. In such a proceeding as this the substance, rather than the form, will be considered. Were this a statutory proceeding, and did the statute require the petition to be made and subscribed or verified by the moving party, a different question would be presented. Where a remedy is given by statute, and a line of procedure pointed out, that course must be substantially followed. No possible harm can come to any creditor from the granting of the injunction asked, except so far as it may deprive the plaintiffs in the attachment action of the benefit of their diligence. But the law itself is designed to do this. "Equality is equity," and in the settlement and distribution of the estates of insolvent persons the creditor near at hand, and first cognizant of the pecuniary embarrassments of a failing debtor, should not be permitted to receive more than his just proportion of the property. If by the use of attachment proceedings one creditor is permitted to take and dispose of the property in the manner attempted in this case, the law is nullified. Until the question of bankruptcy is determined, further proceedings in the action should be stayed, and until 12 months thereafter in case Goldberg is adjudged a bankrupt. Clearly the alleged purchaser at the sale should not be permitted to take or remove the property, if lawfully he may be prevented, nor should the sheriff be permitted to sell.

It is claimed that such action should proceed to judgment, and a sale of the property attached be permitted; the distribution of the proceeds only being enjoined. There is no reason or necessity for such a course. If Goldberg is adjudged a bankrupt, the trustee will take and dispose of the property. If not so adjudged, these attaching creditors will proceed with their action. The right to the injunction sought in this case is plain. *In re Lesser*, 3 Am. Bankr. R. 758, 40 C. C. A. 177, 99 Fed. 913; *Bear v. Chase*, 3 Am. Bankr. R. 748, 40 C. C. A. 182, 99 Fed. 920. Indeed, the act itself suggests this as the proper remedy in such a case. Bankr. Act, § 11a; section 67f; section 2 (15).

Injunction granted and preliminary objections overruled.

In re FLANNAGAN.

(District Court, W. D. Texas, Waco Division, October 13, 1902.)

No. 318.

1. BANKRUPTCY—EXEMPTIONS—BUSINESS HOMESTEAD.

Where a bankrupt engaged in mercantile business made an assignment of all his property, and left his place of business, and went to reside on the farm of his mother, and devoted his subsequent time and attention to his mother's farming interests, and testified that his only

¶ 1. See *Homestead*, vol. 25, Cent. Dig. § 326.

hope of being able to resume business was the remote contingency of his being able to compromise with his creditors, there was no fixed, definite intent to resume the business, sufficient to entitle him to have the place where he formerly carried on his business exempted to him as a business homestead.

In Bankruptcy.

Thos. F. Bryan, for trustee.

J. B. Kimbell, for bankrupt.

MAXEY, District Judge. The question involved in this proceeding is one of homestead exemption, which should be considered in connection with the following facts, appearing of record: On May 25, 1902, the bankrupt executed, pursuant to the statutes of Texas, a deed of assignment, whereby he conveyed to E. F. Bryant, assignee, his entire stock of goods, wares, and merchandise for the benefit of accepting creditors. For the purpose of setting aside the assignment and of bringing the property within the jurisdiction of this court, certain creditors of the bankrupt instituted involuntary proceedings in bankruptcy against him on May 29th following. In his schedules the bankrupt claimed two distinct parcels of property as homestead exemptions, valued, respectively, at \$1,250. The one he claimed as a residence, or home for the family; and the other, the place where he carried on his business, as a business homestead. The trustee appointed in the bankruptcy proceeding set apart to him the residence of the family as exempt under the laws of the state, but declined to include in his exemptions the property in which his business as a merchant had been conducted. Exceptions to the report of the trustee were duly taken by the bankrupt, and upon his motion the entire matter was heard upon the proofs by the referee, who sustained the action of the trustee. The bankrupt thereupon filed his petition for review, and the referee has certified the question to the court. The record further shows that the bankrupt was hopelessly insolvent when he executed the deed of assignment. He conveyed to the assignee all his property, including a stock of goods valued approximately at \$250, and some notes and accounts. After the execution of the assignment, he had no property with which to resume business. It is true the bankrupt testified that he had expectations of resuming his former business, but it also appears from his testimony that such expectations were based upon the remote contingency that he would be able to effect an amicable settlement with his creditors. The following excerpts from the examination of the bankrupt illustrate his financial condition and the futility of his hopes of resuming business:

"Q. In the summary here of your bankrupt schedules you place your indebtedness at \$3,361.54. A. That was supposed to be correct. Q. You had no means of resuming business in that condition? A. No, but I had hopes of making a settlement with those people that I owed, and putting up the notes and accounts, and paying off those claims, if I could have gotten anything like a reasonable settlement. Q. You conveyed them, didn't you? A. Yes. Q. To Mr. Bryant, the assignee? A. Yes, I thought the creditors would come in. Q. You made a conveyance to the assignee of all your property, did you not? A. Yes, I suppose it would be taken that way. Q. Then you had nothing after that, did you, of any assets, with which to enter into business, after you made that deed of assignment to Mr. Bryant?

A. No, sir. * * * Q. What was your intention in regard to that house [meaning the house of business] in case your creditors failed to make a settlement with you? A. I would be almost handicapped. I could not do anything. * * * Q. Did you have any other property at that time, that you did not embrace in the assignment to the assignee, on which to resume business? A. No, sir; nothing at all. Q. Then, if your creditors took what was in that assignment, and released you, you had nothing on which to resume business? A. No, sir."

It is also shown by the record that after the bankrupt executed the deed of assignment he went out to his mother's farm, to attend to her farming operations, and that he was engaged in no other business or calling. The question, then, upon the facts is whether the bankrupt should be permitted to retain the property in which he conducted his mercantile enterprise as a business homestead. It is believed by the court that the case of *Shryock v. Latimer*, 57 Tex. 674, which has been subsequently approved in repeated instances, conclusively resolves the question under consideration against the contention of the bankrupt. At page 677 it is said by Mr. Justice Stayton, as the organ of the court:

"The constitution of this state protects to the family in a city, town, or village a homestead, which 'shall consist of lot or lots, not to exceed in value \$5,000 at the time of their designation as the homestead, without reference to the value of any improvements thereon: provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family.' This court has held that the place of the home of the family, as well as the place of business of the head of the family, in a city, town, or village, although not upon contiguous lots, was protected from forced sale, so long as used for the purposes contemplated by the constitution. *Miller v. Menke's Widow & Heirs* (Galveston term, 1880) 56 Tex. 539. The constitution recognizes that, to establish and preserve a homestead in a city, town, or village, the property must 'be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family'; and it also recognizes 'that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.' To preserve the place of business, which is separate and distinct from the home, as a part of the homestead, two things must concur: (1) The head of a family must have a calling or business to which the property is adapted and reasonably necessary; (2) such property must be used as a place to exercise the calling or business of the head of the family."

And at page 678 it was further said:

"The law no more protects a man in a place to do business which he is not doing, and not making any immediate preparation to do, than it protects to a man a place for a home which is not in fact home, or in reference to which no steps have been taken to make it a home, for the family. The law protects the place of business because it is the place of business, which cannot be unless the head of the family is occupied in a business to which the property is adapted and reasonably necessary. We conclude, under the facts of this case, that the defendant Latimer did not have any business at the time the sale in question in this cause was made, which made the storehouse and lot necessary or proper to the exercise of such business. It matters not what the calling or business of a man may be (and, as we have before said, a calling or business is one of the essentials to entitle a person to an exempted place for its exercise), if he does not use the property for the purpose for which the exemption is given, it will be lost. That the failure to so use the property may result from financial embarrassment does not alter the rule, for the law does not exempt that which a man might like to use, but is unable to use for want of means; but it exempts that which he does use."

See, also, *Alexander v. Lovett* (Tex.) 69 S. W. 68; *Pfeiffer v. McNatt*, 74 Tex. 640, 16 S. W. 821; *Harle v. Richards*, 78 Tex. 80, 14 S. W. 257; *Duncan v. Alexander*, 83 Tex. 441, 18 S. W. 817; *Malone v. Kornrumpf*, 84 Tex. 454, 19 S. W. 607; *Bowman v. Watson*, 66 Tex. 295, 1 S. W. 273.

It was said by the court in *Bowman v. Watson*:

"If the business was one requiring credit or capital to carry it on,—as that of a merchant,—the question would not be one solely of intent, or, rather, the intent would depend upon the situation of the owner. If he had neither the credit nor means of carrying on the business of merchant, he could have no definite intent to resume that sort of business." 66 Tex. 296, 297, 1 S. W. 273.

In the case before the court the record shows that at the date of the execution of the assignment the bankrupt was insolvent, that he transferred all his property to the assignee for the benefit of such creditors as would accept the assignment, and there is not an intimation that he had any credit whatever. Subsequent to the assignment he did not use the property in controversy for any purpose. He devoted his time and attention to his mother's farming interests, and was making no preparations for a resumption of his mercantile business. In view of these facts, the inference is irresistible that he had no fixed, definite intent to resume the business in which he was formerly engaged. The court is aware that it has been held in this state that the making by an insolvent of a general assignment for the benefit of his creditors does not of itself defeat his right to have exemption of his place of business continue. *Tackaberry v. Bank*, 85 Tex. 488, 22 S. W. 151, 299; *Scheuber v. Ballow*, 64 Tex. 166; *Gassoway v. White*, 70 Tex. 477, 8 S. W. 117. But it was said by Mr. Chief Justice Stayton, speaking for the court, in *Tackaberry v. Bank*, 85 Tex. 494, 22 S. W. 153:

"A voluntary discontinuance of business ought to be given the same weight on question of abandonment as is given to a removal from the home, and in the one case as in the other the remaining question of fact necessary to be ascertained to determine whether abandonment exists in a given case is that of intention. If the removal of the family from the home or the voluntary discontinuance of the calling or business be without intent, in the one case, again to use the property as a home, or, in the other, to resume the old or to pursue some other business on the property, then abandonment exists."

After all, the question whether a business homestead has been abandoned is one of intent; and the court is of the opinion, from a careful analysis of all the facts, that when the bankrupt executed the deed of general assignment he had no definite intent to resume the business of merchant, and he must, therefore, be held to have abandoned the property which he had previously used for that purpose.

It follows from what has been said that the ruling of the referee should be affirmed, and it is so ordered.

NOTE BY THE COURT. The wife of the bankrupt was not made a party to the proceeding before the referee, and as to her nonjoinder the record is silent. Query: In bankruptcy proceedings before the referee to determine the question of homestead exemption, is the wife of the bankrupt a necessary party? See *Jergens v. Schiele*, 61 Tex. 255.

CLARK v. ALLEN, Marshal.

(District Court, W. D. Virginia, August 25, 1902.)

1. EXECUTION—LEVY ON REAL ESTATE.

Code Va. 1887, § 3587, authorizes a levy of execution on personal property, but not on real estate. Acts 1821-22 provided that, in a writ of fieri facias on a judgment or decree against one liable to the common-wealth, real estate might be levied on. The enactment was carried into Code 1849, p. 223, § 8, and Code 1887, § 687. By Code 1819 (volume 2, p. 51), the right to levy on real estate was given only as against certain public officers. Act of congress (Rev. St. § 916) provides that in "common-law causes" in courts of the United States the plaintiff shall be entitled to similar remedies, by execution or otherwise, to reach the property of the judgment debtor, as prescribed by the laws of the state where the court is held "in like causes." *Held*, that an execution from a federal court in Virginia may not be levied on real estate there, though the judgment is in favor of the United States, since the phrase "in like causes" does not give the government the rights of the state, but, as applicable to Virginia, which is not a code state, means "common-law causes."

2. SAME—STATUTES.

The rule would not be otherwise had Code Va. 1887, § 687, been adopted after Rev. St. U. S. § 916, which also authorizes the federal courts to adopt from time to time, by rules, such state laws as may be in force touching attachments and other process, since such statute would not give the federal courts power to do more than adopt the state statute.

3. SAME—CRIMINAL CASE.

The rule is not different in criminal or penal cases, since Rev. St. U. S. § 1041, provides that a judgment for a fine or penalty may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced.

McDOWELL, District Judge. The following order was entered May 17, 1900:

"Rule of Court: At the regular May term of the circuit and district courts of the United States for the Fourth circuit, in the Western district of Virginia, at Abingdon, on May 17th, 1900, Hon. John Paul, district judge, present and presiding: Upon motion of the United States attorney, it is ordered that the clerks of this district in issuing any writ of fieri facias upon a judgment or decree against any person indebted or liable to the United States, or against any surety of his, do insert after the words 'We command you that of the goods and chattels,' the words 'and real estate,' and conform the subsequent part of said writ thereto. It is ordered that the clerk of this court do certify copy of this order to the other clerks of this district, to the marshal of the district, and the attorney general of the United States. John Paul, District Judge."

Since then all executions on judgments in favor of the government have directed that the real estate of the judgment debtors be levied on. The right to levy an execution on real estate is a question of such importance in this district that I am led to file this supplementary opinion, with the hope that the circuit court of appeals may see fit, in deciding this case, to express an opinion on this point. In my former opinion in this case, dealing with the right of the government to subject the debtor's homestead (114 Fed. 374), I thought it probable that the expression "in like causes," found in the act of June 1, 1872, and section 916, Rev. St., should be given a wider meaning than I have since concluded should be given it.

The question now presented can perhaps be best considered, first, as relating to judgments in civil cases, and next as relating to penal and criminal cases.

1. Judgments in Civil Common-Law Causes. In this state real estate cannot be levied on and sold under execution in favor of an individual.

Section 3587, Code Va. 1887, reads:

"By a writ of fieri facias the officers shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is."

Prior to 1850, the writs of levamur facias and elegit were in use, but neither of these authorized a sale of real estate (4 Minor, Inst. [3d Ed.] pt. 1, p. 990 et seq.); and, so far as I know, the law of this state never authorized a levy and sale of real estate on a common-law judgment in favor of an individual.

Section 687, Code 1887, reads:

"In a writ of fieri facias upon a judgment or decree against any person indebted or liable to the commonwealth, or against any surety of his, after the words 'we command you that of the' the clerk shall insert the words 'goods, chattels, and real estate,' and conform the subsequent part of such writ thereto. And under any writ so issued real estate may be taken and sold."

The Code of 1849 (page 223, § 8) uses the same language. The act first appeared in Acts 1821-22. By the Code of 1819 (volume 2, p. 51), this right is given only as against certain designated public officers and their sureties. The history of the federal legislation on the subject of executions is given in *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196.

The act of June 1, 1872, from which section 916, Rev. St., is taken, reads as follows:

"Sec. 6. That in common-law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the state in which such court is held, applicable to the courts of such state; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the state in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the state within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules as aforesaid: provided, that similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy." 17 Stat. 197.

There is no question in my mind as to the power of congress to enact that executions on judgments in favor of the government may be levied on real estate. But the question is, has congress so enacted? The state law, as it was in 1872, and is now, is, in effect, that real estate cannot be levied on under fieri facias, except on judgments in favor of the state of Virginia. If, for instance, the state of Kentucky were to sue and recover judgment in a Virginia state court against a citizen of Virginia, the execution issued thereon clearly could not direct a levy on the debtor's real estate. There is a total

want of authority for a writ directing anything more than a levy on his personal property. By the act of 1872, congress has simply given to judgment creditors in common-law causes in the circuit and district courts the remedies provided by the state law. This law, as above stated, denies the right to levy an execution on real estate to all judgment creditors other than the state of Virginia. It is contended that the language, "similar remedies, * * * by execution or otherwise, * * * as are now provided by the laws of the state * * * in like causes," should be construed as giving to the federal government the same rights as are given by the state law to the state government; the argument being that a cause in which the federal government is the plaintiff is a "like cause" to one in which the state government is plaintiff. But this language does not seem to me sufficient to sustain the contention. An examination of the whole of the section in question leads me to think the words "like causes" mean in Virginia, which is not a "Code" state, merely "common-law causes." The act in part reads:

"That in common law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies * * * and the party recovering judgment in such cause shall be entitled to similar remedies * * * provided by the laws of the state * * * in like causes." 17 Stat. 197.

The remedies in equity and criminal causes are elsewhere provided for. Equity Rules 8 and 92; section 1041, Rev. St. Consequently, as applied in a state retaining the distinction between common-law and equity causes, I would read the act as if it were written:

"The party recovering judgment in a common law cause shall be entitled to similar remedies * * * provided by the laws of the state * * * in common law causes."

The words "in like causes" were probably used because many of the states had adopted codes of practice which abolish the distinctions between common-law and equity practice, and in such states there are no causes that are technically known as common-law causes. Again, the act makes no distinction between private judgment creditors and the government as a judgment creditor. *Fink v. O'Neil*, supra. Both are put on the same footing. I can find nothing in the act which shows an intent to give the government any other or greater rights than are given individuals, and the act gives to individual judgment creditors only such rights as are given such creditors by the state law. Unless it can be made to appear that an individual judgment creditor in the United States courts has a right to an execution leviable on real estate, I can see no reason for holding that the government has such right. That an individual recovering a judgment in a Virginia state court cannot levy on anything except the debtor's chattels (and his rights in the federal courts are the same) is very clear. There is nothing in the state law on which to found a contention to the contrary. The rule of court hereinabove quoted does not seem to me to authorize the practice of issuing executions directing that real estate be levied on. The law (17 Stat. 197; Rev. St. § 916) gives the court no power to do more than to adopt, by rule, such state laws as may be enacted after the date of the fed-

eral statute. There has been no change in the state law since 1822. Consequently, I do not perceive any sufficient reason for having made the rule in question. But, even if section 687, Code 1887, had been enacted since the enactment of section 916, Rev. St., this fact would not give the federal courts power to do more than adopt the state statute. The federal law would still be that, if the state of Virginia were the judgment creditor, the execution could direct the sale of real estate, and when any other, whether federal government or private person, is the judgment creditor, the execution could direct no more than a sale of goods and chattels.

2. In Criminal and Penal Cases. Section 1041, Rev. St., provides that a judgment for a fine or penalty may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. I find nothing in this statute showing an intent to give the government any other rights than are given it, as well as private judgment creditors, in civil cases. It follows that what has been said hereinabove applies to penal and criminal judgments. Executions on such judgments can no more be levied on real estate than can executions on civil judgments.

The decree heretofore rendered in this cause, perpetuating the injunction, is therefore proper.

SCHMIDT et al. v. CITY OF DEFIANCE.

(Circuit Court, N. D. Ohio, W. D. February 10, 1902.)

1. MUNICIPAL CORPORATIONS—BONDS—VALIDITY.

Rev. St. Ohio, § 1764, provides that the city council shall provide a certain seal for the city clerk's office. Section 1745 provides that the mayor shall be furnished by the council with the corporate seal of the corporation, in the center of which shall be the words, "Mayor of the city of ———." Section 1552 provides that municipal corporations may have a common seal, and change or alter the same at pleasure. A municipal corporation had no such seal as prescribed by the statute, and bonds issued by it were sealed by the seal of the city clerk, and it appeared that the seal of the city clerk had been used on prior issues of bonds. *Held*, that it would be assumed that such seal had been adopted as that of the city, and the corporation could not set up the absence of a proper seal.

2. SAME—RECITALS—ESTOPPEL.

Rev. St. Ohio, § 1764, provides that the city council shall provide a certain seal for the city clerk's office. Section 1745 provides that the mayor shall be furnished by the council with the corporate seal of the corporation, in the center of which shall be the words, "Mayor of the city of ———." A city having no seal in conformity with section 1745 issued bonds sealed with the seal of the city clerk. *Held*, that recitals in the bond to the effect that the seal attached was the corporate seal estopped the corporation to deny the validity of the seal.

3. SAME—RECITALS AS TO AUTHORITY.

Section 1693, Rev. St. Ohio, provides no obligation shall be entered into by a city save by ordinance of the council. Section 1678 gives the council control of the finances of the city, and section 2706 provides that all bonds shall be signed by the mayor. Municipal bonds recited that

¶ 3. Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

all proceedings, acts, etc., required by statutes and ordinances to be had preliminary to the issue thereof had been taken. In an action on the bonds defendant contended that, since it appeared that the recitals contained in the bonds to the effect that "all the proceedings required by statutes or ordinances had been duly and legally taken by said city," were inserted by the mayor and clerk without authority, they were of no effect to estop the city to prove the contrary. *Held*, that the contention was of no merit, as the statutes contemplate co-ordinate action of the council and mayor, and the purchaser was exempted from knowing that the ordinance did not authorize the recital.

4. SAME—STATUTORY AUTHORITY—INVALID SPECIAL ACT—GENERAL STATUTE.

By Rev. St. Ohio, § 2835, councils of any municipality are authorized, whenever it is desired by the voters, to issue and sell bonds for the purpose of constructing bridges and culverts. Act Feb. 3, 1887 (84 Ohio Laws, p. 273), authorized the city council of the city of Defiance to borrow money for the purpose of building a bridge, and to issue bonds therefor. *Held* that, even if the act of 1887 was unconstitutional, the bonds issued thereunder, and which recited the authority of the act, were not invalid, there being sufficient authority conferred by section 2835.

Action by John W. Schmidt and others against the city of Defiance. Judgment for plaintiffs.

Doyle & Lewis, for plaintiffs.

W. H. Hubbard and Harris, Cameron & Shaw, for defendant.

WING, District Judge. In the suit at law, in which a jury has been waived and trial had by the court, it appears that on April 1, 1889, the city of Defiance, a municipal corporation of the fourth grade, second class, issued its bonds in the sum of \$50,000, one-half thereof to mature April 1, 1899, and one-half April 1, 1909, with interest, represented by coupons attached. There are 200 causes of action set forth in the petition, each cause of action being a coupon for the payment of \$25 as interest. One of the allegations of the answer is as follows:

"And said defendant further says that at all times since said 19th day of March, A. D. 1889, said city of Defiance was, by the terms and provisions of the general laws of the state of Ohio relating to municipal corporations, required to have, and did have, a corporate seal, whereof the mayor of said city was, by said general laws, required to have, and in fact did have, custody and control; yet, notwithstanding the fact that said city of Defiance had a corporate seal, in the custody and control of its said mayor, as aforesaid, and notwithstanding the provisions of the general laws of the state of Ohio relating to municipal corporations, * * * the said so-called bonds mentioned in the petition were not and are not, nor were nor are, either of them, sealed with the seal of said corporation; by reason whereof, and for the want of such seal of said corporation, said so-called bonds are not, and never became or were, negotiable, and are not, and never became or were, obligations of said city."

In reply to this defense the plaintiffs, in substance, say that the seal attached to the bonds was recited in the bond to be the corporate seal of the city, and placed thereon by the mayor and clerk, as such seal, to induce parties to buy the bonds, and was so relied upon, and is the same seal used as a corporate seal both before and after the issuance of these bonds; and that, therefore, the defendant is estopped to deny the validity of the seal. From an inspection of the bonds it appears that a seal was impressed upon each bond, which had in its center the words "City of Defiance," and, in the

margin, the words "City Clerk" and "Ohio." This form of seal is the one prescribed for the use of the city clerk, except that it has the additional word "Ohio" in the margin with the words "City Clerk." There is testimony introduced by the defendant to the effect that the mayor had a seal, in the center of which was the same device as that of the seal of the state of Ohio, and around said device the words "Mayor of the City of Defiance." Section 1764, Rev. St. Ohio, provides that: "The council shall cause to be provided for the clerk's office a seal, in the center of which shall be the name of the corporation, and around the margin the words 'City Clerk.'" Section 1745, Rev. St., provides that the mayor "shall be furnished by the council with the corporate seal of the corporation, in the center of which shall be the words, 'Mayor of the City of ____.'" It therefore appears from the proof that the city of Defiance, at the time of the issuance of these bonds, had no seal which complied with this provision of the statute. Section 1552, Rev. St., provides, among other things, that "municipal corporations" may "have a common seal, and change or alter the same at pleasure." The seal used upon the bonds in question had been used many times before to authenticate bonds of the city of Defiance. I have no doubt, from the proof, that it was intended by the officers of the city of Defiance that this seal should be used as the seal of the city in the issuance of the bonds to which these coupons were attached. It is recited in the bonds themselves that the seal is the seal of the city of Defiance.

A bill is filed by the plaintiffs, on the equity side of the court, setting up these facts with respect to the seal used on these bonds, and praying that the defendant, the city of Defiance, be compelled to affix the city seal to these bonds, or that it be enjoined from setting up the want of a seal as a defense. Both cases are before me. The defense in the case at law, which alleges that the bonds are not sealed with the seal of the city of Defiance, is without merit. In one view of the testimony, the allegation of the answer is unsupported, because it may be assumed that, the city having no seal, the use of the seal which was used on these bonds and the prior issues is evidence of the adoption of that seal as the seal of the city. Another view might be taken of the testimony, which would result in finding that, for the purposes of these bonds, the seal attached must be held to be the seal of the city of Defiance, because of the recital contained in the bonds. Upon either view of the testimony, it would be inequitable for the city of Defiance to set up this defense. One of the prayers of the bill is, therefore, granted; that is, that the city of Defiance be and is enjoined from setting up, in defense to the action at law upon the coupons, the absence of the proper seal. We then come to the defenses raised by the answer which relate to the absence of prerequisite proceedings to the issuance of the bonds, such as a vote of the people, and a vote upon the ordinance authorizing the issuance of the bonds, etc. The solution of this question depends upon the effect of the recitals contained in the bonds, which are as follows:

"This bond is issued under and pursuant to the laws of the state of Ohio, and of an act of the general assembly of the state of Ohio, passed February 3, 1887 (84 Ohio Laws, p. 273), entitled 'An act to authorize the council

of the city of Defiance, Ohio, to borrow money for the purpose of building a bridge'; and which act authorized and empowered the said city council to issue bonds, not to exceed the sum of fifty thousand dollars, for the purpose of building a bridge over the Maumee river in said city, and which act further provided that 'said bonds shall be of such denominations and bear such rate of interest, not exceeding six per cent., payable semi-annually, and mature at such times, not exceeding twenty-five years, as said council may determine'; and in pursuance of the resolution of the said city council of the city of Defiance, Ohio, duly and unanimously passed, declaring the necessity of the construction of said bridge, and the ordinance of the said city of Defiance, entitled 'An ordinance of the city of Defiance, Ohio, to provide for the issue and sale of bonds of said city, for the purpose of building over the Maumee river in said city a good and substantial bridge, with the necessary approaches thereto, and having on each side thereof a good and sufficient sidewalk,' duly and unanimously passed on the 19th day of March, in the year A. D. 1889, by the city council of Defiance, and for the purposes therein set forth; and it is hereby specially declared that all the proceedings, acts, conditions, and things required either by said statutes or ordinances to be had or taken preliminary to the issue hereof have been duly had and taken by said city of Defiance and its officers and agents. In testimony whereof the said city of Defiance has hereunto caused its corporate name and seal to be set by the mayor and clerk thereof, hereunto duly authorized by said statutes and ordinances, this first day of April, in the year one thousand eight hundred and eighty-nine.

"The City of Defiance, Ohio,

"By Fred L. Hay, Mayor.

"M. B. Gorman, City Clerk."

It is urged by counsel for the defendant that by section 1678, Rev. St. Ohio, the legislative authority of the city is vested in its council; that by the same section it was given the management and control of the finances of the city; that by section 1693, Rev. St., the power of creating obligations to bind the corporation is confined to the city council; that, consequently, since it appears that the recitals contained in the bonds to the effect that "all the proceedings, acts, conditions, and things required either by said statutes or ordinances to be had or taken preliminary to the issue hereof" have been duly and legally taken by said city of Defiance, and its officers and agents, were unauthorized, and were inserted by the mayor and clerk without authority, they are of no effect to estop the city of Defiance to allege and prove the contrary. The statutes of Ohio contemplate two classes of agencies to be used in the issuance of municipal bonds,—the council of the city, and its mayor and clerk. It would not be claimed, I fancy, that a bond signed solely by the council of a city would be of any binding effect upon the city. It is contemplated, I think, by the statutes of Ohio, that through the co-ordinate action of these agencies a paper writing becomes in appearance the valid negotiable obligation of the city, inviting the extension of credit to it. It would be a breach of duty for a mayor to sign a bond the issuance of which had not been authorized by the council. The converse of this must be true,—that it is in the performance of duty that he signs a bond. Section 2706, Rev. St. Ohio, provides that all bonds shall be signed by the mayor. The question must always arise in the mind of the mayor, when he comes to act in behalf of the city by affixing his name to a bond, "Have or have not the necessary and proper steps been taken to make it

my duty to sign this bond"? It is plain that it would be a breach of duty for the mayor of a city to sign bonds containing untruthful recitals with respect to matters and things required to be done to constitute the bonds valid. But whenever it becomes a question between an innocent purchaser of bonds in the market and the city purporting to issue them as to which should be the loser by the breach of duty by the city's officer, I think I am warranted by a long course of decisions (of the federal courts, at least), in saying that such questions should be solved in favor of the innocent purchaser. It has been repeatedly held by the supreme court of the United States—more especially in *City of Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760—that the recital in a bond that it is issued in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof does not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued. If he is exempted from looking at the ordinances, he must be exempted from knowing, in the case at bar, that the ordinance did not authorize the recitals upon which the plaintiffs depend. If the argument of defendant's counsel can prevail, it would also prevail against the untruthful recital, although authorized by the ordinance of the city council, because it would be a breach of duty, as between the city council and the citizens, and therefore beyond the power of the council to make, or authorize the making of, such untruthful recitals.

When it is urged that the act of February 3, 1887, is unconstitutional, it may be replied that there is other authority in the statutes of Ohio for the issuance of bonds by cities for bridge purposes. By section 2835, Rev. St. Ohio, councils of any municipality are authorized, whenever it is desired by the voters of such township or municipal corporation to make the improvement, to issue and sell their bonds for the purpose of constructing bridges and culverts. If it be conceded that the act of 1887 was and is unconstitutional, and furnished no authority for the issuance of these bonds, nevertheless there was sufficient authority under the section referred to. So it may be said, as a matter of law, that the city of Defiance had power to issue these bonds, although the particular statute referred to was unconstitutional. It is now firmly established by decisions that, if a municipality has power to and does issue bonds containing recitals of fact, and such bonds come into the hands of innocent purchasers, such city is estopped from denying the truthfulness of such recitals. If, in this case, the city of Defiance cannot be heard to allege or prove things contrary to the recitals of the bonds whose coupons are in controversy, the other defenses than that with respect to the absence of the seal must fail.

In the suit at law judgment should be entered for the plaintiffs in the sum of \$7,751.96.

WILSON v. SMITH.

(Circuit Court. E. D. Pennsylvania. August 21, 1902.)

No. 44.

1. LEGACIES—ADEMPTION.

A gift made subsequent to the date of a will is to be taken as an ademption of a legacy there bestowed only when the testator stands in loco parentis. A legacy of \$4,000 to a nephew is therefore not adeemed by the testator subsequently loaning him \$5,000, which he ultimately turned into a gift.

2. SET-OFF—CLAIM BARRED BY LIMITATIONS—FOLLOWING STATE DECISIONS.

In a proceeding begun in a state court to recover a legacy by a remedy given by the state statute, it will be held by the federal court to which it has been removed, in conformity to the decisions of the state courts, that a claim barred by the statute of limitations cannot be set off against such legacy.

3. DISCONTINUANCE—RETRAXIT.

A discontinuance is not a retraxit barring another action, though counsel had agreed to the facts, and submitted them to the court for its opinion as on a special verdict.

4. RES JUDICATA.

A judgment of the orphans' court dismissing a petition for an account, the object of which is to produce a fund out of which a legacy can be realized, is conclusive against him in a proceeding to recover the legacy begun in the common pleas having concurrent jurisdiction.

5. LACHES.

A proceeding in the nature of a bill to collect a legacy will be dismissed for laches, nothing having been done for over nine years after the refusal of the executor to pay it, and the estate having in the meantime been distributed, though the legatee, immediately on refusal of the executor, placed the claim in the hands of an attorney for action.

Hearing on Bill, Answer, and Proof.

For former opinion, see 66 Fed. 81.

Thomas Cahall and Charles C. Lister, for complainant.

R. L. Ashhurst and Benjamin Nields, for defendant.

ARCHBALD, District Judge.¹ As originally brought in the common pleas of Philadelphia, this was an action to recover a legacy according to the provisions of the state law (Act Feb. 24, 1834, §§ 50-56, P. L. 1833-34, pp. 83, 84); but, having been removed into this court because of the diverse citizenship of the parties, it was transferred to the equity side, on the ground that it was the substitute for a bill, and must, therefore, be proceeded with in that character (*Seibert v. Butz*, 9 Watts, 490). The decedent, Samuel Harlan, Jr., departed this life February 6, 1883, having made a will, in which he gave a legacy of \$4,000 to the plaintiff, his nephew, the son of a deceased sister. This will was duly probated at Wilmington, Del., where the testator had his domicile, on February 9, 1883, and letters testamentary were subsequently issued. The estate of the decedent was a large one, amounting to \$800,000, of which \$100,000, consisting of real and personal property, was located in Pennsylvania, where ancillary letters were taken

¹ 2. State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

See *Courts*, vol. 13, Cent. Dig. § 983; *Executors and Administrators*, vol. 22, Cent. Dig. § 1173.

¹ Specially assigned.

out on May 28th following. Because of the existence of these assets, and for the purpose of reaching them, the present suit was instituted. A number of defenses are made to it, which I will consider and dispose of in their order.

1. In the first place, it is claimed that the legacy was adeemed. The will is dated July 6, 1865, and on February 13, 1866, the testator loaned to the plaintiff \$5,000 to assist him in business, taking his promissory note, payable three years after date, with interest semiannually; and to secure the loan the plaintiff had his life insured for \$10,000 in his uncle's favor. Two installments of interest were paid,—one on August 1, 1866, and the other February 13, 1867,—but that was all that the plaintiff was ever able to do about it. He was unsuccessful in business, and failed several times, and, when the second premium on the insurance policy came due, Mr. Hanlan, being appealed to to carry it for his own benefit, declined to do so, declaring that the \$5,000 was lost, and that he would put nothing more into the matter. So far as the note was concerned, he said he would destroy it, and subsequently informed the plaintiff that he had, and up to the time of his death no further demand was made upon it. This evidence, which was given by the plaintiff, is objected to on the ground that he was incompetent to testify to anything which occurred in the lifetime of the testator; but, inquiry having been made of him on cross-examination with regard to what had become of the insurance policy, it opened the door, as it seems to me, for evidence with regard to the whole transaction. But whether this testimony be received or not, I cannot see that the legacy has been adeemed. A gift made subsequent to the date of a will is to be taken as an ademption of a legacy therein bestowed only when the testator stands in loco parentis to the legatee. 1 Am. & Eng. Enc. Law (2d Ed.) pp. 613, 623; Gill's Estate, 1 Pars. Eq. Cas. 139. Where that relation does not exist, there is no occasion to apply the rule, which is founded on the idea that a legacy to a child is in the nature of a parental provision or portion, which the subsequent gift or advancement to that extent anticipates and supplies. Ex parte Pye, 18 Vesey, 140; Miner v. Atherton's Ex'r, 35 Pa. 528. It is a matter of presumed intention, which the relationship supplies, but which does not exist in the case of a stranger, although extrinsic facts may be always resorted to to sustain or rebut it. 1 Am. & Eng. Enc. Law (2d Ed.) p. 620; Zeiter v. Zeiter, 4 Watts, 212, 28 Am. Dec. 698; In re Ritter's Estate, 10 Pa. Super. Ct. 352. It has also been held that, where the will is confirmed by a subsequent codicil, the legacy is not to be considered as adeemed by an intervening gift (Chapman v. Allen, 56 Conn. 152, 14 Atl. 780); and that doctrine is appealed to here. But a contrary view prevails in Pennsylvania (Alsop's Appeal, 9 Pa. 374; Garrett's Appeal, 15 Pa. 212), and I shall not undertake to decide which should be followed, nor what is the true construction to be given to the codicil relied upon, about which there is some controversy. It is sufficient that the intent to adeem the legacy in the present instance is not to be presumed under all circumstances.

2. It is further contended that the executor has a right to set off the debt to the legacy, or at least to retain the one in satisfaction of

the other. This is met by the counter suggestion that the debt, being barred by the statute, cannot be so used. In support of the one position it is argued that the statute merely bars the remedy, and does not operate upon the debt itself, which still remains a subsisting moral and equitable, if not legal, obligation. This is the view taken by the English courts, where the right of retainer or set-off is fully sustained. *Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav. 249; *In re Cordwell's Estate*, L. R. 20 Eq. 644. It also seems to be the accepted doctrine in some parts of this country. *In re Bogart*, 28 Hun, 466; *Garrett v. Pierson*, 29 Iowa, 304; *Tinkham v. Smith*, 56 Vt. 187; *Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452. Says Jordan, J., in the latter case:

"The right is not one of set-off, but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee or legatee until the latter has discharged the obligation which he owes to the estate."

But in other courts of equal authority the bar of the statute is upheld. *Allen v. Edwards*, 136 Mass. 138; *Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Drysdale's Appeal*, 14 Pa. 531; *Reed v. Marshall*, 90 Pa. 345; *Milne's Appeal*, 99 Pa. 483; *In re Light's Estate*, 136 Pa. 211, 20 Atl. 536, 537. Where this view prevails, a legacy or distributive share is regarded as a legal demand, and the debt of the legatee or distributee to the estate as a set-off or counterclaim to be dealt with the same as any other. Says Sterrett, J., in *Reed v. Marshall*, just cited:

"If the defendants [executors] had brought suit on the notes, it is very clear that, without proof of a new promise within six years, the statute could have been successfully interposed as a bar to their recovery; and it is difficult to see how they are in any better position when they endeavor to avail themselves of the notes as a set-off or cross-demand."

A somewhat broader view is expressed by Gordon, J., in *Milne's Appeal*, *supra*, where he says:

"It is true that the statute operates only upon the remedy or action for the collection of the debt; but it thus operates because of the presumption that the claim has been paid, or otherwise extinguished, if its collection has not been insisted upon in six years, and that, therefore, it would be inequitable after that time to compel its payment."

It is not necessary, however, to decide which of these conflicting sets of authorities is the better sustained by reason, or which should be adopted and followed by this court if called upon to make up an independent judgment of its own. This is a proceeding—as it is to be remembered—originally begun in the state court to enforce a remedy given by the statute law of the state. By its removal into this court it may have lost some of its characteristics, but not its essential ones; nor is this affected by its transfer to the equity side, which was done in fact for the purpose of the better maintaining them. The law must, therefore, be administered as nearly as possible as it would have been had the case remained where it was begun; and, the statute of limitations of the state having been invoked, it is to be applied in conformity to the decisions of the state courts. As said by Mr. Justice Clifford in *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939:

"Proceedings in courts of justice are usually determined by the *lex fori* of the place where the suit is pending, including the statutes of limitation, which are those of the country where the suit is brought, and not those of the *lex loci contractus*."

Or as it is well put by Gray, J., in *McClain v. Life Association*, 49 C. C. A. 31, 110 Fed. 80:

"In extending the judicial power of the United States to controversies between citizens of different states, the only purpose indicated by the constitution was to provide another forum than that of the state; not another law than that of the state."

It matters not, therefore, in the present instance, what the law may be in other jurisdictions, including the state of Delaware, where the testator had his domicile; nor whether, by reason of the continued absence of the plaintiff from that state, the debt which he owed the testator is relieved from the ordinary bar. It is not the statute of limitations of Delaware that I am called upon to administer, but that of Pennsylvania; and, according to the repeated decisions of that state, already referred to, it may be successfully invoked in a case of this kind. The debt, therefore, which is attempted to be set up by the defendant, having long since become outlawed, cannot be used to prevent a recovery by the plaintiff, if he is otherwise entitled to it.

3. In July, 1893, an action of assumpsit was brought by the plaintiff in the superior court of Delaware to recover his legacy, and, a declaration having been filed, pleas were entered, and the case put at issue. On May 22, 1894, a case stated was agreed to by counsel, and was set down for a hearing a few days later; but two days before it was to come up a discontinuance was entered. This, it is claimed, was a *retraxit*, which bars another action. The argument seems to be that, having agreed to the facts, and submitted them to the court for its opinion as upon a special verdict, the plaintiff could not withdraw the submission by a discontinuance, or, if he did, being his own voluntary action, it must be taken as an admission that he had no case. No authority is produced for this position, and I can find none. A special verdict does not prevent a nonsuit (*Washburn v. Allen*, 77 Me. 344); nor a discontinuance (*Price v. Parker*, 1 Salk. 178); and a case stated is a mere substitute, from which the party may recede in the same way. To do so by nonsuit or discontinuance, which is merely an abandonment of that particular action, cannot be wrested into an acknowledgment of record, as in a *retraxit* that the party entirely gives up his case. *Minor v. Bank*, 1 Pet. 46, 7 L. Ed. 47; *U. S. v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; *Lowry v. McMillan*, 8 Pa. 157, 49 Am. Dec. 501. This admittedly would not be the effect without the case stated, and it is difficult to see how the mere fact that one has been entered into can give it any such significance.

4. On June 2, 1894, immediately after the suit in Delaware had been withdrawn, the plaintiff presented a petition to the orphans' court of Philadelphia, setting forth his legacy, the existence of assets in this state, his own residence here, and the fact that ancillary letters had been issued to the executor named in the will, and praying that the

latter might be cited to an account. The executor appeared and answered, and, upon a hearing being had, the petition was dismissed. *In re Harlan's Estate*, 3 Pa. Dist. R. 809. The ground of this action, as I gather from the opinion, was substantially as follows: Notwithstanding that the executor, because of the debt which the plaintiff owed the estate, had refused to pay the legacy when it was demanded by the plaintiff in 1884, no move was made to question this refusal until the suit in Delaware, some nine years later, in July, 1893; and as the executor, acting upon the plaintiff's apparent acquiescence, had meanwhile converted the Pennsylvania assets, and carried them into his general accounts at the place of his appointment, there was no occasion to compel him to make another accounting here. The result so reached was strengthened by the consideration that the court, in the exercise of the discretion committed to it in view of the peculiar controversy between the parties, would, in all probability, even if an account were ordered, have remitted to the court of the domicile for disposition whatever fund was produced from the assets here. The plaintiff is clearly concluded by this disposition of his case. Under the statute law of Pennsylvania, the orphans' court, to which he applied, had jurisdiction concurrently with the common pleas, to which he now resorts (*In re Dundas' Appeal*, 73 Pa. 474), and the same circumstances and considerations would control in each. If he had applied a second time to the orphans' court, he would have had to face the former adjudication, and why should it not operate against him here? The facts are necessarily the same; and, even if they were different, the plaintiff was bound to present his whole case at that time as well as now, and is concluded as much with regard to what he might have shown as what he really did. *Cromwell v. Sac Co.*, 94 U. S. 357, 24 L. Ed. 195; *Raisig v. Graf*, 17 Pa. Super. Ct. 509. It is suggested, however, that the petition in the orphans' court was merely for an account, in which the merits were not involved; but this loses sight of the real nature of the application. The whole purpose of obtaining an account was to produce a fund out of which the legacy could be realized. It was the first step in the process which had that for its end, and, when it was decided that the plaintiff was not entitled to call for an account, the whole controversy was virtually disposed of.

5. But aside from the decision so rendered, and considering the matter as though it were now anew presented, it seems to me that the plaintiff must fail on the ground of laches, pretty much as the orphans' court held. If the suit, as originally instituted in the state court, is to be regarded as a substitute for a bill,—which would be much more the case now that it has assumed that specific character in this court,—the question is whether a chancellor, under all the circumstances, would grant the relief asked. *Dunlop v. Bard*, 2 Pen. & W. 307. It is clear that he would not. Without going over the facts which are to be found in this record, it is sufficient to note that, as pointed out by the orphans' court, from the time the plaintiff demanded his legacy and was refused, in 1884, he did nothing for over nine years to show that he did not acquiesce in the position taken by the executor, and in the meantime the whole estate was

converted, accounted for, and distributed. Conceding that, when once started, the plaintiff has pursued with reasonable diligence the various legal steps to which he has been advised by counsel, and that, following one upon the other, as they do, they are to be taken as a sufficient continuous assertion of his claim, the fact, nevertheless, remains that no beginning was made for over ten years after the testator's death, and nine years after the executor had accounted for the great bulk of the estate, nor until seven years after the final disposition of the property in this state which had been specifically devised. The settling up of an estate cannot be so delayed at the will of those who have claims against it. The executor was bound to go on, and close up this one as he did, and it is altogether too late to expect to reopen it now. It is stated that, at once on the executor's refusing to pay, the claim was put in the hands of reputable counsel in Delaware for action, and that report was had from time to time from there that progress was being made, and that when, at last, it was found that nothing had been done, new counsel was employed. But that does not change or relieve the situation. The plaintiff is chargeable with the neglect of his counsel just as much as if it was his own. It is still the fact that, however brought about, there was this long lapse of time without any action taken, and that nothing has been shown to excuse it, however it may have been explained.

Let a decree be drawn dismissing the bill, with costs.

VAN EYKEN v. ERIE R. CO.

(District Court, E. D. New York. July 30, 1902.)

1. COLLISION—DEFECTIVE STEERING GEAR OF TUG—DUTY OF INSPECTION.

On a steam tug owned by a railroad company, and used for towing car floats in the waters around New York City, the rod extending from the pilot house to the valve that put in operation the steam steering gear was made in sections, the upper section being connected to the one below it by means of a sleeve, which was fastened to the upper end of the lower section by a set screw. As the tug was passing up East river on a strong flood tide, having a loaded float on each side, the steering gear failed to work by reason of the set screw having become loose, allowing the sleeve to slip down and disconnect the rod, and through such fact, and the delay of the pilot in using the hand gear, one of the floats struck a pier, and broke her lines, and was then drifted by the tide against a vessel moored to an adjoining pier, causing serious injury. The connection was in a place where it could not be readily examined, and the testimony of claimant was that the screw was set two years before, and had not been inspected since, such inspection being considered unnecessary; but there were dents in the rod showing that the screw had been used several times upon occasions of either general or special examination. *Held*, that the tug was in fault for the collision, not only because of the negligent delay of the pilot in using the hand gear, but because of the failure to make proper inspection of the connection, which it was the duty of the owner to have made of a part so vital to safe navigation, especially in view of the service in which the tug was employed.

2. SAME—RIGHT TO LIMITATION OF LIABILITY—PRIVITY OR KNOWLEDGE OF OWNER.

A vessel owner, which employs competent persons to perform the duties imposed upon it as such owner, and to determine what such duties

are, may limit its liability in respect to damage caused by a collision which resulted from the failure of such persons to make or require proper inspection of the vessel, where such owner had no actual knowledge of the neglect, or the defect arising from it, although such lack of knowledge arose from inattention, or from necessity, owing to the magnitude of the owner's business.

8. SAME.

Where a tug was alone in fault for the breaking of the lines by which she was towing a barge, resulting in a collision between the barge and another vessel, and in proceedings in rem would alone have been liable, the owner of both tug and barge is required to surrender the tug only, in order to obtain a limitation of liability.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellant.

Wilcox & Green, for respondent.

THOMAS, District Judge. On the 15th day of May, 1901, a little before 4 o'clock in the morning, the tug Shohola, with car float No. 9 on her port side, and car float No. 13 on her starboard side, heading upstream, passed under the Brooklyn Bridge, and, when 300 or 400 feet off Catharine Ferry, while under one bell, ported her wheel for the purpose of rounding to and making a landing at Jay street, which is some 1,800 feet above on the Brooklyn side. The river at Jay street between piers is at least 1,200 feet in width. The strong flood tide sets from under the bridge upon and above Catharine Street Ferry. The tug was 102½ feet long by 22½ feet wide. The car floats were each 235 feet in length, and carried 12 empty cars. The Shohola has been valued at \$16,000, car float No. 9 at \$9,000, car float No. 13 at \$14,500. When the pilot of the tug attempted to port his wheel, using the steam steering gear, his efforts were unavailing, and it was at once apparent that the gear was disordered. Thereupon the pilot signaled for the engines to go astern at full speed, which was done, and he also called to the engineer to inspect the steering chains. Thereupon the engineer went to the stern of the tug, looked at the steering chains, saw that they were taut, hastened to the forward part of the boat, made the same inspection with like result, called to the pilot to use the hand steering gear, and immediately shut off the steam which was furnished to the power steering gear,—an act erroneously regarded by the engineer and pilot as necessarily preliminary to the use of the hand gear. The hand gear was held by two wooden beackets and was lashed in addition. The pilot loosed and had it ready for action by the time the engineer reported, but in the meantime the tow had backed, and, before it could be controlled, the port car float collided with pier 31. This broke her lines, and she drifted on the tide, and collided with the stern of the steamship Folmina, lying within the slip on the lower side of pier 33, doing, as it is claimed, some \$45,000 damages, which injury is the subject of recovery in this action. The cause of the accident was the disconnection of the rod that extended from the pilot-house to the valve that put in operation the steering gear. This rod

¶ 2. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

was in several sections, the lower end of the upper shaft or section fitting into a sleeve, so that it had free vertical motion, while the lower end of the sleeve held the upper end of another section of the shaft by means of a set screw passing through the sleeve and making a bearing against the shaft. Toward the end of each shaft were projecting keys, which fitted into the sleeve, and upon these the strain caused by the turning of the shaft to open the valve came, and there was no play as regards the lower section of the shaft, unless the keys became worn. This set screw had loosened, and allowed the sleeve to slip down from the lower end of the upper shaft, so that when the pilot attempted to turn his wheel he moved only such upper shaft, while the lower portion, connected with the valve, being disconnected, did not operate it. The steam gear was placed in the tug in 1893, and the same upper shaft, sleeve, and set screw had been in use from that time until the time of the accident; but in 1899 the shaft was lengthened, in connection with raising the pilot house, and the section thereof first below the sleeve was renewed. There were at least four very distinct dents or gouges in the lower rod, showing where, on several occasions, the screw had been set into it. It was claimed on the part of the respondent that the screw was never inspected, and that the steering gear, as regards the connections in question, had not been examined since 1899, although the tug was thoroughly overhauled once each year, and at times received slight repairs. The strain upon the shaft in the due performance of its function is not necessarily great, and its only office is to open and shut the steam valve in the steering gear. It is within the power of the engineer to throw the wheel quickly to one side or the other, with unnecessary violence; but there is a telltale connected with the wheel, that shows when there has been sufficient movement; and, while it is within the power of the pilot to exceed the due limit in the management of the wheel, yet even that should bring no considerable strain upon the shaft beyond the vibration which its connection with the machinery might cause. There is also expert evidence that the shocks to the boat might bring additional strain upon the rod and upon the set screw, but there is also evidence that this would produce no appreciable result. The set screw itself was in evidence; one witness for the respondent, a machinist, testifying that it showed wear at the end. Manton, the manufacturer of the gear, testifying that it showed no wear. The evidence generally on the part of the respondent was that the set screw was regarded as a permanent thing, and that it was not a subject of inspection; that, the longer it stayed in, the more secure it became on account of incurring rust. The respondent placed much value on rust as an agent of adhesion. Indeed, the sleeve in question was in a shaded recess, some four feet in height, and situated intermediate the deck of the pilothouse and the ceiling of the kitchen. There was no way of making an examination of the set screw without climbing into this recess and testing its proper adjustment. Hence, unless the screw did its own duty, there was no observed method nor practice of helping it. The general theory of the respondent's mechanics was to wait until something happened before the set screws were examined, and their alleged expectation

was that nothing would happen. The respondent claims to have set the screw properly two years before, and not to have inspected or disturbed it since. The screw was in a place where it could not be reached by a meddler, and yet the parts suddenly dropped away from each other. Upon this little set screw might depend the safety, not only of the tug and all controlled by it, but the life or property of others, as illustrated in the present instance. If the screw became loosened, the steering gear, without warning, would become disorganized, and the vessel would be at the mercy of the elements. And yet, with no inspection, no pretense of care in that regard, with the set screw placed out of reach in a darkened recess, this large and heavy tow was attempting a maneuver at a point in the river where the flood tide ran with dangerous swiftness. If it were true that a part so vital to safe navigation was never inspected, and had not been reset nor disturbed since 1899, still it should be considered that the respondent was negligent in failing to make such inspection. The respondent gives evidence that no inspection is required, and predicates this upon experience,—that such an accident had not happened before. If so, the respondent owes more to good fortune than to prudence. It was not the duty of the libellant to search through all vessels of this and other navigators for the purpose of discovering that a set screw so used has at some time given way. Even if that had happened once, or many times, proof might be difficult, if not impossible. The nature of the case teaches the necessity for care. That necessity is found in the vital function of the set screw, whose retention was related closely to safe navigation. But the shaft bears palpable evidence that this set screw had not been undisturbed since 1899, and that rust, with its unifying power, had not retained it in place. The dents are sufficiently far apart to show that the shaft had been shifted frequently in the sleeve, and that there had been readjustments of the parts. Why was it repeatedly set, unless the shaft as often had been loosened by accident or design? If it loosened so frequently from use, surely inspection was necessary. If it was released, and reset purposely, then some inspection was customary.

It is also urged that the respondent's pilot was negligent in his failure earlier to use the hand steering gear. He was in a very dangerous position in the river, with a tow not easily manageable at that point at the best; and when his power steering gear became useless the most ordinary prudence demanded that he should immediately employ the hand gear. But he delayed, first, to call for reversal of the engines, then for the engineer to make an inspection, and only acted after the engineer's report. There was not the slightest occasion for his waiting. The excuse of danger in the use of the hand gear before the steam to the power gear was shut off was without foundation, and the apprehension that difficulty would come from the use of the hand gear if the chain were out of order related merely to an inconvenience in readjustment, and not to any danger. Considering the fact that he was in a part of the river where he strictly had no right to be, that he was upon a perilous tide, setting hard upon the nearby pier, it seems that ordinary judgment required

greater expedition in the use of the hand gear. Therefore the respondent must be found in fault for negligence in failure to inspect, and negligence on the part of the pilot in the due use of the hand gear. The contention that a nut or screw in machinery subject to use would not loosen, and that it would be timely to look after it after the event, is not in accordance with usual legal holding. The *Altentower* (C. C.) 39 Fed. 118; *The Aggi* (D. C.) 93 Fed. 484, affirmed in 46 C. C. A. 276, 107 Fed. 300.

May the respondent limit its liability, and, if so, should the tug alone be surrendered? The libelant contends that, as the duty of providing a seaworthy vessel rested upon the owner, and as there was no system of inspection, there was "privity or knowledge" on its part that should preclude its limiting its liability, and for this relies upon *In re Myers Excursion & Navigation Co.* (D. C., 1893) 57 Fed. 240, affirmed *The Republic* (1895) 9 C. C. A. 386, 61 Fed. 109 (Second Circuit); *The Garden City* (D. C., 1866) 26 Fed. 766; while the respondent refers to *Quinlan v. Pew* (1893) 5 C. C. A. 438, 56 Fed. 111 (First Circuit); *The Annie Faxon* (D. C., 1895) 66 Fed. 575 (Ninth Circuit), affirmed in 21 C. C. A. 366, 75 Fed. 312; *Tyne Steam Shipping Co. v. British Shipowners' Co.*, 5 Asp. 194, affirmed under title of *The Warkworth* (1884) 9 Prob. Div. 145. In *re Myers Excursion & Navigation Co.*, supra, affirmed by the circuit court of appeals of this circuit, upon the ground that it was proven that the owner knew of the defect which made the vessel unseaworthy, Judge Wallace stated:

"We do not find it necessary to consider whether a shipowner is denied the protection of the statute whenever the loss has occurred from the unseaworthy or defective condition of his vessel. The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge, and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage,—an expert possessing skill and experience far beyond his own,—and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be a hard construction of the statute which would deprive the shipowner of protection under such circumstances."

In the case at bar the respondent's contention is that it was no part of its policy to inspect the set screws, that the superior agents in the mechanical department knew that it was not done, and did not intend to have it done, because, in their judgment, inspection was unnecessary. Hence, if this omission was negligent, the corporation had constructive knowledge of the omission, and to it the negligence of employes was imputable according to usual rules. Although the corporation, through its agents, was negligent in the matter of inspection, there is no evidence that it actually knew of the failure to inspect; nor was actual notice of the defect in the shaft brought home to the corporation, its officers, managers, or subordinate agents or servants. No one knew, because no one took the slightest pains to discover. The respondent is one of the large railway companies in the United States. Of necessity it delegates the duty of inspecting

machinery, discovering defects, and repairing the same, to agents of varying degrees of authority; and to those servants also must be left the duty of determining when inspection is necessary, how often it shall be repeated, and how it shall be made. It would be impossible for the owner, or the higher officers, to have direct knowledge either of the adoption or failure to adopt a system of inspection, or of omission to enforce the same. Undoubtedly, the negligence of a servant would be imputable to the master, and the actual knowledge of a servant may be the constructive knowledge of the master. The neglect to provide rules for inspection, and to inspect accordingly, ordinarily would impose liability upon the master; and there may be some difficulty in reaching a logical conclusion that the master may, through the magnitude of his undertakings, deprive himself of all opportunity of personal knowledge of the condition of his vessels, and base his exemption from personal liability upon such purposed, and maybe necessary, ignorance. But the decisions in *Quinlan v. Pew* and *The Annie Faxon*, *supra* (and *In re Myers Excursion & Navigation Co.* is not adverse), are understood to hold that, if the owner select a proper person to perform the duty imposed upon the owner, and such person neglect the same, and the owner be unaware of the neglect or the defect that arises or continues from it, such owner may limit his liability. It seems to be the policy of the law to augment the shipping interests at the expense of private persons suffering damage from the tortious acts or omissions of shipowners and their servants, and to permit shipowners to limit their liability, in case they delegate their duties to competent persons, and escape through inattention or necessity actual knowledge of the manner in which the delegated duty is performed. It may be, however, that the neglect to know might be so gross as to deprive the owner of the privileges of the act. This state of the law enables the present respondent to limit its liability.

The remaining question relates to the necessity of surrendering barge No. 9 in addition to the tug. The libellant suggests this upon the theory that the barges and tug "formed a common united instrument of commerce, moving as an entirety, when the tort was committed, although afterwards separated in the successive collisions." *The Bordentown* (D. C., 1889) 40 Fed. 682; *The Columbia* (1896) 19 C. C. A. 436, 73 Fed. 226. Generally, in collisions the tug has been regarded as the responsible actor. In the present case the proximate cause of the injury was the disordered steering gear, and in rem the tug alone would be liable. The fact that the defective condition of the tug enabled her to collide with the pier, and become detached, and injure another vessel, did not make the presence or movement of the tow a primary agent in effecting the injury. The presence of the barges was a part of the condition under which the wrongful act or omission took effect. It was not a part of the wrongful act. Therefore it is concluded that the respondent may limit its liability upon surrendering the tug.

THE IBERIA.

(District Court, E. D. New York. June 24, 1902.)

1. COLLISION—STEAMER AND SAILING VESSEL MEETING—OBSTRUCTION OF LIGHTS.

A collision at sea, in the night, between a steamer and sailing vessel, meeting, *held* to have been due to the fault of the latter in failing to keep her side lights unobstructed, as required by statute; the evidence showing that to the extent at least of one point on either side of directly ahead such lights were obscured by the foresail, which fact prevented the steamer from making out her character or course, and brought about the collision without the steamer's fault.

2. SAME—LOOKOUT.

The fact that the lookout on a steamer was stationed on the bridge, which was a favorable position, does not render her in fault for a collision with a sailing vessel in the night, where the only light on the sailing vessel which could be seen from the steamer was seen, and given due attention.

In Admiralty. Suit for collision.

Carter & Ledyard and Mr. Taylor, for libellant.

Butler, Notman, Joline & Mynderse, for claimant.

THOMAS, District Judge. The *Carib* was a partly laden brigantine, whose length was 108 feet and beam 25 feet. Her forecastle deck was 10 or 15 feet, and her poop deck 30 feet, in length. The *Iberia* was a fruit steamer, 150 feet in length, and 28 feet wide. Her bridge was on the top of the charthouse, was of the steamer's width, from 60 to 70 feet from the stern, and some 8 feet above the deck. The wheel was on the bridge, and there was no house forward. On October 24, 1900, the *Carib*, after skirting along the northern coast of Spanish Honduras, was at 6 o'clock sailing with square yards and wind aft, with all sails except the royal, with *Caballos Light* bearing five points on her port bow, and apparently 10 or 15 miles away at 6:40 p. m. Her course was nearly true west. The wind was between east and northeast. Before 8 o'clock her boom was put over from port to starboard, and her course changed to south by west. A few minutes before 8 o'clock the yards were braced two points, as claimed by her, with the wind on her port quarter free. Between 8 and 8:20 o'clock her staysails were taken in, and shortly her course was changed to south by east. The yards were braced sharp, leaving her about one point free, if the wind be regarded as east. She was bound for the harbor of Puerto Cortez, an open bay facing to the westward, sheltered on the north by Point *Caballos*, which separates it from the Gulf of Honduras. The *Iberia* had left Puerto Cortez harbor at 6:45 p. m., bound for Belize, in charge of a Honduras pilot, to conduct her coastwise to Belize. She pursued westerly and northerly courses until at 6:55 p. m. When Point *Caballos Light* bore east half south, distant about three-quarters of a mile, she took her proper course due north, which should not have been changed, at least for some time after the collision. About 10 minutes later, as she claims, a white light was seen bearing dead ahead, or perhaps half a point on her port bow. Her pilot assumed that this was

carried by one of the small coasting sloops, and from its dimness indicated at the instant a distance of two miles or more away. The pilot gave an order to port, and this order was at once executed. Thereupon the pilot looked at the light through his glass, and saw that the vessel was an approaching square-rigged sailing vessel, close at hand. He called out, "It is a big sailer," or words to that effect, and ordered the wheel hard a port. The loom of the *Carib's* sails became quickly visible, and it was seen that she was luffing, whereupon the order was given to stop the *Iberia's* engines, reverse, and go astern at full speed. This was done, but, before the way of the steamer could be stopped, her stem struck the *Carib* on the starboard side just abaft the main rigging, the angle of collision being a right angle. Thereupon the *Carib* listed first to starboard, filled, listed to port, fell over on her broadside, in which position she was seen the next morning still afloat.

On the part of the *Carib* it is claimed that from three to five minutes after the yards had been braced, as above stated, Montgomery, the son of the captain, a boy 15 years of age, who was acting as mate, was on the lookout from the poop deck, and that he made out the green light and masthead light of the *Iberia* from two to three points on the starboard bow of the *Carib*; that he reported, "Steamer's light on starboard bow." The master and four of his crew testified with reference to the relation of the *Carib* to the *Iberia* at the time of this report. Lee, a seaman at the wheel, gave this evidence:

"Q. When the master's son first reported the steamer, you could only see the white light? A. Yes, sir; only the masthead light. Q. Why was that? Was it too far away to show her green light? A. I think so. Q. Which way did you see her,—on which side? A. On the starboard bow. Q. How much on your bow? A. I could not tell you. Q. Did you watch the white light until the green light came into sight? A. No, I looked up, and saw the green, too, after a while. Q. And where were they,—on the starboard bow? A. Yes, sir. Q. How much on the starboard bow? A. I don't know. I never took so much notice. Q. Can't you tell me at all how many points they were on the bow? A. About two or three points, I think. Q. That is, the white light, when you first saw it? A. When I saw both lights. Q. How far do you think the white light was on the bow? A. About the same as the others. Q. How far away were the lights when you saw both the white and green lights,—how far do you think? A. About three or four miles, I think. Q. How long did you watch them? A. Only a moment. I had to look at the compass, and look after my steering. Q. When did you next see them? A. When she was close alongside. Q. After they cried out, 'Steamer ahoy'? A. Just when they cried out I saw her. Q. You had not seen her between that time— A. I never looked at her; no, sir. Q. Had you heard anything about her before that time? A. No, sir."

Mann, another seaman, who was forward, testified:

"Q. After you had finished bracing the yards, what did you do? A. Well, I just cruised around the deck, that was all; and while I was there I heard them sing out, 'Steamboat ahoy! steamboat ahoy!' and when I rushed up on the poop I saw this big steamboat right clean up on top of us. Q. Before you heard them shouting this 'Steamboat ahoy!' had you heard any one report on the brigantine that any steamer's lights were in sight? A. Yes, sir; the mate reported to the captain. Q. Did you look up and see the lights? A. No, sir; I did not take any notice of it. I simply heard the report that there was lights on the starboard bow. Q. You didn't look up? A. No, sir; didn't pay no attention. Q. Was this report that there was a steamer's

lights on the starboard bow before or after you had braced up the yards? A. After we braced the yards, sir. Q. When you heard them shout, 'Steamboat ahoy!' you rushed up on the poop? A. Yes, sir. Q. And you say the vessel was then very close to you? A. Yes, sir."

Edwards, who was with the last witness, stated:

"Q. Did you see the lights of the steamer? A. I did not. Q. Where were you? A. Forward on the forecastle head. Q. What were you doing there? A. Just clearing up the ropes ready to shorten sail. Q. When did you first see the steamer? A. When she was right on top of us. Q. Had there been anything to attract your attention to her? A. The mate was singing out, 'Steamer ahoy!' and then I looked. Q. And did you see any lights on the steamer? A. I saw the starboard and masthead lights, sir. Q. How close was she then? A. Within only about two minutes of striking us. Q. Do you know how far she was? A. No, sir. Q. Was she a length of your boat away? A. No, sir; less than that. Q. Did you hear any order given by the master to the man at the wheel? A. All I heard was, 'Put your helm hard down.' I heard that."

Montgomery, Jr., testified:

"Q. After the staysails were taken in, and before the collision, was any change made in the yards? Were they pulled one way or the other? A. After the staysails were taken in, the yards were braced up sharp. Q. After that was done, where were you standing? A. I was standing on the starboard side of the poop, forward. Q. You mean the forward end of the poop? A. Yes, sir. Q. And what were you doing there? A. Keeping watch. Q. Who was keeping the lookout? A. I. Q. You were keeping watch and lookout, too? A. It's the same thing. Q. When did you see the lights of any steamer that evening? A. Well, I don't know the exact time. Q. I don't mean the exact time by the clock, but with reference to the other events. A. Just a few minutes after the wheel was relieved. Q. Before or after you had braced the yards? A. Just after. Q. You saw the light of a steamer? A. Yes, sir. Q. What lights did you see? A. I saw the masthead light and the green light. Q. Which did you see first? A. They both loomed up together. Q. How did they bear with reference to the Carib? A. I should think about two points on the starboard bow. Q. What did you understand, from seeing a steamer's lights in that position, with reference to the course of the steamer? * * * I don't mean as to speed, but I mean as to course. A. I should think she was going perhaps in just the opposite direction that we were going. Q. About how fast was the Carib going at this time? Had there been any change in her speed? A. I should think she was going just about the same speed,—about seven knots. Q. When you saw the steamer's lights, what did you do? A. I reported them to my father. Q. What did you say? A. I told him there was a steamer's lights on the starboard bow. Q. What words did you use, as near as you can remember? A. Well, as near as I can remember, I believe I said, 'Steamer's lights on the starboard bow.' Q. What did he say? A. I don't exactly know, but it was something about knowing it. He had seen them. Q. About how far distant from the Carib did the steamer that was carrying these lights seem to be at the time when you first saw her, as near as you can get at it? A. Well, perhaps three miles. Q. Now, did any change take place, with reference to the position of the masthead light, while you were on watch? A. Well, I think it gradually grew higher up, very slowly. I could notice it grow higher up. Q. What did that mean? A. That she was getting closer. Q. About how much time elapsed, do you think, from the time you first saw the steamer's lights until the collision? A. As near as I can remember, I should think it was about fifteen minutes. Q. Do you think it was more than that or less? A. As near as I can remember, I should think it was about fifteen minutes."

The master testified:

"Q. What was your son doing at this time? A. On the lookout. Q. Where was he standing when he made that report? A. On the starboard side of

the poop deck, forward. Q. Where were you? A. By the wheel. Q. What did he say? A. 'Steamer's light on the starboard bow,' is what I understood. Q. Did you see her yourself? A. Yes, I looked leeward, and saw the white light. Q. Did you see anything at that time except the white light? A. No, sir, nor afterwards. Q. Between the time when you first saw the steamer and the time of the collision, were you standing still or walking about the deck? A. I was moving almost continually. Q. In what direction? A. Across the deck from one side to the other, but mostly on the weather side making this point. I wanted to keep close to it, because I expected the wind to come off the land and head me off. Q. What was the next thing you knew about the steamer? A. Well, for several times I looked and saw this light, and came to the conclusion it must be a vessel bound to the westward,—bound from Puerto Cortez for Livingston and Port Barrios. They most all go in that direction from Puerto Cortez. Q. Did you have any further report about the steamer and her lights from your lookout? A. No, sir. Q. What was the next thing that your lookout reported to you? A. After some time, I heard them hailing, 'Steamer ahoy!' Q. Where were you then? A. On the weather side. I then went to the leeward, and began to hail, myself. Q. And when you got to the leeward, what did you see? A. I saw the steamer coming up stem onto us on the starboard side. Q. Did you see her masthead light then? A. No, sir, I was looking at her hull; and when I saw she must strike us I told the man to put the helm hard down. Q. How far away was she when you first saw her at that time? A. Not over 120 feet when we began to hail her." And also: "Q. You say the light of the Iberia was reported to you by your son? A. Yes, sir. Q. And that you looked, and saw the white light only? A. Yes, sir; that's right. Q. How did that bear from you,—over which bow? A. The starboard bow, about three points. Q. And distant? A. Probably three miles. Q. And how long do you say it was from the time you first saw the light of the steamer until the collision? A. Probably ten minutes. Q. Or more? A. It might be more. I am only guessing at the time."

From this evidence it appears that a lad of 15 alone saw a green light on the starboard side of the Carib when he reported the vessel. Lee, at the wheel at that time, saw the white light, and at some indefinite time afterwards saw a green light. Mann did not look for anything, and saw nothing; while Edwards states that he saw the starboard and masthead lights when the Iberia was less than a length away. The master saw the green light at no time, although he saw the masthead light at least four times. Hence the Carib's contribution of information on the subject is meager and unsatisfactory, and prompts a suspicion that these men saw the lights of the steamer Foxhall, that was on the port hand of the Iberia. However that may be, it is from these witnesses principally that it is necessary to infer, if at all, that the Iberia was two or three points on the Carib's starboard bow. But the determination of this question is all-important, and its solution must precede other discussion. On the Iberia's bridge were several persons,—the pilot for the coast, in charge of the vessel, the master of the vessel, the mate, the wheelsman, and some representative of the cargo. The courses of the vessels were apart substantially one point. The pilot testified that he saw a dim white light right ahead, possibly a quarter of a point on the port bow. The mate stated that the dim light was right ahead, and that when the Iberia began to hard a-port it appeared a little on the port bow; and the master places the dim white light right ahead. If the Iberia was two points on the Carib's starboard bow, those on the Iberia should have seen her green light, which at most was not

obsured for more than one and a half points. But the evidence is that no one on the *Iberia* saw the *Carib's* green light until she luffed. It does not follow that a light was not visible because it was not seen, but the fact that no one of the several persons on the bridge saw the green light is useful evidence upon the issue whether it was visible, and the value of this evidence is enhanced by the fact that three persons did see the white light in the *Carib's* cabin, were attentive thereto, called attention to it so that others on the bridge saw it, and a maneuver was made to avoid it, and yet not one person on the bridge saw the green light. Moreover, if the *Iberia* was two or three points on the *Carib's* starboard bow, the former went in the wrong direction to avoid the white light. For what possible reason could a vessel heading and bound north, meeting a vessel bound south by east, and bearing from the latter vessel two or three points to the starboard, go to starboard, not only out of her own course, but directly across the path of the other vessel? Such aberrations happen, and vessels are condemned accordingly. But when considering whether a vessel was two or three points on another vessel's starboard bow, the improbability of such error is helpful in determining the fact. Here are three reasons for believing that the *Iberia* did not bear as much as one and a half points from the *Carib*: (1) The master, mate, and pilot saw her ahead. (2) No one of them, although looking at the white light, and maneuvering with reference to it, nor any one on the bridge, also made attentive, if not alert, by the announcement of the white light, saw the green light, as they would have done if the *Carib's* contention were true. (3) If the *Carib's* contention were true, there would have been no motive for the maneuver actually made, and, moreover, such maneuver would not only have been to the *Iberia's* disadvantage, but to the obvious peril of all concerned. Therefore it must be concluded that the witnesses for the *Carib* were in error as to the bearing of the *Iberia* from the former vessel.

With this conclusion in view, why did not those on the *Iberia* see the green light of the *Carib*? The side lights were set in the main rigging. Without entering into details of the measurements of the foresail, and its relation to the other parts of the vessel and to the lights, it must be found from the evidence relating thereto that it obscured to some extent both the starboard and port lights, and, as the vessels were related, prevented the *Iberia* from seeing the *Carib's* lights. The statute (Rev. St. U. S. 1873, § 4233) requires that the light shall be "so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam, * * * and of such a character as to be visible at a distance of at least two miles." The *Iberia* gathers data from which it infers that the light was obstructed so that there was a dark field three points wide carried in front of the *Carib*, and that her starboard light was within this field to the extent of at least a point and a half. The advocate for the *Carib*, somewhat changing the basis upon which his conclusion rests, with equal skill shows that the field covering the starboard light might have been at most one point or less; but the

combined discussion justifies the conclusion that the light was obscured at least to the extent of one point. This fact shows a violation of the statute. The fact of obscuration of the light harmonizes with the evidence of those on the *Iberia* that they did not see the light, and with the conclusion that the relation of the *Iberia* to the *Carib* was such that the light could not be seen. Hence the cause of the accident is understood, and the action of the *Iberia* is reasonable. With the obscuration thus found, the evidence is harmonized, save the *Carib's* evidence that the *Iberia* was further to the starboard. This evidence must yield to the conclusions already found. The primary fault of the collision, therefore, rests with the libellant.

It is urged that the *Iberia's* lookout was deficient. The bridge was a favorable place for a lookout, and certainly this duty received sufficient attention. The only light upon the *Carib* that could be seen was seen. It does not appear that a lookout on the deck would have been more likely to see the obscured light. If the light was not visible, a lookout would have been a useless protection.

There must be a decree dismissing the libel.

MITCHELL et al. v. COLORADO FUEL & IRON CO. et al.

(Circuit Court, D. Colorado. August 19, 1902.)

No. 4,330.

1. PRELIMINARY INJUNCTIONS.

A preliminary injunction will not be granted where, upon the hearing of the motion, it is not apparent that the ultimate determination of the suit in favor of the complainant is reasonably probable.

2. CORPORATIONS—BY-LAWS—INJUNCTION.

The statutes of Colorado authorize the directors of corporations, if the certificate of incorporation so provides, to make such prudential by-laws as they deem proper for the management of the corporation. A certificate of incorporation gave the directors power to make such by-laws, and one was adopted which on its face appeared merely a provision for an orderly method of conducting shareholders' meetings. A bill alleged that the by-law was passed to enable a packing of a shareholders' meeting to enable numerous holders of small amounts of stock to outvote complainants, etc., and it was prayed that the by-law be declared void. These allegations were denied. *Held*, that on a motion for a preliminary injunction the by-law would not be declared void.

3. SAME—PRELIMINARY INJUNCTION.

Mills' Ann. St. Colo. § 481, relative to corporations, provides that all elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company. Act Colo. April 14, 1893, provides that the corporation shall keep a book containing the names of all stockholders, number of shares held by each, etc. A corporation failed to keep such book, and certain stockholders applied for a preliminary injunction restraining the corporation from making any decision save in accordance with the majority vote of stockholders as shown by the list of holders of stock as certified by a certain trust company as transfer agent, and by a certain other trust company as registrar. *Held*, that a contention that, owing to the absence of the book required by the act of 1893, the court should grant the injunction prayed, was not tenable.

*1. See Injunction, vol. 27, Cent. Dig. § 309.

4. SAME—DISCRETION OF COURT.

A motion for a preliminary or provisional injunction is an appeal to the discretion of the court, which discretion ought not to be exercised except in a very clear case. The court is not bound at such stage of a case to decide doubtful and difficult questions of law or disputed questions of fact.

Action by John J. Mitchell and others against the Colorado Fuel & Iron Company and others. Motion for a preliminary injunction. Denied.

Wolcott, Vaile & Waterman, for complainants.

David C. Beaman, C. J. Hughes, Jr., and Cass E. Herrington, for defendants.

RINER, District Judge. After devoting the time necessary to make a careful examination of the bill of complaint, answer, and affidavits, I am unable to do more than state briefly the conclusions reached by the court, without going at length into the reasons upon which those conclusions are based.

This is an application for a preliminary injunction. In disposing of the questions presented, I shall disregard the order adopted by counsel in their argument, and notice first the objections raised to the by-law adopted by the board of directors on the 30th day of July, 1902. The bill asks that this by-law be declared and decreed by the order and judgment of the court to be fraudulent, and absolutely void and of no effect as against the complainants, and each of them, and the shareholders represented by them by proxies. As a basis for this portion of their prayer for relief, complainants allege upon information and belief, in an amendment to their bill, that it is the purpose and intention of the defendants to control the shareholders' meeting; and to dictate the action taken thereat, by depriving certain stockholders there present, and especially the complainants, not only of the right to vote upon the temporary organization, but to deprive such shareholders of the right to vote in the temporary organization of said meeting in accordance with the number of shares of stock held by them, respectively; and that it is the purpose and intention of these defendants to pack the meeting of shareholders with such number of individual holders of small amounts of stock as shall in number of persons outnumber the complainants and those associated with them at such meeting. It is further alleged that, in pursuance of a conspiracy to in this unlawful manner control the meeting, they, shortly before the closing of the books of the company, caused to be transferred upon the transfer books five shares of common stock to eighteen different persons, residents of Colorado, many of whom were employes of the defendant the Colorado Fuel & Iron Company, and all of whom are in sympathy with the individual defendants in their effort to control the organization of the company and to perpetuate the administration of the existing officers. It is further alleged that David C. Beaman, secretary of the company, acting in collusion with his codefendants, "has given out and claimed" that one of the complainants—Arthur J. Singer—had not established his right to vote at said meeting, for the reason that he had not shown

that his name was entered in the stock book required by the statute of the state of Colorado to be kept by the secretary. The same allegation is made as to William N. Vaile. And they further complain that they had no notice of the adoption of the said by-law by the board of directors on the 30th day of July, 1902. So far as this motion is predicated upon the alleged fraudulent action of the directors in adopting this by-law, the complainants should not, in the opinion of the court, prevail, upon the facts as they appear upon the hearing. The rule is well settled that an injunction will not be granted where, upon the hearing of the motion, it is not apparent that the ultimate determination of the suit in favor of the complainant is reasonably probable. The allegations of the complaint in relation to the purposes for which this by-law was adopted are fully met and denied by the defendants in their answer, which is under oath. The statutes of Colorado expressly authorize the directors, if the certificate of incorporation so provides, to make such prudential by-laws as they deem proper for the management of the affairs of the company, not inconsistent with the laws of the state, "for the purpose of carrying on all kinds of business within the objects and purposes of such company." In the case of this company the certificate of incorporation expressly confers this authority upon the directors. The by-law here complained of was, so far as the evidence discloses, adopted at a regular meeting of the board of directors. Three of these complainants were members of this board. Under the by-laws as then in existence, no notice of regular meetings of the board was required. Upon its face the by-law seems to do nothing more than provide for an orderly and lawful method of conducting a shareholders' meeting; and the defendants under oath say in their answer that they had no other object or purpose in view. The matter of adopting by-laws for the government of corporations, and the manner in which their business shall be transacted, is a matter so much of discretion that the court should interfere only in a plain case of abuse. The law has confided to the board of directors the power to determine, within reasonable bounds, of course, what by-laws are necessary for the government of the corporation; and while they act within their jurisdiction, and exercise their judgment on the matters confided to them in good faith, their acts are clothed with the authority of law. While the court may unquestionably prevent the effects of perversion or abuse, yet, so long as it is a mere question of discretion, depending upon the relative conveniences and facilities to effect the authorized objects, it is intrusted to the board of directors, whose honest and impartial judgment the court will not attempt to control. In the evidence before the court in this case it does not sufficiently appear that the directors acted in bad faith in adopting this by-law. They profess and say under oath in their answer that they have acted in the exercise of their discretion according to their judgment, and not from partiality or design to oppress the complainants or improperly favor others.

The court is further asked by this bill to enjoin the defendants from in any way hindering or obstructing the complainants in casting and having counted and considered votes of all shares of stock owned and

held by the complainants, either in person or by proxy, at the annual meeting of the Colorado Fuel & Iron Company, called for the 20th of August, 1902, or at any adjourned or special meeting called in place of said meeting heretofore called for the purpose of electing a board of directors of the company for the ensuing year. Also, that the defendants be restrained and enjoined from taking or declaring any action or decision, or the result of any vote, either in making the temporary or the permanent organization of such meeting, or upon any question, during either the temporary or permanent organization of such meeting, except upon and in accordance with the majority vote of the shareholders voting according to the number of shares by them respectively held, whether such vote be cast by the shareholder in person or by proxy, according to the number of shares and names of stockholders shown by the list of holders of the common stock and preferred stock in said company, as certified by the Knickerbocker Trust Company, as transfer agent, and countersigned by the Atlantic Trust Company, as registrar, of the Colorado Fuel & Iron Company. Further, that the defendants, and each of them, and all persons acting under them or in association with them at any such regular or special meeting of the shareholders, be restrained and enjoined from refusing to accept and receive the votes, whether cast or offered in person or by proxy, of persons so certified to be shareholders, on the ground that the names have not been entered on a book kept by the secretary or clerk of said the Colorado Fuel & Iron Company, or because such book has not been made or kept under the order of the board of directors of said company or the secretary thereof. Further, that the defendants, and each of them, be restrained and enjoined, whether such defendant be acting as an officer of said company or of any such meeting, or otherwise, from receiving or counting, or permitting to be received or counted, or considered votes offered at such meeting upon any election, proposition, question, or matter whatsoever by any person being or pretending to be a stockholder of said company, save according to the number of shares of stock in said company shown by said lists, and certified and countersigned by the transfer agent and registrar of said company, respectively. This prayer of the bill calls for a brief examination of the statute of Colorado approved April 14, 1893. By that act, which is an amendment of the corporation laws of the state, it is made the duty of the directors of all corporations except railway and telegraph companies to cause a book to be kept by the secretary or clerk containing the names of all persons, alphabetically arranged, who are, or shall within one year have been, stockholders of the corporation, and showing their place of residence, number of shares of stock held by them respectively, and the time when they respectively became the owners of said shares, and the time when they ceased to be stockholders, the amount of stock actually paid in, and what proportion had been paid in cash. The statute further provides that this book shall be open for inspection of the stockholders and creditors of the company and their personal representatives at the office or principal place of business of the company in the county where its business operations are located, giving the right to the

stockholder to make extracts from the books, requiring transfers to be entered therein within 60 days to be valid, and providing a penalty for the failure upon the part of the officer charged with this duty for neglecting to keep the book, or refusing to allow the same to be inspected and extracts to be taken therefrom, as provided by the statutes. It was conceded at the argument by both sides that the directors of this company had failed and neglected, until the 13th day of the present month, to comply with the requirements of this statute, and that they caused no such book as the statute contemplates to be kept by the secretary or clerk of the board; and it was argued that, because they had failed and neglected to comply with the requirements of this statute, it becomes the duty of the court to declare by its decree that the list of holders of common and preferred stock certified by the trust company, transfer agent, and countersigned by the registrar, contains a list of all the stockholders entitled to vote at such annual meeting. The court is unable to adopt this view of the case. Section 481, Mills' Ann. St., provides, among other things, as follows: "All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company." Whether or not the effect of the act of 1893 would be to deprive a stockholder, who had failed to have the transfer of stock entered in the book therein provided for within the 60 days, of his right to vote, it is unnecessary in this case to determine, for the reason that the board of directors have wholly failed in their duty by neglecting to require the secretary or clerk to keep such a book. A motion for a preliminary or provisional injunction is always an appeal to the discretion of the court. This discretion, however, ought not to be exercised except in a very clear case. The court is not bound at this stage of the case to decide doubtful and difficult questions of law or disputed questions of fact, nor to exercise this high and dangerous power (if exercised rashly) in a doubtful case, and before the defendants have an opportunity for a full and fair hearing.

The allegations of the bill that the defendants are conspiring together for the purpose of continuing and retaining their control of the corporate organization of the company, in violation of the rights of the complainants, by depriving certain shareholders, especially the complainants, of the right to vote, are, in my judgment, fully met by the answer and denied under oath.

The motion for a preliminary injunction will be denied.

STATE OF SOUTH CAROLINA v. VIRGINIA-CAROLINA CHEMICAL CO.
et al.

(Circuit Court D. South Carolina. July 29, 1902.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—ACTION BY STATE.

Under the settled rule that, to render a cause removable on the ground that it involves a federal question, it must appear from the plaintiff's

¶ 1. Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Co.*, 35 C. C. A. 7.

pleading, by clear and necessary intendment, that such question is directly involved, so that the state court cannot give judgment without deciding it, an action by a state to subject a foreign corporation to penalties imposed by a state statute is not removable on such ground where neither the complaint nor the statute makes any reference to the constitution or laws of the United States, but the statute purports to have been enacted by the state in the exercise of its police powers.

On Motion to Remand to State Court.

G. Duncan Bellinger, Atty. Gen., J. N. Nathans, and J. H. Hudson, for the motion.

Mitchell & Smith, Jas. Simons, W. A. Holman, and W. C. Miller, opposed.

SIMONTON, Circuit Judge. This case comes up on a motion to remand to the state court the cause of the state of South Carolina against the Virginia-Carolina Chemical Company, a corporation of the state of Virginia, et al. The record has been filed in this court. With the record is no order of the state court removing it. But from the admissions made at the bar, and from the whole tenor of the argument, it appears that the absence of the order removing the cause was not based upon the insufficiency of the bond, but upon the legal ground that the case made by the plaintiff does not raise the federal question on which alone this court can take jurisdiction. The question involved in this discussion is grave and beset with difficulty. The state has the right to have the case brought by her tried in her own courts unless the constitution of the United States has secured to the defendant the right of protection in the federal court. *Germania Ins. Co. v. Wisconsin*, 119 U. S. 475, 7 Sup. Ct. 260, 30 L. Ed. 461.

The second section of the act of 1887-88 gives to a defendant sued in a state court the right to remove the cause into the circuit court of the United States when the suit is one arising under the constitution or laws of the United States, of which the circuit courts of the United States are given original jurisdiction in that act. This act gives to these circuit courts original jurisdiction "of all suits arising under the constitution or laws of the United States." The phrase "suits arising under the constitution or laws of the United States" has been construed to mean suits in which the title or right set up by the party may be defeated by one construction of the constitution of the United States, or may be sustained by the opposite construction. *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388; *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. 1030, 30 L. Ed. 992; *W. U. Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 243, 20 Sup. Ct. 867, 44 L. Ed. 1052.

Is this a suit arising under the constitution or laws of the United States? In deciding this question we are confined to the case as made by the plaintiff in its own pleading, and we cannot aid the decision with anything appearing in the petition of the defendant, or in any defense it may make to the action. The rule is distinctly stated in *Walker v. Collins*, 167 U. S. 58, 17 Sup. Ct. 738, 42 L. Ed. 76, affirming *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39

L. Ed. 85, and following *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511:

"A case not depending upon the citizenship of the parties, not otherwise specially provided for, cannot be removed from a state court to the circuit court of the United States, as one arising under the constitution, laws, or treaties of the United States, unless that appears in the plaintiff's own statement."

Upon this point there can be no controversy.

In order to reach a conclusion in this matter the court cannot take judicial cognizance of any matter of fact which would be evidence for defendant, or anticipate the defense which may be set up, nor can any matter dehors the pleading of the plaintiff be considered. In *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017, the state of Texas brought an action in one of its own courts against the railway company to recover certain tracts of land. The defendant filed its petition for removal, which was refused. The grounds are not stated. But from its defense it appears that the defendant relied upon its charter, and the laws, general and special, of the state of Texas, of which it claimed the court should take judicial cognizance. The supreme court held that, as it did not appear from the state's statement of its own case that the suit was one arising under the constitution or laws of the United States, the defendant could not be aided by the charter and laws of the state, —a defense outside of the record. In *Railroad Co. v. Skottowe*, 162 U. S. 495, 16 Sup. Ct. 869, 40 L. Ed. 1048, the defendant was sued as a corporation organized, existing, and doing business in Oregon. The court could not take judicial cognizance of the fact that it was incorporated under an act of congress, and so create the federal question. So in *Milling Co. v. McFadden*, 180 U. S. 535, 21 Sup. Ct. 488, 45 L. Ed. 656, it was conceded that the cause must be remanded unless the court would take judicial cognizance of the fact that the claim of the Mountain View Company was located on an Indian reservation restored to the public domain by an act of congress, notwithstanding that the complaint had stated no claim based on these facts. The court say the circuit court could not make plaintiff's case other than they made it by taking judicial notice of facts they did not choose to rely on in their pleadings. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge. This position is illustrated in the leading case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. That reported case covers three cases brought by the state of Tennessee against two banks. Two of the bills were filed in the circuit court of the United States, and one bill was filed in a state court, and had been removed into the circuit court. The purpose of the suits was to enforce a statute of Tennessee taxing these banks. The bills filed originally in the circuit court of the United States sought to secure the jurisdiction by the statement that the defendants would set up an exemption granted them by the state of Tennessee, and so protect themselves under the constitutional provision against the impairment of contracts. The bill in the state court made no allusion to the constitution. The two

bills filed in the original jurisdiction were dismissed because the case made by complainant presented no federal question. The suggestion made in the bills that defendants relied upon or would raise the constitutional protection could not affect the case, because "the right of plaintiffs to sue cannot depend upon the defense which defendant may choose to set up. The right to sue is anterior to that defense, and must depend on the state of things when the action was brought." *Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204.* The case removed from the state court was remanded as improperly removed. The bill itself showed no federal question. That depended upon the exemption supposed to arise under the charter and the acts of the state of Tennessee, which defendant, if it intended to rely upon them, must plead, or could refrain from doing so if it chose. The court would not make a defense for it. The rule is clearly stated in *Powell v. Brunswick Co., 150 U. S. 433, 14 Sup. Ct. 166, 37 L. Ed. 1134:*

"If it appear from the record, by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient. But resort cannot be had to the expedient of importing into the record the legislation of the state, as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon in arriving at its conclusion upon matters actually presented and considered."

Here, then, we have the key to the case before us,—the point upon which it must be decided. Does it appear from the complaint of the plaintiff, by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, or, using the definition fixed by the cases of the phrase "the federal question," does it appear from the complaint of the plaintiff, looking to it only, and without considering any defense to be made to it, that by clear and necessary intendment some right or title is set up which may be defeated by one construction of the constitution of the United States, or may be sustained by another?

This leads necessarily to a consideration of the complaint. This complaint, after stating that the Virginia-Carolina Chemical Company, a corporation of the state of Virginia, duly authorized to do business in South Carolina, had purchased outright or had secured control of several corporations of the state of South Carolina engaged in the manufacture of commercial fertilizers, with the purpose and intent of securing a monopoly in the manufacture and sale of such fertilizers, charged that it in so doing had violated a statute of the state of South Carolina passed to prohibit trusts and combinations and to provide penalties, and sought to subject the defendant to the penalties prescribed in that act. The words of the statute (22 St. at Large, p. 782), upon which alone the plaintiff bases its cause of action, are as follows:

"Be it enacted by the General Assembly of the state of South Carolina, that from and after the passage of this act all arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen or which tends to lessen full and free competition in the importation or sale of articles imported into this state or in the manufacture or sale of articles of domestic

growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations that may lessen or affect in any manner the full and free competition in any tariff rates, tolls, premiums or prices or seeks to control in any way or manner such tariffs, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

It will be noted that this statute makes no mention of the constitution or of any law of the United States, and claims no right, title, privilege, or immunity from either source. In this respect it resembles the complaint in *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192, 39 L. Ed. 231, and in *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144, in both of which cases this was held requisite to make the federal question. On the contrary, the statute declares the public policy of the state, and thereby professes to act under the police power. It must also be noted that, in order to apply the test of the constitution to this act of the state of South Carolina, the court must in some way consider the defense. It must assume that that will be the issue in the case. But the right of the plaintiff to sue cannot depend upon the defense which the defendant may set up. *Osborn v. Bank*, *supra*. Nor can it be assumed that this will be the defense. The complaint sets up matters of fact, upon which is charged the breach of the statute. May not these matters of fact be traversed or confessed and avoided? Does it appear from the complaint, by clear and necessary intendment, that the federal question is directly involved, so that the state court could not have given judgment without deciding it? *Powell v. Brunswick Co.*, *supra*. Even if it had been suggested in the complaint that the defendant could, might, or would raise this question, this would not have made it a suit arising under the constitution of the United States. *Tennessee v. Union & Planters' Bank*, *supra*. Still less when, as in this case, the suggestion comes from the defendant.

It is true that the court must take judicial cognizance of the constitution of the United States. This judicial notice belongs to the law of evidence. It is part of the proof of an issue (*Andrews, Am. Law*, p. 1138, § 667), and presupposes an issue. As to it the principle applies "that the right of a court to act upon what is in point of fact known to it must be subordinate to these requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." *Thayer, on Evidence*, quoted with approval in *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144.

I confess to great difficulty and doubt on this case. Under these circumstances I feel constrained to adopt the dictum of the Chief Justice in this *Arkansas* case:

"Even assuming that the complaint showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by congress, or with the fourteenth amendment, as

contended, it would only demonstrate that the suit cannot be maintained at all, and not that the cause of action arose under the constitution or laws of the United States."

I am the more inclined to the course suggested because, notwithstanding that an order to remand is not reviewable anywhere, still the defendant is not thereby precluded from making the federal question in the state court, and from obtaining a review of the decision of that court in the supreme court. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 78, 20 Sup. Ct. 545, 44 L. Ed. 673; *Tennessee v. Union & Planters' Bank*, supra; *Chappell v. Waterworth*, 155 U. S. 103, 15 Sup. Ct. 34, 39 L. Ed. 85; *Arkansas v. Kansas & T. Coal Co.*, supra; *Railroad Co. v. Fitzgerald*, 160 U. S. 583, 16 Sup. Ct. 389, 40 L. Ed. 536.

Let an order be taken remanding the cause to the state court.

GALE v. SOUTHERN BUILDING & LOAN ASS'N OF ALABAMA.

(Circuit Court, W. D. Virginia. September 1, 1902.)

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—PLEADING.

A bill, by alleging that complainant is a resident of or lives at a certain place, does not state his citizenship, necessary to give the federal court jurisdiction.

2. SAME—SERVICE ON NONRESIDENT CORPORATION.

Under Act Cong. March 3, 1875 (18 Stat. 470), amended by Act Cong. March 3, 1887 (24 Stat. 552), restricting the districts in which a personal transitory action may be brought to that in which defendant resides or that in which plaintiff resides, and in the latter only when defendant can there be found for service of process, suit may be maintained against a foreign corporation in the district of plaintiff's residence, where there has been service of process on the corporation's agent, appointed under Code Va. 1887, § 1104, requiring a foreign corporation doing business in the state to appoint a resident of the state on whom process may be served.

3. FRAUD IN PROCURING CONTRACT.

Statement of an agent of a building and loan association to complainant that his stock would mature in six years, whereby his loan would be paid, will not be held a fraudulent representation avoiding the contract, but an expression of opinion, or an unauthorized statement, complainant having a prospectus of the association, stating that shares are estimated to mature in about six years, and that no agent has power to change any of the conditions or terms expressed therein.

4. SAME—LACHES.

An unexplained delay of four years after knowledge of the falsity of statements is fatal to relief in equity for fraud in procuring a contract.

5. CONTRACT—BY WHAT LAWS GOVERNED.

A contract by which a stockholder in a building and loan association borrows money of it is one of Alabama, the association being created under its laws, and having its chief office there, and it being provided that remittances shall be sent to it at H., in Alabama, by check, payable

¶ 1. Averments of citizenship to show jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

See Courts, vol. 13, Cent. Dig. § 878.

¶ 2. Service of process on foreign corporations, see note to *Eldred v. Palace Car Co.*, 45 C. C. A. 3.

there, though monthly payments may be made to local treasurers, the association not being liable therefor till the money is received at the home office.

6. USURY—AVOIDING LAW.

Provisions in a contract by which a stockholder borrows money of a building and loan association, intended to make the contract one of Alabama, will not be held to have been intended to avoid the usury laws of Virginia, both parties expecting, when the contract was made, that the maturity of the stock, whereby the loan would be paid, would be in such a time that the interest paid would be less than six per cent. per annum, the rate allowed by the Virginia laws.

7. SAME—BUILDING AND LOAN ASSOCIATION—PLEADING.

As construed by supreme court of Alabama (Code Ala. 1886, § 1556, subsecs. 9, 10), providing a building and loan association may loan to a shareholder on such terms as may be prescribed by the by-laws, and when advisable, or when several desire to borrow, it may loan to the highest bidder, allows such an association to lend on a fixed premium, which, together with the interest, exceeds the interest rate which others may charge; and a bill to avoid a contract of loan on the ground of usury because of a fixed premium must allege that the premium feature is contrary to the association's by-laws, and it is not enough to allege that the contract is forbidden by the statute.

Scott & Staples, for complainant.

J. H. Wright, for defendant.

McDOWELL, District Judge. The questions here come up on demurrer to a bill in equity. The complainant is a borrowing stockholder in the defendant association, who avers that for various reasons his debt to the defendant should be declared satisfied, and the deed of trust given on his land (located in this district) should be canceled; or, failing this, that his contract be held usurious, and that a settlement be decreed accordingly. The defendants are the Southern Building & Loan Association, a corporation created by the laws of Alabama, having its chief office there, and the two trustees in the deed of trust given to secure the loan. These trustees are averred to be "residents" of Alabama. So far as appears, no attempt has been made to mature the bill as to them.

The first ground of demurrer is that the complainant is not alleged to be a citizen of Virginia. The bill reads: "Your orator is, and for the past fifteen years has been, a resident of the city of Roanoke, county of Roanoke, and state of Virginia." Elsewhere in the bill Roanoke is spoken of as the place where complainant "lived." Roanoke is in the Western district of Virginia. In 18 Enc. Pl. & Prac. 307, it is said: "An averment of the residence of the parties is not the equivalent of an averment of citizenship for the purpose of giving jurisdiction to the federal courts." Again, in 22 Enc. Pl. & Prac. 265, it is said: "An averment of residence in a particular state is not an averment of citizenship therein." In *Denny v. Pironi*, 141 U. S. 123, 11 Sup. Ct. 967, 35 L. Ed. 657, it is said: "That an averment of residence is not the equivalent of an averment of citizenship, and is insufficient to give the circuit court jurisdiction, has been settled in a multitude of cases

¶ 6. What law governs usury by building and loan associations, see note to *Kirlicks v. Association*, 51 C. C. A. 319.

in this court." In *Shaw v. Mining Co.*, 145 U. S. 447, 12 Sup. Ct. 936, 36 L. Ed. 768, it is said: "It was held by this court from the beginning that an averment that a party resided within the state or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen." In *F. G. Oxley Stave Co. v. Butler Co.*, 166 U. S. 655, 17 Sup. Ct. 711, 41 L. Ed. 1149, it is said: "The averment that a party resides in a particular state does not import that he is a citizen of that state." The averment that the complainant "lives" in the state is also not a sufficient allegation of citizenship. One may live, even for many years, in one state, and at the same time retain his citizenship in another. I am constrained to hold that this ground of demurrer is well taken.

The next ground of objection is that this court has no jurisdiction of the nonresident corporation defendant. The act of March 3, 1875 (18 Stat. 470), as amended by the act of March 3, 1887 (24 Stat. 552),—the act of 1888 making no change in this respect,—restricts the districts in which personal transitory actions may be brought to that in which the defendant resides or that in which the plaintiff resides. But there is jurisdiction in the latter only in the event that the defendant can be there found for the service of process. 1 *Fost. Fed. Prac.* (3d Ed.) 77; *Pitkin Co. v. Markell* (C. C.) 33 Fed. 387; *Dinzy v. Railroad Co.* (C. C.) 61 Fed. 52. The Code of Virginia of 1887 (section 1104) requires every company incorporated under the laws of another state and doing business in this state to appoint some person residing in this state its agent, by written power of attorney, upon whom process may be served. The power is to be recorded. The return on the process in this case reads: "Executed at Roanoke by serving a copy on John H. Wright, attorney for the association." On the proposition that suit may be maintained in the district of the plaintiff's residence against a nonresident corporation, when there has been service of process in that district on one declared by the state law to be the proper agent of the corporation, I am in no doubt. The case of *Machine Co. v. Walthers*, 134 U. S. 43, 10 Sup. Ct. 485, 33 L. Ed. 833, is conclusive. In *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, the suit was brought in the Western district of Texas by a resident of the Eastern district against a Kentucky corporation doing business and having an agent in the Western district. It was held that the court was without jurisdiction, but that the defendant was suable in Kentucky or in the Eastern district of Texas. The case of *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, was one in which the plaintiff did not reside in the Southern district of New York, where the suit was brought, and the only claim of jurisdiction was that the Michigan corporation defendant had its usual place of business there, and service of process was there made on its secretary. In *re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, is to the same effect. The case of *Dinzy v. Railroad Co.* (C. C.) 61 Fed. 49, is exactly in point here. There a citizen of the Northern district of Iowa brought suit in the federal circuit court of that district against the Illinois Central Railroad Company, an Illinois corporation, hav-

ing its chief office in Illinois. Service of process was made, under the Iowa statute, on one of the local ticket agents of the company, a part of whose road was in the Northern district of Iowa. It was held that the circuit court had jurisdiction,—citing, on the point that service on a nonresident corporation may be according to the state statute, *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292. See, also, *Rawley v. Railroad Co. (C. C.)* 33 Fed. 305. It follows that it is unnecessary to consider the question of jurisdiction under the eighth section of the act of 1875 (18 Stat. 472).

Fraud in Procurement of Contract.

The proposition that the contract here is fraudulent, because of the alleged representations of some unnamed agent of the association that the stock would mature in six years, is not, in my opinion, sound. The prospectus of the association, which the complainant had at the time, reads: "All shares are estimated to mature in about six years from their date, and at maturity the member may withdraw such share, and receive \$50.00 [the par value] therefor." And later: "No representative, agent, or officer of the association has power to waive or alter any of the conditions or terms expressed in the printed literature of the association." The complainant should, I think, be held to have known that a statement as to when the earnings of the association would mature the stock was intended as an expression of opinion. Such a statement cannot be a fraudulent misrepresentation. And, if the agent undertook to contract that the stock should mature in six years, he was going beyond his authority. And this was, or should have been, known to the complainant. Moreover, it was known to complainant at least as early as October, 1895 (even if the letter of April 18, 1894, should not have apprised him of his error), that the association did not consider that its stockholders had a right to treat the stock as matured by 72 monthly payments. This suit was not instituted until September, 1899. Such delay, not sufficiently excused, is fatal to relief in equity for fraud in the procurement of the contract.

Usury.

The contract here was, I think, made with reference to the laws of Alabama. The association was created by Alabama laws, had its chief office there, and the bonds given by borrowing stockholders were expressly made payable there. While monthly payments could be made to local treasurers, the association was not to be liable for such payments until the money had been received at the home office. And in another place in the prospectus, under the heading "How to Remit," it is provided that remittances shall be sent to the association at Huntsville, Ala., by check, etc., payable in Huntsville to the order of the association. We need not, therefore, consider the question of usury with reference to the law of Virginia, unless it be because of the averment in the bill to the effect that the provisions in

the contract intended to make it one solvable under the laws of Alabama were inserted for the purpose of evading the usury laws of Virginia. It does not seem to me that the doctrine here invoked is applicable to the facts in this case. Both parties supposed at the time the contract was made that the stock would mature in about six years, and that the loan would thereby be paid. If this supposition had been well founded, the complainant would have paid less than 6 per cent. per annum for the use of the money. It is, therefore, not predicable of such a transaction that the parties intended to evade the usury laws of Virginia, which allow 6 per cent. interest.

There remains to be considered the charge that the transaction here is usurious under the laws of Alabama. This court takes judicial notice of the public statutes of the other states (*Owings v. Hull*, 9 Pet. 625, 9 L. Ed. 246; *Lamar v. Micou*, 114 U. S. 223, 5 Sup. Ct. 857, 29 L. Ed. 94; *Gormley v. Bunyan*, 138 U. S. 635, 11 Sup. Ct. 453, 34 L. Ed. 1086; *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 580), and of the judicial decisions of the courts of the different states (*Pennington v. Gibson*, 16 How. 81, 14 L. Ed. 847; *Cheever v. Wilson*, 9 Wall. 123, 19 L. Ed. 604). The statute of Alabama provides:

"Subsec. 9. When funds are on hand, to lend the same to any shareholder of the corporation, on such security, and on such terms and conditions as may be prescribed by the by-laws; but the security shall be a mortgage on real estate sufficient to protect the association.

"10. When deemed advisable, or when two or more shareholders desire to borrow funds on hand, the association may lend such funds to the highest bidder; and all shareholders shall have equal opportunities to bid under such regulations as may be prescribed by the by-laws; but no shareholder shall borrow or purchase the loan of more than two hundred dollars for each share held by him."

Code Ala. 1886, § 1556.

This statute has been construed by the supreme court of Alabama to give to building and loan associations the right, if their by-laws so provide, to lend on a fixed premium, which, together with the interest charge *eo nomine*, exceeds the interest rate allowed to be charged by other lenders. *Sheldon v. Association (Ala.)* 25 South. 820; *Johnson v. Association (Ala.)* 26 South. 201; *Association v. Rector*, 38 C. C. A. 686, 98 Fed. 171; *Association v. Ballard (Ala.)* 27 South. 971. It is also held by that court that a bill which fails to allege that the premium feature is contrary to the by-laws of the association is fatally defective. *Association v. Ballard*, *supra*; *Beyer v. Association (Ala.)* 31 South. 113. The bill in the case at bar alleges that the contract is forbidden by the statute above quoted, but does not allege that the by-laws do not allow the premium charge. In the supplemental brief of counsel for complainant it is said:

"Since we received the supplemental brief of counsel for the defendant, we have secured advance sheets of the Southern Reporter, and read several cases bearing thereon. We are reluctantly forced to the conclusion that the case of *Beyer v. Association*, decided by the supreme court of Alabama last December, and reported in 31 South. 113, holds that, in order to maintain the allegation of usury, the bill must also allege that the loan was not made in accordance with the by-laws. * * * Should this court hold that the contract is governed by the laws of the state of Alabama, we recognize that it will follow that decision, regardless of its consequences."

Having reached the conclusion that the contract here is governed by the law of Alabama, it follows that the demurrer is, on this point, well taken. An order may be submitted dismissing the bill, and awarding the defendant its costs.

TAYLOR et al. v. WALKER et al.

(Circuit Court, N. D. Illinois, N. D. May 3, 1902.)

1. CORPORATIONS—LIABILITY OF STOCKHOLDERS—EXCHANGE OF PROPERTY FOR STOCK.

To render the organizers of a corporation, who caused its stock to be issued to themselves in exchange for property which they conveyed to the corporation, liable to its creditors for the difference between the value of the property and the nominal value of the stock, it must be shown that such property was taken in payment for the stock at a large overvaluation, fraudulently, with intent to cheat and defraud those who might become creditors of the corporation, and also that the creditors became such on the faith that its stock was paid up.

2. SAME—PRESUMPTION OF FRAUD—GROSS OVERVALUATION.

Gross overvaluation of property conveyed to a corporation in payment for its stock is presumptive evidence of fraud, which places the burden of proof upon the stockholder to show the good faith of the transaction.

3. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* sufficient to show that the members of a mercantile partnership who organized a corporation to which they transferred the assets of the firm at a gross overvaluation in exchange for its stock acted in good faith and without intent to defraud those who should become creditors of the corporation; being misled as to the actual value of the firm's assets above its liabilities by a statement made from the books, owing to the system of bookkeeping used, of which they had no personal knowledge.

In Equity. Bill filed by judgment creditors against stockholders of James H. Walker Company to enforce unpaid stock liability. On exceptions to master's report, which found that the property exchanged by defendants for their stock was grossly overvalued, but that defendants acted in good faith and without fraudulent intent.

The following is the opinion of the lower court on demurrer to the bill:

"Within the decision of *Coit v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, and *Bank v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 33 L. Ed. 725, I am constrained to sustain the demurrer to the bill. I think it should be averred that the assets of the James H. Walker Company were taken in payment of stock in the corporation at a large overvaluation, fraudulently, with intent to cheat and defraud those who might intend to become creditors of the said corporation. And I think it should also be averred that the creditor became such in the faith that the stock had been fully paid up. It is true that a gross and obvious overvaluation of property conveyed to a corporation in consideration of an issue of stock at a valuation is strong evidence of fraud, and possibly, if the fact should turn out to be as stated in this bill, the valuation here asserted would, as a matter of law, be conclusively presumed to be fraudulent as against creditors giving credit on the faith of a supposed full payment of stock, but I think that the fraudulent

¶ 1. Acts of corporators and promoters, see note to *Yeiser v. Paper Co.*, 46 C. C. A. 576.

See *Corporations*, vol. 12, Cent. Dig. §§ 883, 884.

intent and purpose should be specifically charged in the bill, with all apt allegations. In this respect the bill seems to be indefinite."

After the bill had been amended, the defendants again demurred, which demurrer was overruled in the following opinion:

"The bill charges, substantially, that the firm of James H. Walker & Co. in December, 1892, was heavily in debt, its stock of dry goods on hand, old and unsalable, being the accumulation of years, and that it had several hundred thousand dollars of old and worthless accounts appearing upon its books; that the total assets of the said firm did not exceed \$2,700,000, and its liabilities exceeded \$1,800,000, and that the amount of the property of the firm, over and above the indebtedness, did not, under any circumstances, exceed \$900,000; that thereupon, in fear of approaching insolvency, and with a view to relieve the members of the firm from present personal liability and from future liability for debts thereafter to be contracted in the business, the James H. Walker Company was organized as a corporation by the members of the firm of James H. Walker & Co., with a capital stock of \$1,500,000, divided into fifteen thousand shares, of \$100 each, all of which stock was subscribed for by Cummings, Howard, and Walker, who composed the firm of James H. Walker & Co., except that 535 shares were subscribed for by James H. Walker, Jr., who refused to accept the shares, which were afterward canceled and reissued to William B. Howard. Cummings, William B. Howard, James H. Walker, Mason, and Willis constituted the first board of directors. The firm of James H. Walker & Co. on the 27th day of December, 1892, proposed to the corporation to sell and convey to it all the assets of the firm for the sum of \$1,500,000; the corporation assuming the outstanding liabilities of James H. Walker & Co. The proposition asserted that the assets exceeded the liabilities by that sum. The directors of the corporation, at a meeting held the day of the date of the proposition, passed resolutions reciting the proposal of the firm; that a full examination of the books, accounts, and business of James H. Walker & Co. had been made by the board and by experts and disinterested parties, by which it appeared that the assets exceeded the liabilities of the firm by the sum of \$1,500,000,—and thereupon accepted the proposition of the firm. On the same day a resolution was passed that the subscribers to the capital stock be called upon to pay in full their respective subscriptions. It will thus appear that Cummings, Howard, and Walker substantially undertook to and did sell to themselves (they owning practically all of the stock of the corporation) the assets of James H. Walker & Co. No cash was paid in upon the subscriptions, but the stock of Walker & Co. was in fact taken as in payment of the subscription. The bill charges that that stock did not exceed in value, over and above the liabilities of the firm, the sum of \$900,000, and that the scheme was a fraudulent device upon the part of the members of the firm of James H. Walker & Co. to relieve themselves from present liability, and to launch this corporation with a pretended stock of \$1,500,000, when in fact but \$900,000 had been paid, and so to defraud those who might be creditors of the corporation. The complainants assert that they became creditors in the faith that the stock of the corporation had been fully paid up. Of course, if there was a mere honest dispute or difference of opinion with respect to the value of the property acquired, and the corporation had acted in good faith in thus accepting the assets of the firm, a court of chancery could not undertake to make a different bargain for the corporation than it made for itself. But this is not the case presented by the bill. The case made, if the facts charged should turn out to be truly stated, is that the members of the firm of James H. Walker & Co. substantially contracted with themselves to place this business in the name of a corporation to relieve themselves from personal liability, and to palm off upon the corporation a stock of goods at the price of a million and a half dollars that was in fact an old and unsalable stock, not worth to exceed \$900,000, in full payment of a stock subscription of a million and a half dollars. And this is charged to have been done fraudulently, with a view to obtain credit in the future and save themselves from liability for the debts incurred. If these charges should prove to be true, within the

decisions of *Colt v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104, and *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111, the bill can be sustained as against Cummings, William B. Howard, James H. Walker, Mason, and Willits."

George B. Wells, for complainant.

Moses, Rosenthal & Kennedy and N. A. Partridge, for intervening petitioners.

John S. Miller, for Mr. Walker.

S. A. Lynde, for estate of C. R. Cummings.

John C. Howard, for estate of William B. Howard.

JENKINS, Circuit Judge. I adhere to the opinion, expressed in the opinion sustaining the demurrer to the original bill, and filed June 19, 1895, that, within the decisions of the supreme court therein referred to, a suit by the complainants can only be sustained upon the ground that the assets of the firm of James H. Walker & Co. were taken in payment of the stock in the corporation at a large overvaluation, fraudulently, and with the intent to cheat and defraud those who might become creditors of the corporation. I am also of the opinion that a gross and obvious overvaluation of property conveyed to the corporation in consideration of an issue of stock is presumptive evidence of fraud, requiring the stockholders charged to show that the transaction was in good faith. I have carefully scrutinized the evidence and the arguments of counsel, and am constrained to the conclusion that the finding of the master must be sustained. It is not necessary, if time served for that purpose, to enter into a critical examination of the evidence. The summing up of the whole matter is well stated by the master, and there is really nothing to be added to his lucid exposition of the facts. In a general way, I may say that the overvaluation of the assets of the firm taken for the stock is gross, in my judgment, and called for an explanation by the defendants. But I think that explanation is forthcoming. Cummings and Howard were special partners in the firm, interested to the extent of \$900,000, against the capital supposed to have been contributed by Walker to the amount of \$200,000. Mr. Walker was a merchant with a high reputation for ability. The firm conducted a large wholesale business, and also a retail business, in the city of Chicago. In considering the question of good faith, we are to look at the value of assets, not as determined at the end of the great panic of 1893, but as it appeared in the fall of 1892. There is no evidence that either of them anticipated a panic which certainly took the world by surprise. The theory of the complainants is that this corporation was organized in December, 1892, with a view to shield the partners from personal liability for the debt, anticipating the panic, and with knowledge of the coming insolvency of the copartnership. With respect to this it is to be said that neither Cummings nor Howard could possibly profit by such a transaction, as neither of them was personally liable for the debts of the copartnership. Mr. Howard was in ill health, and had shortly before returned from Europe. It would seem that prior to his visit to Europe the formation of the corporation had been sug-

gested by Cummings. Mr. Howard does not seem to have been friendly to the idea until his voyage home, when he met on ship-board and consulted with a large creditor of the firm, who warmly approved the suggestion, and would seem to have converted Mr. Howard to the idea. Mr. Cummings' thought, manifestly, was to infuse young and more active blood into the concern, and also to have more direct control over the business, and that it should not be left wholly within the management of Mr. Walker. Singularly enough, if this were a scheme to defraud, Mr. Walker, the only man personally liable for the debts, was opposed to the corporate scheme, and did not yield to the insistence of his special partners until he had consulted the principal creditors of the firm in New York. I think there is no foundation for the claim that the corporation was formed for the purpose of defrauding the creditors. The corporation had a professed capital stock of \$1,500,000, the three partners taking nearly the entire stock. There was no payment of cash by them for the stock taken, but the corporation took the assets of the firm in payment, assuming the liabilities of the firm. It is shown that the estimate of the property was founded upon the statement made by the bookkeeper July 1, 1892, and included an estimate of profit for that year of \$100,000 in the wholesale business, which was not realized. An item of \$186,000 represented a credit in favor of the wholesale business against the retail department. This latter item represented the value of goods furnished and charged against the retail department, less the amount of sales, but did not represent expenses or losses in the retail business. There was also an item of \$101,227.96, which was in fact suspended accounts, probably not of greater value than \$25,000. Cummings and Howard knew of the standing of the business only from statements furnished them by the bookkeeper, who seems to have had the exclusive charge of the books, and carried them on upon his own system, which proves to have been erroneous, with reference to arriving at the actual condition of the firm. Indeed, Mr. Walker, while he knew more of the actual management of the business than his special partners, was obliged to place reliance upon the statements furnished by the bookkeeper. We can now see that the bookkeeper should not have included suspended accounts at their face in any statement to show the actual standing of the firm, and should have included losses and expenses, but the question is whether these men were guilty of fraud in accepting in good faith these statements and relying upon them. I do not think they were. A large business was being conducted, and it was but natural that they should, as they must, rely upon statements furnished by their confidential men. As I read the evidence, they had no reason to suppose that the statements contained other than the actual facts with respect to that business, and they had no purpose in creating the corporation, other than to put new life into the business, and to establish a better control over it. The disaster which came about with the panic of 1893 would have resulted if the corporation had not been formed, in which event there would have been no personal liability upon Cummings and Howard, who were the financial support of the concern. Certainly, so far as they are concerned, I can see no object to be at-

tained in perpetrating the supposed fraud upon creditors of the firm. Mr. Walker might have profited by such a scheme, in escaping personal liability, but he was opposed to it, and yielded only to his special partners. And while he doubtless entertained very sanguine views of the business, I do not doubt that he acted in good faith, placing reliance upon the statements of his bookkeeper, the inaccuracies of which resulted from the peculiar method of bookkeeping. These inaccuracies are gross, it is true, but I think the defendants have fully explained how they came about, and have shown their good faith in the matter. They certainly did not anticipate the shipwreck that followed, and, as I think, acted without any purpose of defrauding creditors.

The exceptions to the master's report are overruled, the report confirmed, and the bill dismissed for want of equity.

INTERSTATE COMMERCE COMMISSION v. SOUTHERN RY. CO.

(Circuit Court, W. D. Virginia. August 4, 1902.)

1. **CARRIERS—INTERSTATE COMMERCE LAW—RATES FOR LONG AND SHORT HAUL.**
Competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided for by section 4 of the interstate commerce act, and may justify a lesser charge for the longer than the shorter haul.

2. **SAME—UNJUST DISCRIMINATION IN RATES.**

The making of a lesser rate to a more distant and competitive point than is charged to a nearer noncompetitive point is not an unjust discrimination against the nearer point, nor does it give an undue preference to the more distant point, in violation of the interstate commerce act, where such rate is induced by real and substantial competition.

3. **SAME.**

The fact that a railroad company has acquired the ownership of the only road which previously competed with its own for business at a certain point cannot affect the question whether its rates unjustly discriminate against such point in favor of another point where competition exists, where it affirmatively appears that the rates to the non-competitive point have not been increased since the purchase of the competing road.

4. **SAME—UNREASONABLENESS OF RATES—EVIDENCE.**

In determining whether the rates charged by a railroad company to and from a city are unjust and unreasonable in themselves, the greatest weight should be given to the following considerations: The opinions of expert witnesses; the effect of the rates charged on the growth and prosperity of the city; the cost of transportation as compared with the rates charged, and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at such city.

5. **SAME.**

In determining the effect of the rates charged upon the growth and prosperity of the city, as affecting the question of the reasonableness of such rates, comparison cannot be made alone with another city, where competition has produced unusually low rates, but should be made with other cities where the circumstances and conditions are similar.

6. **SAME—EVIDENCE CONSIDERED.**

Evidence examined, including new evidence taken since the hearing by the interstate commerce commission, and held to overcome the prima

facie case made by the findings of such commission that certain rates charged by the Southern Railway Company to and from Danville, Va., were in themselves unjust and unreasonable.

In Equity. Suit to enforce an order made by the interstate commerce commission.

L. A. Shaver, for complainant.

Ed. Baxter, for defendant.

MCDOWELL, District Judge. This case comes up on a bill in equity filed by the interstate commerce commission against the Southern Railway Company to enforce an order made by the commission requiring the defendant to reduce its rates on sundry classes of freight to Danville, Va., and on tobacco shipped from Danville to points in the West. The gravamen of the complaint is the disparity between the rates at Lynchburg and at Danville. There is also complaint as to tobacco rates to the West, because Lynchburg and Richmond have a much less rate than is given Danville. Richmond and Lynchburg are reached by the Southern, the Norfolk & Western, and the Chesapeake & Ohio Railways. Prior to 1886 Danville was reached by four independent railroads. In 1886 three of these roads passed under one control,—that of the Richmond & Danville Railroad Company. In 1894 the Southern Railway Company acquired control of the properties of the Richmond & Danville Company, and in 1899 it purchased the last remaining independent line running to Danville (with the exception of a short, local line which is treated as of no importance), to wit, the Atlantic & Danville road. At Lynchburg (as well as at Richmond) active competition has produced very low rates. From the evidence it appears that the Chesapeake & Ohio, which competes with the "trunk lines," and which complies with the fourth section of the interstate commerce act by charging no more for the short than the long haul, is primarily responsible for these low rates. The rates given Danville are very considerably higher than those given Lynchburg and Richmond. A few instances will show the disparity:

Rates in cents per 100 pounds to Lynchburg and to Danville.

	Class 1.	Class 2.	Class 3.
Boston to Lynchburg.....	54	47	38
Boston to Danville.....	71	63	52
New York to Lynchburg.....	54	47	38
New York to Danville.....	66	58	47
Baltimore to Lynchburg.....	49	42	33
Baltimore to Danville.....	60	52	41
Chicago to Lynchburg.....	72	62	47
Chicago to Danville.....	108	90	70

	Sugar.	Molasses.	Coffee.	Rice.
New Orleans to Lynchburg.....	32	26	40	32
New Orleans to Danville.....	43	37	51	43

Tobacco Rates to Louisville.

From Richmond.....	24
From Lynchburg.....	24
From Danville.....	40

The distance from Norfolk to Danville is one mile less than the distance from Norfolk to Lynchburg. Freight from New Orleans for Lynchburg over the Southern road passes through Danville, as does freight from St. Louis, Chicago, Louisville, and Cincinnati. Tobacco shipped from Lynchburg to Louisville by the Southern road also passes through Danville. But other roads compete for all freight to and from Lynchburg.

In the opinion in *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, it is said:

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say 'seemingly' on the one hand and 'apparently' on the other, because in the supposed cases the preference is not 'undue,' or the discrimination 'unjust.' This is clearly so when it is considered that the lesser charge, upon which both the assumption of preference and discrimination is predicated, is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge." *East Tennessee, V. & G. Ry. v. Interstate Commerce Commission*, 181 U. S. 18, 21 Sup. Ct. 516, 45 L. Ed. 719.

The evidence in this case leaves no room for doubt that the competition at Lynchburg (as well as at Richmond) is real and substantial; that it comes about mainly, if not entirely, from conditions not within the control of the defendant; and that there is a modicum of profit to the defendant in transporting freight to and from Lynchburg and Richmond. It follows that in reaching a conclusion in this case adverse to the defendant the rates to and from Danville must be held unreasonable in and of themselves. If reasonable, they cannot be held to subject Danville to an undue prejudice, or to give Lynchburg an undue preference, merely because the Lynchburg rates are considerably lower.

A strong argument is made by counsel for complainant, based on the proposition that the defendant, in purchasing the Atlantic & Danville road in 1899, violated the "Anti-Trust Act" (26 Stat. 209), and consequently seeks to take advantage of its own wrong in treating Danville as a noncompetitive point. In applying the doctrine here invoked, I am met with the evidence that the rates now are no higher than they were when the Southern and the Atlantic & Danville were independent and competing roads. The evidence is that, while there was competition in soliciting business between the two companies, this competition did not reduce the rates. The fact that the Danville rates were as low as the Lynchburg and Richmond rates prior to 1886 does not affect the question. This was prior to the passage of the anti-trust act, and prior to the reduction in rates by the Norfolk & Western and Chesapeake & Ohio. The wrong, therefore, that is charged to the defendant is the purchase of the Atlantic & Danville road. But as the rates are as low now as they were at the time of the purchase,

it does not appear that the defendant has taken any inequitable advantage of the purchase. Whether or not the Danville rates are reasonable per se is a question that has given me no small amount of trouble. That the cost of transporting freight by wagons is not a proper test is very clear. The rates at Lynchburg cannot be alone used as a basis of comparison. The criteria to which I think the greatest weight should be given are as follows: The opinions of expert witnesses; the effect of the present rates on the growth and prosperity of Danville; the cost of transportation as compared with the rates charged; and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at Danville. Numerous business men, citizens of Danville, who have, perhaps, sufficient knowledge of the subject to give opinion evidence, testify that the Danville rates are unreasonably high. On the other hand, a great number of railroad traffic officials of large experience and high position testify that the rates are reasonable. Both sets of witnesses are charged with bias, and it is probable that they are all of them, unconsciously, biased in favor of the side calling them. On the whole the weight of the opinion testimony is, I think, with the defendant; but, so far as these mere opinions go, I am unable to reach a conclusion. The effect of the present rates on the growth and prosperity of Danville is worthy of careful consideration. Many Danville citizens testify that the town has not prospered as it should have done because of the high freight rates charged by the defendant. But these witnesses, consciously or unconsciously, are, I think, contrasting Danville with Lynchburg. A low freight rate is an important factor in the prosperity of cities. But the prosperity enjoyed by Lynchburg as a result of low rates cannot properly be used as a basis of comparison. Before it can be said absolutely that Danville has not prospered as it should have done, it must appear that comparisons are made, not with points where competition has produced unusually low rates, but with cities where the circumstances are similar to those existing at Danville. The evidence is that one or more industries were deterred from moving to Danville because of the high rates. But here again we are confronted with the same difficulty. Did not the proposing manufacturers contrast the Danville rates with those prevailing at some place or places where competition has brought about very low rates? If this is true,—and the impression left on my mind is that it is,—this evidence cannot be treated as of much weight. It is a further fact that the very low rates given Lynchburg have enabled her merchants to drive the Danville merchants out of territory nearer to Danville than to Lynchburg. But does this fact enable us to say that the Danville rates are inherently unreasonable? If I correctly understand the purport of the supreme court decisions, the rates given Lynchburg—being the result of substantial competition, and affording the defendant some profit—are not unlawfully low. Therefore the necessary consequence of the disparity in the rates respectively given Lynchburg and Danville cannot be conclusive of the question before us. If the testimony for the complainant had shown that Danville had not prospered as it should have done, or that its trade territory had been reduced, in comparison with other cities where competition

had not produced unusually low rates, and where the circumstances are otherwise similar to those at Danville, it would be proper to conclude from such testimony that the Danville rates are too high. But such testimony was not offered. In this connection an argument suggested by one of the witnesses for the defendant, which is of much force, may be mentioned: It is difficult to conceive of any interest that the defendant could have to unduly prefer Lynchburg and oppress Danville, for the defendant has practically the whole of the transportation to and from Danville, and only a proportion of that to and from Lynchburg. The next test to be applied is to compare the cost of transportation with the earnings derived therefrom; or, in other words, to learn if the defendant is earning from this transportation an unusually large profit. But, unfortunately for present purposes, the business of a large railroad system is so complicated that very little assistance can be had from this method when applied to a small portion of its whole business. If we consider the income derived from the whole system of the Southern Railway Company, there is no doubt left by the evidence that its earnings are rather less than a fair return. The evidence is that it would cost nearer fifty than forty thousand dollars per mile of road to duplicate or reproduce the road, terminals, and equipment of the company, considering the cost of acquiring what may be called the good will of its patrons. And the net annual income of the road is about 4 per cent. on the lesser sum. The cost of transporting freight to and from Danville, considered separately, could not, I imagine, be arrived at with any very great accuracy. At any rate, no sufficient data are given on this point, and from the evidence I am wholly unable to reach any satisfactory conclusion based on the test of income.

The inconclusive and unsatisfactory results, and the inherent difficulties in applying the above-mentioned tests, have led me to the conclusion that the most satisfactory test to be applied in this case is to compare the Danville rates with those in force at numerous other cities and towns in the South, where the circumstances are as nearly as may be similar to those at Danville. This has been done by numerous witnesses for the defense. The rates to and from a great number of towns and cities in the South—some larger and some smaller, some of more and some of less commercial importance, than Danville; some inland and some having water as well as rail transportation; some being on only one railroad and some having more than one road—have been shown. The result of comparisons between these rates and the Danville rates is the conclusion that the latter compare favorably with the former. It may be said that the rates used for comparison are themselves unreasonably high. But the expert witnesses for the defense—who alone testify on the point—are of opinion that they are not; and, if it be true that they are unreasonably high, evidence to this effect should have been introduced by the complainant. Again, it may be true that there are many cities in the South that are fairly to be compared with Danville, the rates at which are much lower than the Danville rates. But, if so, no evidence to this effect has been introduced. It may further be true that the expert witnesses introduced for the

defense are biased. In fact, I incline to the opinion that they, probably unconsciously, are, and I therefore give less weight to their opinions than I would if they were entirely free from bias. But when they state facts—for instance, that a particular city is larger, and commercially more important, than Danville; that it has competing carriers; and that its rates are higher than the Danville rates—which are not controverted, I am not at liberty to disregard their testimony. As judged, then, by this last test, I am led to the conclusion that the Danville rates are not unreasonably high. In reaching this conclusion I have not overlooked the findings of fact of the commission, which are *prima facie* evidence; nor have I lost sight of the high value to be given its opinion. But a mass of evidence has been taken since the hearings before the commission, which was not, of course, considered by the commission, and which has made out a vastly stronger case for the defendant than it had at the former hearings.

As the other tests of the reasonableness of the Danville rates are inconclusive and unsatisfactory, and as a comparison with rates given other cities, where the conditions are to some extent similar to those at Danville, lead to the conclusion that the Danville rates are "in and of themselves" reasonable, it follows that the bill should be dismissed, with costs.

In re FRAIZER.

MISSOURI MOLINE PLOW CO. v. SPILMAN.

(District Court, W. D. Missouri, C. D. August 1, 1902.)

1. VOLUNTARY BANKRUPTCY—CONDITIONAL SALE—FAILURE TO RECORD.

The institution of a voluntary proceeding under Bankr. Act 1898 forthwith makes all the bankrupt's creditors adversary parties in a legal proceeding for the appropriation of his property for the payment of his debts, as much as an involuntary proceeding, so that they are within Rev. St. Mo. § 3412, declaring void as against creditors, unless evidenced by a recorded writing, the condition in a sale of chattels that the title shall remain in the seller till payment of the price.

Bishop & Cobbs and W. D. Jones, for petitioners.
Thomas M. Jones, for trustee.

PHILIPS, District Judge. This cause has been certified to the court by John Montgomery, Jr., referee in bankruptcy, at the instance of the Missouri Moline Plow Company, petitioner, for review. The controversy grows out of the following facts, substantially:

Some time prior to the adjudication in bankruptcy against Morris Fraizer, the Missouri Moline Plow Company, under a written agreement with said Fraizer, of date December 14, 1901, sold and delivered to said Fraizer a list of goods, consisting of certain agricultural implements. The said Fraizer, upon the receipt of the goods, or upon monthly balances, at his option, was to execute notes to the said company for the amount to be paid for the goods. The contract contained the following provisions:

"The second party [that is, Fraizer] agrees that the title to and ownership of the implements which may be shipped as hereinafter provided shall remain in the party of the first part [the Moline Company]; and their proceeds, in case of sale, shall be the property of the Missouri Moline Plow Company, held subject to their order, until full payment shall have been made for said goods or said notes, and until any judgment rendered therefor or thereon is paid in full. If the purchaser under this contract sells out, fails, or becomes insolvent, or any member of the purchaser's firm fails, sells out, or becomes insolvent, or dies, all accounts and notes for goods bought under this contract, including renewal notes, in whose hands soever said notes shall be, shall then become due and payable, whether the notes be given in payment for the goods or accounts, or collateral security thereto."

At the time of the adjudication in bankruptcy, the bankrupt held certain goods sold and shipped to him under the foregoing agreement, and the same were taken possession of by the trustee in bankruptcy. Said Missouri Moline Plow Company thereafter presented its petition to the referee in bankruptcy for an order on the trustee to turn over and deliver said goods to the petitioner. The contract aforesaid was neither acknowledged nor recorded in the county where Morris Fraizer, the vendee, resided, and where the goods were delivered. On this statement of facts, the referee denied the petition, and the petitioner asks to have this ruling reviewed.

Section 3412 of the Revised Statutes of Missouri, 1899, declares that:

"In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain to the vendor, lessor, renter, hirer or deliverer, of the same, until such sum, or the value of such property, or any part thereof, shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in cases of mortgages of personal property."

The state supreme court, in *Collins v. Wilhoit*, 108 Mo. 451, 18 S. W. 839, holds that the term "creditors," as employed in the foregoing statute, applies to all creditors of the vendee, whether prior or subsequent. The case at bar is therefore ruled by the decision of the court of appeals of this circuit in *Re Pekin Plow Co.*, 112 Fed. 308, 50 C. C. A. 257, in which it is held that although the term "creditor," employed in a correlative statute, means a creditor "armed with legal process" (that is, one who has taken legal steps to enforce his right as a creditor), yet all creditors of an involuntary bankrupt, after adjudication in bankruptcy and the presentation of their claims, become creditors, within the meaning of the statute aforesaid, and the various provisions of the bankrupt act; that a trustee chosen under the bankrupt act of 1898 "becomes the representative of all the creditors, and is possessed of their rights to attack fraudulent conveyances"; and that he becomes vested by operation of law of all the property which prior to the filing of the petition in bankruptcy the insolvent debtor could by any means have transferred, "or which might have been levied upon and sold under judicial process against

him." And therefore, as all the creditors of the bankrupt, by operation of law, became parties to the judicial proceeding for the seizure and appropriation of all the apparent property of the bankrupt for the payment of his creditors, such a conditional sale of property, not evidenced by an instrument in writing duly acknowledged and recorded in pursuance of the state statute, is void as against such creditors.

Other reasons occur to my mind in support of the ruling of the referee, but all argument is concluded by the ruling of the court of appeals in the Pekin Plow Co. Case, *supra*.

It results that the exceptions to the referee's decision are overruled, and his findings and conclusions are affirmed.

On Rehearing.

August 27, 1902.

In the opinion heretofore filed, on exceptions by the intervener, the Moline Plow Company, overruling the exceptions to the referee's action denying the claim of the intervener, the court followed the ruling of the court of appeals of this circuit in *Re Pekin Plow Co.*, 50 C. C. A. 257, 112 Fed. 308. Petitioner has filed a motion for rehearing, directing the attention of the court to the fact that the case ruled by the court of appeals was a proceeding in involuntary bankruptcy; whereas the case at bar is a voluntary proceeding. The contention is that the ruling of the court of appeals rested upon the proposition that a petition in involuntary bankruptcy is an adversary proceeding taken by the creditor against the bankrupt, and that the institution of such adversary action places the creditors in the position of "using the courts of law and their process for the collection of their debts," within the meaning of the term "creditors," employed in section 3412, Rev. St. Mo. 1899, quoted in the former opinion herein. It may be conceded that, as a general rule, courts are not concluded by a decision beyond the particular facts and principles of law arising therein. But it must likewise be conceded that, in applying the ruling of a court in a given case, its reasons assigned, and the underlying principles of law asserted, should guide in carrying them into another cause,—especially so in construing the same statute in *pari materia*. Why should there be any difference in respect of a conditional sale, in effect fraudulent against creditors under the Missouri statute, when the bankrupt is declared to be bankrupt in a voluntary or involuntary proceeding? In both instances the bankrupt estate becomes amenable to the operation of the bankrupt act. The postulate announced by the court in *Mueller v. Nugent*, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405, "that the filing of a petition is a caveat to all the world, and in effect an attachment and injunction," in the very necessities of the whole scheme and spirit of the bankrupt act, must apply as well to a voluntary as an involuntary proceeding. The moment the petition is filed the proceeding is in rem. It, in legal effect, sequesters all of his property interests for the benefit of all of his creditors, *pari passu*, as if seized under attachment or a writ of execution. His whole estate passes into custodia

legis. Eo instante every creditor of the bankrupt becomes an adversary party in a legal proceeding for the appropriation of the property of the bankrupt, and stands as a creditor seeking the aid of the court of exclusive jurisdiction. The trustee, representing the creditors, becomes antagonistic to such a creditor as the petitioner, who claims as a vendor of personal property under a conditional sale, not acknowledged and not recorded. So that after filing his petition in bankruptcy the bankrupt cannot dismiss the petition without notice to all of his creditors, with the consequent right on their part to appear and contest. It was of this right, under section 59, subsec. "g," Bankr. Act, that the court, *inter alia*, in *Re Pekin Plow Co.*, asserted:

"These provisions evince an unquestionable intent on the part of congress to make all creditors of the bankrupt parties to the proceeding, when once instituted. The effect of the institution of such proceeding is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts pro rata and equally."

The trustee in bankruptcy acquires the same property rights and interests and privileges, and has the same duties and obligations imposed upon him, under a voluntary as under an involuntary proceeding. He acquires no less and no greater rights and interests than the trustee in an involuntary proceeding, under section 70a, "to all the property which prior to the filing of the petition he [the bankrupt] could by any means have transferred, or which might have been levied upon and sold under judicial process against him." When Judge Adams, speaking for the court of appeals in *Re Pekin Plow Co.*, said, "The trustee chosen under the act of 1898 becomes the representative of all creditors, and is possessed of their right to attack fraudulent conveyances," etc., the language, by its natural force, applies as well to a trustee in a voluntary as in an involuntary proceeding. It is also observable in the foregoing case that the court attached much importance to subdivision "g" of section 59 of the bankrupt act, which declares that "a voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors," and also subdivision "a" of section 67, which provides that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." This provision first appears in the bankrupt act of 1898. What was the claim of the creditors of the bankrupt as against the property sold and delivered to the bankrupt by the vendor under an instrument of writing unacknowledged and unrecorded? Admittedly, it was the right to institute legal proceedings, and, under writs, to seize such property and appropriate it to the payment of their debts. As against creditors, both prior and subsequent, who sought the aid of the courts and judicial process, such vendor's claim was void. The moment of the institution of the proceedings in bankruptcy, such creditors, as already stated, by operation of law, became adversary parties; and the clear expression of the act is that the claim of such vendor shall thereafter be no more a lien against the bankrupt's estate than he

would have had against the claims of creditors, had they, prior to the institution of the bankruptcy proceedings, invoked the process of court for the collection of their debts. In other words, the intention of congress was to as effectually cut off such lien in favor of creditors by the adjudication of bankruptcy as if the creditors had, prior to the recording of such contract of sale, sought the aid of a court for the collection of their debts. And this is emphasized by the language of Judge Adams in commenting upon this provision of the bankrupt act, in declaring that "it means that any liens which would not have been valid if other creditors had a right, before bankruptcy, to avoid the same, either for want of record or otherwise, shall not constitute a lien against the estate in bankruptcy." No matter what the form of the legal proceeding taken by the creditor, if it be instituted prior to the assertion of the lien by the vendor, the prior right of the creditor has attached. The general language of the court in *Re Pekin Plow Co.* that "the effect of the institution of such proceeding is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts, pro rata and equally," was not limited to the instance of an involuntary proceeding, as shown by the context. The learned judge had just quoted subdivision "g" of section 59, that "a voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners either for want of prosecution or by consent of the parties until after notice to the creditor," for the purpose of showing that after filing a voluntary or involuntary proceeding all the creditors acquired such rights and interests therein that it was neither in the power of the bankrupt nor the petitioning creditors to dismiss the cause without notice to and hearing by all the creditors. There is nothing expressed in the whole bankrupt act giving color to the idea that a creditor or the trustee under an involuntary proceeding should have any greater rights than under a voluntary proceeding. Any such discrimination would run counter to the whole scheme and policy of the bankrupt act, which is to secure equality among all creditors of the bankrupt estate. It would be remarkable that an insolvent debtor, by anticipating a movement on the part of his creditors to throw him into bankruptcy, could file a voluntary proceeding, and by his act bring about such inequality of right between the creditors of a voluntary and an involuntary bankrupt.

The logic of the ruling of the court of appeals in *Re Pekin Plow Co.*, in my judgment, sustains the conclusion of the referee that it should apply to the instance of a voluntary as well as an involuntary bankrupt. Therefore the motion for a rehearing is denied.

RICH v. HAMBURG-AMERICAN PACKET CO.

(District Court, E. D. Pennsylvania. August 18, 1902.)

No. 76.

1. COLLISION—STEAMSHIP AND ANCHORED BARGE.

A steamship passing down the Delaware river after daylight in the morning struck and sunk an anchored barge, laden with coal. The defenses that the barge was anchored in the channel and that there was a fog were not sustained by the proof; it being shown that the barge was within the regular anchorage grounds, and well outside the channel, and that it was sufficiently clear to permit objects to be seen at a distance of a mile. *Held*, that the steamship was in fault, both for being outside the channel, and for failing to maintain an efficient lookout.

2. SAME—CLAIM OF EXEMPTION—CARRYING LICENSED PILOT.

There can be no exemption of the owners of a vessel from liability for a collision on the ground that she was in charge of a licensed pilot, whose taking was compulsory under the law, unless it is affirmatively shown that the pilot was solely in fault.

3. SAME—CONTRIBUTORY FAULT—ANCHOR WATCH.

A barge anchored in known anchorage grounds, outside the channel used by passing vessels, cannot be held in fault for a collision with a moving vessel in the daytime, and in the absence of fog, on the ground that she had no anchor watch, which it was not customary to maintain under such conditions.

In Admiralty. Action in personam for collision.

Francis C. Adler and John F. Lewis, for libellant.

J. Rodman Paul, Biddle & Ward, and J. Wilson Leakin, for respondent.

J. B. McPHERSON, District Judge. This is an action in personam to recover damages for a collision between the steamship *Bengalia* and the barge *Iron State*, in which the barge and her cargo were sunk, and, so far as now appears, became a total loss. The collision occurred about 6 o'clock in the morning of September 27, 1900, while the barge was lying at anchor in the Delaware river near Gloucester, and the *Bengalia* was proceeding to the capes, on her way to Baltimore. The *Iron State* was a wooden vessel 214 feet long, with a carrying capacity of 1,700 tons, and at the time of the accident was loaded with coal, and awaiting a tug to tow her to a New England port. The *Bengalia* is a large steel steamship, 500 feet long and about 60 feet beam. She had on board 5,000 tons of cargo, and was bound for the port of Baltimore, where the rest of her cargo was to be loaded. She was drawing 22 feet 7 inches forward, and 23 feet 6 inches aft. The tide was ebb, running about $3\frac{1}{2}$ or 4 miles an hour, and the bow of the barge was pointing upstream. There was no wind, or very little; and, if there was no fog,—a point to be considered in a moment,—there was daylight enough to permit objects to be seen without difficulty more than a mile distant. The bow of the *Bengalia* struck the port bow of the barge a severe blow about 40 feet aft of the stem, crushing in the side for a space of about 6 feet, tearing her loose from her anchorage,—the anchor weighed 4,000

† 2. See Collision, vol. 10, Cent. Dig. § 236.

pounds, and about 15 fathoms of chain were out,—and carrying her against the bow of another barge, also at anchor several hundred feet farther down the stream, by which her starboard side was also crushed in; the result being that she filled and sank in a short time.

The barge being at anchor, and the Bengalia being the moving vessel, the steamship was presumptively at fault; and the burden of proof is upon her to show that she was wholly innocent, or at least was only partly to blame. Her first defense is that the barge was anchored in the channel, directly in the road of passing vessels, and it is therefore important to determine first of all whether this averment is true. I have no hesitation in finding that the evidence not only does not support it, but establishes satisfactorily that the barge had been for three days on the regular anchorage ground near Gloucester, and that her position was well to the eastward of the channel, where she was entirely safe from any passing vessel that was pursuing a proper course. Many other vessels were at anchor in the neighborhood, and the disinterested testimony concerning the position of the barge leaves me in no doubt that she was where she had a right to be, and that the Bengalia could not have struck her if the steamship had not been out of her proper course.

This brings us to the second defense, namely, that there was a dense fog shortly preceding and at the time of the collision; that the atmosphere was clear when the Bengalia left her moorings, about 5:30, but soon became so thick that objects could only be seen about 100 feet away; that it was hazardous to anchor in the narrow channel, and the steamship accordingly was compelled to proceed, but continued at a very slow speed, giving fog signals and maintaining an efficient lookout; but, in spite of all precautions, that the barge, which was giving no signals and had no anchor watch, could not be seen or heard until the vessels were so near that the collision could not possibly be avoided. Of course, if there was no fog, the whole of this defense disappears, and I am thoroughly satisfied that there was no such impediment to sight as the steamship's witnesses describe. It is probable that the morning was misty; but, if any reliance is to be placed upon disinterested testimony, the mist did not offer any serious obstacle to vision. As already stated, there were many vessels on the anchorage ground, and, moreover, a ferryboat was close at hand when the collision took place, to say nothing of witnesses on shore that were probably available, but only one witness was called to corroborate the officers and crew on this material point, while there is an abundance of apparently unbiased testimony from the ferryboat and from other vessels on the anchorage ground to the effect that there was no fog, and that the shores and other objects could easily be seen for more than a mile. This is corroborated, also, by the officers of the steamship themselves, for they admit that they heard no fog signals from any of the vessels at anchor; and such a universal silence would, I think, be most unlikely, if a dangerous fog had suddenly enveloped the river. Further, the steamship's own testimony concerning the coming on and the duration of the fog is so contradictory that I should hesitate to accept it, even if the opposing witnesses were not in the case.

Dismissing the fog, therefore, as an exaggeration of a light September haze, the *prima facie* fault of the steamship is not excused, and she must be held to have been to blame. Precisely why she got out of her course, the testimony leaves somewhat in doubt; but I feel justified in drawing the inference either that her steering gear did not work satisfactorily, or that she took a sheer for some reason that is not explained, or that the pilot's orders, which were given in English, and translated into German for the wheelsman, may have been misunderstood or incorrectly transmitted. But in any event it seems clear, also, that the lookout must have been inefficiently maintained. Whatever it may have been that took the steamship over upon the anchorage grounds, where she had no business to be, the vision of those upon the lookout could not have been affected thereby; and, since it satisfactorily appears that the barge could have been seen a mile away, it was the duty of the seaman on the lookout, or of the officers on the bridge, to see her in sufficient time to avoid her. They all agree that they did not see her until she was too near to be escaped, and, since there was no fog to excuse their failure of vision, the fault of the ship's servants in this vital respect seems to me to be plain.

At the argument a further attempt was made to defend upon the ground that an action in personam could not be maintained because the steamship was in charge of a licensed pilot at the time of the collision. To take such a pilot on board was said to be compulsory under the Pennsylvania act of 1803, and it was denied that he was the servant of the owners in any such sense as would subject them to an action in personam for his default. The precise point has never been decided in America, so far as I am aware, and I do not feel bound to decide it in the present case. Indeed, it does not properly arise upon the facts as I have just found them; for, even if the pilot was at fault in conducting the vessel out of her course,—and I cannot find that fact specifically upon the evidence,—the concurring fault of the ship's officers or men in failing to maintain an efficient lookout contributed materially to the collision, and it is well settled that in such event the owners are liable. The following propositions laid down in *The China*, 7 Wall. 63, 64, 19 L. Ed. 67, show, I think, that this defense cannot prevail in the present case:

"The statute giving the immunity where a licensed pilot is employed abridges the natural right of the injured party to compensation, and is therefore to be construed strictly.

"The exemption applies only where the pilot is actually in charge of the vessel, and solely in fault.

"If there be anything which concurred with the fault of the pilot in producing the accident, the exemption does not apply, and the vessel, master, and owners are liable.

"The colliding vessel is in all cases *prima facie* responsible.

"The burden of proof rests upon the party claiming the benefit of the exemption. He must show affirmatively that the pilot was in fault, and that there was no fault on the part of the officers or crew 'which might have been in any degree conducive to the damage.'"

I have serious doubts, also, whether this defense was properly raised by the pleadings, or is based upon sufficient evidence to allow

me to consider it. And still further, as the cases stand, the question whether the Pennsylvania statute is compulsory is still open in the federal courts, while the state decisions hold that the act does not oblige a vessel to take a pilot. The Pennsylvania authorities are referred to in *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 414, 21 Sup. Ct. 835, 45 L. Ed. 1155. In such a situation, I do not feel disposed to go out of my way to express an opinion upon so important a subject. It will be decided when it is distinctly raised by the pleadings and properly supported by the proofs.

It remains to consider whether the barge was also at fault. Nothing is left upon this point, except her failure to keep an anchor watch; and this, I think, was not negligence, under the circumstances of the present case. She was upon a known anchorage ground, well out of the road of passing ships; she had a proper light burning, although the daylight had ceased to make this fact important; and I do not think she was bound to anticipate that another vessel, in the daytime and not in a fog, would get so far out of her proper course as to become a menace. The evidence shows that, unless the owners of barges order an anchor watch to be kept, it is not customary to keep it, and I cannot say that the *Iron State* was to blame in the present instance. No doubt, the barge took the risk of her light going out, or of a fog coming down and making signals necessary, but neither risk fell out against her; and I am of opinion that she was not bound to anticipate an unlikely collision, and to keep a watch on deck in order to attempt to let out her chain or to maneuver with her helm. Whether either attempt would have been successful, I have much doubt.

The libellant is entitled to a decree, with costs.

THE ANNEX NO. 5.

(District Court, E. D. New York. July 10, 1902.)

1. COLLISION—SUFFICIENCY OF FOG BELL—ANCHORED SCOW.

There is no statute for harbor regulation fixing the size of the fog bell to be used on scows permanently anchored in New York Harbor, but the sufficiency of such bell is to be determined by the rule that reasonable care must be exercised in its selection, having reference to the locality and dangers to be encountered and the vessels to be warned. A bell seven inches in diameter and height, to be rung by hand, held insufficient on a scow stationed 850 feet off the piers in East river, in the track of steam vessels of all kinds.

2. SAME—FERRYBOAT AND ANCHORED SCOW—FOG.

A scow anchored in East river for the purpose of making tunnel borings held in fault for a collision with a steam ferryboat in a fog, because of the insufficient size of its bell, which could not be heard on the ferryboat until the latter stopped when close to the scow. The ferryboat also held in fault for improper navigation after discovering the position of the scow.

In Admiralty. Suit for collision.

Bergen & Dykman, for libellant.

Robinson, Biddle & Ward and Mr. Hough, for claimant.

THOMAS, District Judge. The libellant, pursuant to authority from the Rapid Transit Commissioners, authorized by the legislature of the state of New York, and a permit furnished from the secretary of war, placed in the East river a scow 22 feet wide and 50 feet in length for the purpose of making certain borings underneath the river's bed. The scow was located about 850 feet from pier 4, on the New York side, and about 2,000 feet from the foot of Joralemon street, on the Brooklyn side, with her bow straight up the river. She had been in this position for a week, and her locality was well known to the captain of the Annex boat, which came in collision with her. The collision occurred on Sunday. The wind was light from the southwest, and the tide was ebb. There was a light rain and heavy fog, which had been continuing for some hours, the fog lifting slightly at times. At about 5 p. m., Annex Boat No. 5 left her slip below the bridge on the Brooklyn shore, went out upon a northerly course, straightened down the river upon what the captain stated was a southwest course, which, if continued, would have carried him well to the southerly side of Staten Island. However, he testified that, in order to avoid a tow, he went well towards the New York shore, and, after proceeding a few minutes, stopped, to discover the exact location of the scow, and that, after drifting, he suddenly saw her one and a half or two of his own boat's lengths away, and that then for the first time he heard her bell; that thereupon he put his own boat, which was lying across the tide, and pointing for about pier 4 on the New York side, under full speed, and then or shortly afterward starboarded his wheel to throw his stern around, and kept on his way; that the after part of the port side of his boat came in contact with the port corner of the scow, as he judges, although it seems that neither he nor anybody on his vessel knew that there was an actual collision. He stated that when he first saw the scow she bore about two points on his port bow, but the diagram later prepared by him shows that she was about four points on his port bow, and that he was crossing her bow when he discovered her. On the scow were two persons, one of whom was ringing a bell that was about 15 feet above the deck of the scow; and another had been watching from the stern of the vessel, but shortly before the accident came to the point where the bell was. The evidence on the part of the scow is to the general effect that the port side of the Annex boat, somewhat forward of the wheel, struck the starboard corner of the scow, and broke her two forward anchor ropes, so that she went adrift, and did some other injury, for which the libel is filed.

The questions are whether the bell used by the scow was proper, and duly rung, and whether the Annex boat, in the exercise of due care, should have heard it. The bell was about seven inches in diameter and height, the sounding part being some five inches in height. It is claimed that the bell was sufficient under the act of congress of 1897 (chapter 4) entitled "An act to adopt regulations for preventing collision upon certain harbors, rivers and inland waters of the United States," and the part thereof relating to "sound signals for fogs," etc., which provides (article 15):

"In fog, mist, falling snow, . . . the signals described in this article shall be used as follows, viz.: (d) A vessel when at anchor shall at intervals of not more than one minute, ring the bell rapidly for about five seconds."

See similar provisions in chapter 802, Act Aug. 19, 1890.

It is also urged that authority for the use of the bell in question is to be found in the rules and regulations of the board of supervising inspectors, provided at a meeting held February 13, 1897, as follows:

"Such vessels of ten gross tons and under, if provided with a bell of six inches in diameter, of good tone and quality, to be rung by hand in fog or thick weather, shall be deemed to be properly equipped in that respect."

This provision relates to steam vessels. Therefore attention is not called to any applicable statute fixing the size of the bell. Hence reasonable care must be used in its selection, and such care should have reference to the locality and dangers to be encountered and vessels to be warned. The evidence is that the bell was rung from time to time, two persons being engaged for that purpose, and acting alternately. The young man who was ringing the bell at the time of the collision states that he had been ringing it vigorously; and his companion testified that he came forward when the whistle of the Annex was heard, and told his alternate to ring hard, whereupon the latter, holding the tongue in his hand, did strike the bell hard and quickly, and, the steamer's whistle being repeated, the ringing was vigorously continued. At the time of the intensified ringing those on the Annex heard the bell, as did persons upon tugs in the slip of pier 4. These witnesses in the slip were connected with the libellant's undertaking, and favorable to it, and yet it appears from their evidence that the bell, although rung actively just before the accident, and therefore heard, at other times was heard faintly, or not at all, which latter circumstance may have happened from a lack of continued attention. The bell was rung more efficiently shortly before the collision, and the wind was favorable for carrying sound to the Annex. The day was Sunday. There was no other vessel near by, and, if the bell had been sounded with all possible activity, it should have been heard farther away than it was heard by those on the Annex. The bell seems to be about the usual size employed on tugs, but it was altogether too small and incapable to warn vessels of this new and continued menace to navigation in one of the most frequented localities of the East river. To strike the bell quickly and hard was possible, but the labor of doing it could not be long continued, and, when the diminished effort came, the bell would not be heard upon a sidewheel steamer by reason of its own noise. The bell was practically nothing more than a good-sized hand bell, and at the peril of hearing it was placed the safety of a large number of vessels that passed and repassed and crossed and recrossed in its immediate locality. It is not believed that the captain of the Annex could or should have heard the bell earlier than he did, and that was when he was in close and dangerous proximity to the scow.

But the Annex herself was not free from fault. It is believed that she struck the scow on the latter's starboard side. The Annex was

in the wrong place in the river, and when the captain discovered the scow his vessel was heading for pier 4, directly across the bows of the scow. His first evidence shows that he was about two points on the starboard side of the scow. Later he increases the points to four. In any case, he tried to cross her bow and avoid her by starboarding and swinging the ferryboat's stern out of her way. The result was that he ran into her. He was negligent in attempting to go ahead of her in such close quarters. He knew of the scow; had shortly before passed her; knew what kind of a bell she was using; knew how it sounded in the prevailing weather; and, if he could not hear it farther away than he did, he should have kept off, or, in any case, backed away; or, if he was on the starboard side of the scow, as he evidently was, he should have stayed there. The bell was bad. Being bad, it was of necessity badly sounded, and the Annex boat was maneuvered with culpable negligence.

The damages and costs should be divided.

ALDRICH v. CARGO OF 246 5/20 TONS OF EGG COAL.

(District Court, E. D. New York. June 17, 1902.)

1. SHIPPING—ACTION FOR FREIGHT—OFFSET.

A canal boat laden with coal filled and sank, after reaching her dock, through leakage, and the negligence of her captain. The consignee, whose duty it was to discharge the cargo, did so after waiting two days, being put to additional expense because the boat was under water. *Held*, that he was justified in such action to save the cargo from further damage and possible loss, and was entitled to offset the increased cost of discharging against the carrier's claim for freight.

In Admiralty. Action to recover freight.

Hyland & Zabriskie, for libellant.

James J. Macklin, for claimant.

THOMAS, District Judge. The canal boat Annie E. Aldrich, laden with 246 1/4 tons of coal, crossed the Bay from Edgewater, N. J., and, by direction of the consignee's agent, took a berth on the north side of the pier at Bath Beach, on Friday, August 9, 1901, between 9 and 10 o'clock a. m. In the early part of Saturday night the vessel was found to be leaking, and sank between 3 and 4 o'clock on Sunday morning. The only person in attendance upon her was her captain. He was absent from her until about 11 o'clock on Friday night, and during that time had been drinking in the village of Bath Beach. During Saturday he was for the greater part of the time upon the boat, and claims that he tried her pumps not only on Saturday, but several times on Friday; that on both days he found that she had nine inches of water, although he stated that coming across the bay she had so little water that she did not need to be pumped. When he tried the pumps about 10 o'clock Saturday night, he found that she had 29 inches of water. Hence she was in such condition that she gained nearly two feet within an hour, and yet he had not discovered her condition until she was beyond aid.

Sunday morning the captain went to New York to report the condition of the boat to her owner, who, with his son, arrived at the boat about noontime, found her sunk, and remained till about 5 or 6 o'clock p. m. He states that her bow was under water, but that from her stern forward she was about two-thirds of the way out of water; that on Monday he notified the insurance company, and was authorized by it to procure a person to raise the boat, the work to begin on Tuesday; that on Tuesday he went down, and found that Henjes, the owner of the dock, and a stevedore, who was authorized so to do by McCollum, the consignee, had undertaken the discharge; that thereupon he notified the wrecker employed by Aldrich not to come, and left the work to Henjes. Henjes completed the discharge by noon on Wednesday, at which time he discovered that there was a leak on the starboard or offshore side of the boat, which he temporarily stopped. Thereafter the vessel was taken by Aldrich to a dry dock, where it was found that the bilge log on the under side and on the outer side was chafed and gouged over a considerable space; that in three places on the bottom planks were driven in,—all of which injuries were sufficient to admit water to the vessel.

The present action is against the consignee for the freight. To this claim for freight the consignee counterclaims the additional expense incurred in the employment of Henjes to discharge the cargo. The first question is, by whose fault did the canalboat sink? The libellant contends that there were small and large stones along the port or inshore side of the boat in the neighborhood of the injuries; that there was such a swell, and the water was so shallow, that the boat ground against such stones, and the leak resulted. The evidence on the part of the claimant is that there was sufficient water at the place where the boat lay; that it was one of the customary places for boats of her draft and of greater draft, and that no injuries had arisen to boats on former occasions, or had been caused since that time; and that there were no large stones on the bottom, although it was a place where cracked stone for macadamizing was from time to time unloaded. The evidence preponderatingly shows that, whatever stones there were on the bottom, there was sufficient water for the floating of vessels of her draft, but that, if she took bottom, the sharp stones were sufficient to produce the injuries to the vessel. Henjes testified that the captain told him that the boat drew six and a half feet. This the captain denies, and states that when the boat was fully loaded with 325 tons she would draw eight and a half feet, with one foot freeboard, but on the present occasion she had three and a half feet freeboard; that when he pumped on Friday or Saturday she had nine inches of water, but that he did not regard this as dangerous, and that he would not regard the water dangerous unless it were from four to five feet. He states that she did not have over three inches of water when she arrived at the dock, and he accounts for the nine inches of water that he found on Friday or Saturday by the alleged fact that water was shipped crossing the bay, and that she showed only three inches on arrival, because the water had not yet run through the coal. It is difficult to escape the conclusion that the boat was taking water after she ar-

rived and before she took bottom, and that the water gained sufficiently upon her to cause her to sink through the negligence of the captain in pumping her. His evidence and appearance upon the stand indicated that at that time, at least, he was not in a proper condition to take charge of the boat, and that he was negligent in his attention to her. The good condition of the bottom and the safety of the berth is illustrated by the former and subsequent use of the place by vessels of even greater draft, and it is equally well proved that there was no swell or action of the water that should have given her the violent motion attributed by the captain. The first conclusion is that the vessel leaked to some extent before she took bottom, and that she sank because the captain in charge allowed her to take too much water.

But it is urged that, inasmuch as the cargo was landed, the carrier should be allowed to recover his freight, and that the consignee may not offset against it the additional expense of discharge, caused by the negligence of the carrier's captain. It is undoubtedly true that if, after the sinking of a vessel, the carrier effects the completion of his duty and the delivery of the cargo, he may recover his freight; but if by carelessness of the carrier or the master the vessel is placed in such condition that the consignee is put to unusual disadvantage, and thereby additional expense in discharging her, the burden of such additional expense should not fall upon the consignee. The libelant's position is understood to be that, having notified the insurance company, and secured a wrecker at its instance, the consignee had no right to undertake the discharge of the vessel. Nevertheless the consignee acquiesced in Henjes' undertaking, and it is believed that the consignee, finding that the captain had left the boat on Sunday, and hearing nothing from him or from the owner by midday Monday, had a right to discharge the cargo, and that he was not obliged to wait either for his cargo, or the peril of its being further damaged, or possibly lost. All that he did was to discharge his cargo. But the libelant claims that the additional expense of discharging the cargo should fall upon the insurance company, and should not be deducted from the freight. The insurance company is not a party to the action. The libelant demands from the respondent compensation for transporting coal. The consignee answers that the carrier, by his negligence, brought the cargo under water, and added to the expense of the discharge, which was the consignee's duty. It is just to compel the carrier to pay the consignee such sum as will compensate for the additional burden placed upon the latter by the former's negligence. There may be some technical maritime rule that transcends the good sense that would ordinarily be applied to such a state of facts, but the decisions presented by the libelant do not seem to sustain this contention. The commissioner will ascertain the sum necessarily incurred by the consignee in discharging by reason of the libelant's negligence, and the same shall be deducted from the freight. If it exceed the freight due, the libel should be dismissed.

THE HELEN G. MOSELEY.

MOSELEY et al. v. SLOMAN et al.

(District Court, E. D. New York. July 10, 1902.)

I. COLLISION—STEAMER AND SCHOONER CROSSING—INEFFICIENT LOOKOUT.

A collision occurred at sea in the night between a steamer and a schooner on crossing courses. The night was clear, and the wind light, but it was shown that the schooner had steerageway, and that her lights were burning, and in proper position. While the evidence was conflicting as to her course, it gave no reasonable support to the contention of the steamer that she was on such a course that her lights could not be seen in time to have prevented the collision, although the steamer's lookout and three other members of her crew testified they were on the watch, and did not see the lights until immediately before the collision. Held that, under such evidence, the steamer must be held in fault.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for The Albano.

Carver & Blodgett and William S. Maddox, for The Helen G. Moseley.

THOMAS, District Judge. On September 10, 1901, at 1 o'clock a. m., the three-masted schooner Helen G. Moseley, heavily laden with lumber, and bound for New York, collided off Tucker's Beach, N. J., with the steamship Albano, bound, partly laden, for Newport News. Thereby both vessels were injured; hence the above actions. The weather was dark and clear, the sea smooth, and the wind S. W. by W., or S. S. W., as the steamer claims. For some time before the collision, the steamer had been on her proper course of S. W. by S. The bow of the schooner struck the starboard bow of the steamer, so that the angle of collision was nearly or quite a right angle. The steamer went to port a point or less immediately before the contact, and for the purpose of avoiding the same.

Without tracing the grounds therefor, the conclusion is reached readily that the steamer's course was S. W. by S. Hence, making an allowance of one point to port for the steamer changing at the moment of collision, the schooner at the time of contact was heading E. S. E. If the angle of collision was seven points instead of eight (and the evidence would justify such inference), the schooner was heading E. by S., making the above allowance for the steamer's porting. The crew of the schooner state that she was headed N. E. by E., that the steamer's white light, and later her green light, bore three points on the schooner's port bow, and that the steamer did not change her course. With such heading of the schooner and bearing of the steamer (1) the accident could not have happened; (2) the red light, and not the green light, of the steamer should have appeared. The schooner's crew emphasize the presence of the steamer's green light, and its bearing as given. If the steamer headed S. W. by S., and her green light bore as stated, the schooner could have headed E. N. E. But from a given heading of E. N. E. for the schooner, two conclusions follow: (1) The schooner should have seen both lights

of the steamer; (2) the angle of collision should have been no more than four points, making allowance for the steamer's porting as above. But it already appears that the angle of collision was at least seven points, and the evidence does not permit departure to the eastward from such a finding. Therefore, making allowance for the steamer's porting one point, and assuming the angle of collision as seven points, the schooner's heading must have been E. by S. The schooner could have been headed E. by S., and still have been so related to the steamer as to see the latter's green light three points on her port bow, and her red light shut out. This conclusion harmonizes with the schooner's evidence, except as to her heading. Therefore, the facts are: The schooner should have been heading about N. E. by E. for her proper course, whereby the wind, if S. W. by W., would have been dead astern, but she was in fact heading as far south as E. by S., which brought the wind four points abaft the beam. With this heading she could have been sailing winged with her mainsail to port and her mizzen sail to starboard. Yet this was to her disadvantage by several points. The steamer was sailing S. W. by S., and at the time of the collision the schooner was headed E. by S., or E. S. E., or E. S. E. one-half S. The green light of the steamer bore three points from the schooner's port bow, and was visible, but the steamer's red light was shut out. The wind had been very light, and it appears from the argument of the learned proctor for the steamer that "at over sixteen hours before the collision the Moseley was less than fifteen miles distant from the point where it occurred." Nevertheless, the evidence of both parties shows that at the time of the collision the schooner had steerageway. But if the heading of the schooner was E. by S., her red light should have been seen by the steamer. The evidence is that the lights were large, of good make, well cared for, and properly burning. What excuse had the steamer for failing to see the same? The bridge of the steamer was 170 feet aft the stem. A competent seaman was at the wheel. On his port side was a boatswain, and on the starboard side the second officer. The captain had been absent from the bridge about five minutes before the collision. On the forecastle head, and about 47 feet aft of the stem, was a lookout. The men on the bridge and the lookout testify that they were keeping watch, and that the red light of the schooner did not appear until less than a minute before the collision, when all four of the steamer's crew, as just mentioned, saw the red light, which to them appeared small and dim, and about one ship's length off. The wheel was put hard astarboard; the boatswain and second officer assisting the wheelman thereto. The captain, attracted to the bridge, gave the signal to stop, and go full speed astern, which order was executed by the engineer. Hence, four suitable men in the positions stated claim to have been looking forward and around for lights, yet each testifies that he did not see this light until the moment named. But the light existed, it was uncovered, and was sufficiently bright to have been seen for 10 minutes before the collision. What is the explanation?

The steamer urges that the failure to see the light was "due to the schooner having been off her course, so that the steamer was ap-

proaching abait the range of her lights, until a slant of wind or a freshening land breeze brought the schooner far enough around to the east to show the steamer her regulation side light." As has already been seen, the schooner was headed E. by S., or, if the angle of collision be regarded as a right angle, the schooner's heading would be E. S. E.; or if it be considered that the steamer did not go to port more than half a point, the schooner's heading was E. S. E. one-half S. There is no reason why the light should not have been seen, even in the last-named position. The second officer of the steamer states that when he first saw the schooner she was heading S. E. by S. But he saw her. He also testified that the wind was S. S. W. This alleged heading of the schooner S. E. by S. would have brought the wind three points forward of the beam, with the mizzen sail winged to starboard; in any case a highly improbable, if not impossible, relation to the wind on the part of a vessel having steerageway and bound for New York. But there is not the slightest reliable evidence in the case that the schooner was on a course of S. E. by S., or even S. E. The evidence, even of the master of the steamer, is that the schooner had steerageway. Whether the wind be regarded as S. S. W., as the steamer claims, or S. W. by W., as the schooner claims, there would be only gross unreason in such alleged heading of the schooner. The angle of collision shows that such was not her heading. The evidence of the schooner's crew, although not adopted fully on this subject, places her heading at N. E. by E. With the wind S. S. W., she could not have been sailing winged on the course claimed for her by the steamer. But it is necessary to adopt this theory in order to exculpate the steamer for her failure to see the red light. Therefore, the question is whether a supposition that has not sufficient support from the evidence should be adopted, because it would, if true, relieve persons who should have seen a light from a failure therefor. It is not the province of the court to find theories, but facts. There is no doubt that the steamer was employing a suitable lookout, and that her men on watch were using a fair degree of care, but had they exercised requisite care, no reason for their failure to discover the existing red light of the schooner is shown. At least the evidence gives no satisfactory explanation. The case is peculiar. It may be that the absolute truth is with the steamer, but the question here is, what does the evidence show? It certainly does not show the schooner with her head turned so far to the southward as to hide her port light.

There must be a decree in favor of the schooner and against the steamer.

In re MORSE.

(Circuit Court, D. Missouri, in Chambers. September 17, 1902.)

1. CRIMINAL LAW—CONSTRUCTION OF SENTENCE—BEGINNING OF TERM OF IMPRISONMENT.

The material part of a judgment sentencing one to imprisonment is that which specifies the period of incarceration and the place of imprisonment, and in those respects it should be definite and certain; but, where it unnecessarily fixes the time when the term of imprisonment shall begin, such provision is merely directory or provisional, and, in case the execution of the sentence is suspended, as permitted by law, by proceedings in error, the term is to be computed from the time when the defendant is actually incarcerated.

On Demurrer to Return to Writ of Habeas Corpus.

THAYER, Circuit Judge. A writ of habeas corpus was issued by me on August 25, 1902, upon a petition filed by Ben H. Morse, a convict in the Missouri State Penitentiary, wherein he alleged, in substance, that he was wrongfully restrained of his liberty by F. M. Woolldridge, the warden of said penitentiary, because the term of imprisonment which was fixed in the sentence by which he was committed to that institution had expired on August 3, 1902. On the day appointed for the return of the writ, to wit, September 13, 1902, the warden filed a return, and the petitioner has demurred to it, admitting all the facts stated therein, but contesting their legal sufficiency to justify his further detention. The facts so admitted are the following: On May 3, 1900, Morse was tried in the United States district court for the Western division of the Western judicial district of Missouri upon an indictment charging him with having unlawfully devised a scheme and artifice to defraud by means of the use of the post-office establishment of the United States. He was convicted of the offense by the verdict of a jury, and was thereupon, on May 4, 1900, sentenced to pay a fine of \$1 and "be imprisoned for the period of eighteen months from this date in the Missouri State Penitentiary." On May 4, 1900, Morse was tried before the same court upon another and distinct charge or indictment for having devised a scheme and artifice to defraud by the use of the post-office establishment, and on that day was convicted by the verdict of a jury, and sentenced, as in the other case, to pay a fine of \$1, together with the costs, and "be imprisoned for the period of eighteen months from this date in the Missouri State Penitentiary." It was stated, however, in the latter sentence, that said imprisonment should "begin at the expiration of the sentence in case No. 2,200." Case No. 2,200, thus referred to, was the first of the two cases mentioned above; the last case to which reference is made being case No. 2,199. Immediately after his conviction, the district court fixed the amount of his bond for an appeal at the sum of \$2,000 in each case. Subsequently the petitioner gave such a bond in each case, and was released to

¶ 1. See Criminal Law, vol. 15, Cent. Dig. §§ 2521, 3312.

await the result of a writ of error to be prosecuted to the United States circuit court of appeals for the Eighth circuit. Such a writ was issued on September 13, 1900, and was pending in the United States circuit court of appeals for the Eighth circuit until on or about April 24, 1901, at which time the petitioner voluntarily dismissed the writ of error brought for the purpose of obtaining a review of the proceedings below, whereupon a mandate was issued by the United States circuit court of appeals reciting the fact that the writ had been dismissed, and ordering that the petitioner "surrender himself to the custody of the United States marshal for the Western district of Missouri within five days after the filing of said mandate, in execution of the sentence heretofore imposed by the trial court." On the filing of this mandate in the district court for the Western division of the Western district of Missouri, the clerk thereof was ordered to make out and deliver to the marshal commitments in both cases, being cases Nos. 2,200 and 2,199, aforesaid. In pursuance of such commitments the body of the petitioner was delivered to the warden of the penitentiary on April 29, 1901, since which time he has been undergoing imprisonment in execution of the aforesaid sentences.

The petitioner bases his claim for a discharge upon the ground that, because the judgment rendered by the district court in each of the cases, 2,200 and 2,199, specifically declared that he should "be imprisoned for the period of eighteen months from this date," his term of imprisonment must perforce be computed from May 4, 1900, when the judgments were rendered, without reference to the fact that he was immediately released on bond during the pendency of a writ of error, and was not in fact committed to prison in execution of the sentences until April 29, 1901. It is said that, in order to make the imprisonment begin on a date subsequent to May 4, 1900, to wit, April 29, 1901, as the government insists that it shall begin, it was necessary to have brought the petitioner into court on the filing of the mandate of the court of appeals and to have resented him. It will be conceded that, if this theory is correct, and that the term of imprisonment must be computed from May 4, 1900, then the petitioner's term of imprisonment, by reason of the allowance of nine months' time for good behavior, has expired, and he is entitled to his discharge. I am persuaded, however, that the proposition urged in behalf of the petitioner is untenable, and that the term of his imprisonment must be computed from the time it actually began; that is to say, from April 29, 1901. When a sentence of imprisonment is imposed in a criminal case, it is unnecessary, if not improper, to state in the sentence when the term of imprisonment shall begin, because whatever directions may be given on this point by the trial court cannot control the right which is usually accorded to a prisoner by statute to suspend the execution of the sentence by a bond during the pendency of an appeal or writ of error. When a clause fixing the time when imprisonment shall begin is inserted in a sentence,—as it sometimes is,—it must be understood to be in its nature directory, or as fixing a time when it shall begin, provided the prisoner treats the judgment as final, and does not avail himself of his statutory right to suspend the execution of the sentence by giving bond

while he is seeking a reversal of the judgment in an appellate court. If he does avail himself of this right, and is enlarged indefinitely on bond while seeking a reversal of the judgment, he cannot consistently claim, if he fails to secure an acquittal or a new trial, that he should be regarded as in prison while he was actually at liberty, simply because the judgment specified the date when he should be incarcerated. The material part of a judgment sentencing one to imprisonment is that which specifies the period of incarceration and place of imprisonment. In these respects the judgment or sentence should be definite and certain. The time, however, when imprisonment shall begin, is a matter which is governed by circumstances or other proceedings in the case, and usually is beyond the control of the court by which the sentence is imposed. When, therefore, the judgment in a criminal case fixes the date when imprisonment shall begin, it should be construed to mean that the period of imprisonment is to be computed from the date named, unless the execution of the sentence is stayed for the time being in some of the ways provided by law, in which latter event it ought to be computed from the time when the prisoner is actually incarcerated. When a judgment or decree in a civil case requires an act to be done within a given time after the rendition of the judgment or decree, and the doing of the act is stayed in a manner provided by law by an appeal or writ of error, it is usually held that the act must be done within the time limited, after the stay is removed, and the judgment becomes final. No reason is perceived why a similar rule should not be observed in criminal cases so as to make the term of imprisonment begin when the prisoner is actually incarcerated in those cases, like the one at bar, where the sentence fixes the period of imprisonment definitely, and also contains the unnecessary direction that it shall begin at a given date, but it does not in fact begin on the date specified because execution of the sentence is superseded by a writ of error and bond as the law permits.

In conformity with these views, I have reached the conclusion that on the filing of the mandate of the court of appeals in the district court it was wholly unnecessary to have resentenced the prisoner, fixing a new date for the term of imprisonment to begin. The writ of error which was sued out did not affect the judgment below, but merely suspended the execution of the sentence until the case was heard and decided on appeal. It was never so heard, because prior to the hearing the accused dismissed the writ of error, whereupon the appellate court ordered that he surrender himself to the marshal "in execution of the sentence heretofore imposed," which was a sentence aggregating three years, no part of which had at that time been executed. This was a direction, in effect, that he be thereafter imprisoned for the term of 18 months from the date of his actual incarceration, which was the sentence imposed in case No. 2,200, and that he also be imprisoned for the term of 18 months, which was the sentence imposed in case No. 2,199; the latter term of imprisonment to begin at "the expiration of the sentence in case No. 2,200."

In accordance with this view, it is now ordered that the writ of habeas corpus heretofore issued be discharged, at the cost of the petitioner, and that he remain in the custody of the warden.

WART et al. v. WART.

(Circuit Court, N. D. Iowa, W. D. September 23, 1902.)

1. JURISDICTION OF FEDERAL COURTS—ACTION TO CONTEST VALIDITY OF WILL—PROCEEDING AUTHORIZED BY STATE STATUTE.

The statutes of Iowa having provided that an original proceeding may be brought to contest the validity of a will after the formal probate thereof (Code, § 3296), in which either party may demand a jury trial, such a proceeding is one of which a federal court may take jurisdiction where the requisite amount is involved and diversity of citizenship exists between the adversary parties.

On Demurrer to Amended Petition.

T. D. Higgs, F. F. Faville, and A. Van Wagenen, for plaintiffs.
Milchrist & Scott, for defendant.

SHIRAS, District Judge. The plaintiffs aver in the petition, as amended, that they are the children and heirs at law of William Wart, deceased, who at the time of his death was the owner of certain realty situated in Buena Vista county, Iowa, and that, as his heirs, the plaintiffs are severally entitled to the one-sixth part of the realty described; it being further averred that the defendant, Grace Wart, is the widow of William Wart, and that she is in the possession of the entire realty, which she claims title to under an instrument purporting to be the last will of her deceased husband, which was admitted to probate in the district court of Buena Vista county; it being, however, further averred that at the time of the execution of the will the testator, by reason of sickness and old age, was mentally incapacitated from executing a valid will. In the petition, as amended, it is averred that the plaintiffs are citizens of the state of New York and the defendant is a citizen of the state of Iowa, and that the total value of the property is the sum of \$35,000; thus showing that the value of the interest claimed by each of the plaintiffs, being one-sixth of the whole, exceeds the sum of \$2,000. The demurrer is intended to present the question of the jurisdiction of this court, it being claimed that the federal courts have no jurisdiction to admit to probate or to cancel the probate of a will, and that under the provisions of the Code of Iowa the jurisdiction to test the validity of a will is solely conferred upon the district courts of the state. The petition filed in this case does not seek to secure the proving of a will. In one view it is a suit at law to have determined and adjudged what share or interest the plaintiffs have, if any, in the realty belonging to their father, at the date of his death. By reason of the averments in the petition to the effect that the defendant claims title to the whole of the realty under an instrument admitted to probate as the last will of William Wart, it being averred, however, that this instrument is invalid on account of the mental incapacity of William Wart at the time of its execution, the legal question is presented whether, under the provisions of the statutes of Iowa, a suit may be brought to test the validity of a will after it has been probated in a

¶1. Probate jurisdiction of federal courts, see note to *Quarries Co. v. Thomlinson*, 36 C. C. A. 276.

district court of the state. By section 3296 of the Code of Iowa it is provided that "wills, foreign or domestic, shall not be carried into effect until admitted to probate as hereinbefore provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding." By section 3283 it is enacted that: "After the will is produced, the clerk shall open and read the same, and a day shall be fixed by the court or clerk for proving it, which shall be during a term of court, and may be postponed from time to time in the discretion of the court. When the probate of a will is contested, either party to the contest shall be entitled to a jury trial thereon." Section 3296 clearly makes provision for a contest over the validity of a will after the formal probate thereof. When a will is offered for probate, a contest over its validity may be initiated, and either party may demand a jury trial of the issues presented. If such a contest is brought, the parties thereto are bound by the result thereof, and, if the will is admitted to probate, the contestants cannot subsequently maintain an original proceeding again questioning the validity of the will. *Smith v. James*, 74 Iowa, 462, 38 N. W. 160. If, however, when the will is offered for probate, no contest is made over its validity, and the instrument is admitted to probate, it is still open to the parties in interest to attack the validity of the will by an original proceeding.

This right being reserved to the parties in interest by the express provisions of section 3296 of the Code of Iowa, the real question presented by the demurrer is whether such original proceeding can be instituted in a federal court if the adversary parties are citizens of different states, and the amount involved exceeds \$2,000. This general question is discussed at length by the supreme court in *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006, it being therein said that:

"The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law, for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has often been decided by this court that the terms 'law' and 'equity,' as used in the constitution, although intended to mark and fix the distinction between two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the states, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another (*Railway Co. v. Whitton*, 13 Wall. 270, 287, 20 L. Ed. 571; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439), but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save the suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law."

In *Richardson v. Green*, 9 C. C. A. 565, 61 Fed. 423, this question is discussed at length, the conclusion reached being that under the laws of Oregon a proceeding to contest the validity of a will could be instituted after the probate thereof, and that, if the adversary parties were citizens of different states, and the amount involved was sufficient to meet the requirements of the judiciary act, a court of the United States could take jurisdiction over such a controversy. An application was made to the supreme court for the purpose of bringing this case, by means of a writ of certiorari, before that court, but the application was denied. *Richardson v. Green*, 159 U. S. 264, 15 Sup. Ct. 1042, 40 L. Ed. 142. The denial of the writ, when the question involved was that of jurisdiction, must be taken to be, in effect, an approval of the ruling of the court of appeals.

As the statutes of Iowa provide that after formal probate of a will the validity thereof may be contested in an original proceeding brought for that purpose, either party to such contest being entitled to demand a jury trial, it follows, under the doctrine recognized in the cases just cited, that a proceeding thus brought to contest the validity of a will presents a controversy between adversary parties of which a court of the United States may take jurisdiction, provided the requisite amount is involved, and diversity of citizenship exists between the litigant parties.

The demurrer is therefore overruled.

BRETT et al. v. MEISTERLING.

(Circuit Court, N. D. Iowa, W. D. September 3, 1902.)

1. LAND GRANTS—LOCATION—CONCLUSIVENESS.

The action of the land department in defining the limits of a grant to a railroad company, pursuant to its duty, on the line of the road being located, and the map showing the location being furnished to it, is final, as between persons claiming land within such limits,—one under the homestead law, the other as purchaser from the road.

2. PURCHASERS IN GOOD FAITH.

The land department cannot be held, as matter of law, to have erred in holding one an innocent purchaser from a railroad company of land within its grant, so as to be entitled to the protection of Act Cong. March 3, 1887 (24 Stat. 556), though it failed to entitle itself to the land by completing the road; no one having been in possession when he contracted for the land and received his deed from the company.

3. EQUITY—AMENDMENT OF BILL.

Bill to quiet title to land, presenting merely the question whether there was error of law in the action of the land department in issuing patent to defendant, may not be amended to present the questions of limitations and estoppel; complainant being in possession, and such matters being available as defenses, in any action defendant may bring for possession, where they can be better heard and disposed of.

In Equity.

Cory & Everett, for complainants.

W. P. Jewett and M. H. Allen, for defendant.

SHIRAS, District Judge. This suit is brought to settle the conflicting claims of the parties to the N. E. $\frac{1}{4}$ of section 15 in township

98 N. of range 38 W. of the fifth P. M., situated in Dickinson county, Iowa; the plaintiffs basing their right upon a homestead claim and the occupancy of the land, and the defendant upon a purchase from the Sioux City & St. Paul Railroad Company, and a deed of conveyance executed in pursuance of the contract of purchase. The case is one arising out of the readjustment of the land grant contained in the act of congress of 1864 in aid of the construction of a line of railway from Sioux City, Iowa, to the Minnesota state line, which line was partly constructed by the Sioux City & St. Paul Railroad Company; but, through the failure of the company to build the line southerly of Le Mars, Iowa, it failed to entitle itself to all the land falling within the terms of the grant, as is shown by the decision of the supreme court in the case of *Sioux City & St. P. R. Co. v. U. S.*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177, and, the particular land above described not being earned by the company, the title thereto never passed to the railroad company, but the right thereto has become the subject of dispute between the plaintiffs, claiming under the homestead laws of the United States, and the defendant, claiming the protection afforded by the act of congress of 1887 to purchasers in good faith from the railway company. For a full statement of the facts and of the legal questions growing out of the named land grant, reference may be made to the already cited case in 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177, to *Manley v. Tow* (C. C.) 110 Fed. 241, and to *Benner v. Lane* (C. C.) 116 Fed. 407, in which the opinion of the court has just been filed.

It is claimed on behalf of the plaintiffs that the land in dispute does not fall within the limits of the grant as defined in the act of 1864, and therefore the readjustment act of March 3, 1887, is not applicable. When the line of the proposed railway was located by the railway company, and the map showing the location was furnished to the land department, it became the duty of the department to define the limits of the grant, which was done; and the land in dispute falls within the limits thus defined by the department. In a controversy of this nature this action of the department is final upon the question of the location of the limiting lines of the grant, and cannot be investigated by the court. The rights of the parties are therefore to be determined upon the theory that the land in dispute falls within the limits of the grant of 1864, but, owing to the fact that the railway company has not entitled itself to the land by a performance of the terms of the grant, the same has reverted to the United States.

On behalf of the complainants it is contended that the terms of the grant have not been met by the railway company, for several reasons, in addition to the fact that the entire line of road provided for in the grant was not built. It is not necessary to consider these claims, because the adjustment act of March 3, 1887, is not limited to cases of failure to complete the entire line, for it is declared in section 2 "that if it shall appear, upon completion of such adjustments respectfully, [sic] or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, it shall be the duty of the attorney general to commence and prosecute in the proper courts the necessary proceedings," etc. 24 Stat. 556. The

necessary proceedings have been thus taken against the Sioux City & St. Paul Railroad Company under the provisions of the act of 1887, and it has been finally determined, in effect, that the railway company never became entitled to the land in dispute, and that, owing to the failure of the company to earn the land by the completion of its line south of Le Mars, the same has reverted to the United States. Upon this decision being announced, the land department proceeded to dispose of the land, giving all parties claiming an interest therein the opportunity to present their claims. At this hearing the defendant, Meisterling, based his claim upon a purchase from the railway company, and the complainants upon their rights under the homestead laws of the United States. The facts found by the receiver and register of the local land office were, in substance, that John Meisterling in June, 1887, entered into a contract looking to the purchase of the land at the rate of \$10.50 per acre, which was completed on the 15th day of August, 1887, by the payment of one-half of the purchase price, receiving from the railway company a warranty deed of the premises, and giving a mortgage to the railway company to secure the payment of the unpaid half of the purchase price; the deed to Meisterling being filed for record in the proper office in Dickinson county on the 10th of August, 1887. With respect to the claim of complainants, it was found that in July, 1890, Jessie C. Brett (then Jessie C. Cummings) bought of one Frederickson his claim and improvements, consisting of the breaking of 100 acres, and a small house and barn, paying him \$240 therefor, with the intent to make a homestead entry thereof; that she continued from that time forward to occupy and improve the land for homestead purposes; that in 1895 she married John F. Brett, who since that time has occupied the premises with his wife. As a conclusion of law, the land department held that Meisterling was an innocent purchaser from the railway company, and that under the provisions of the act of 1887 he was entitled to a confirmatory patent, which was duly issued to him. Thereupon the present suit in equity was brought by the complainants, asking a decree to the effect that the department erred in its construction of the act of 1887, and that under the facts of the case the homestead claim of Jessie C. Brett should be given the preference over the claim of the purchaser from the railway company.

Viewing the case solely with respect to the questions passed upon by the land department, no good reason is perceived for holding that error of law was committed by the department in the ruling that Meisterling, within the terms of the act of 1887, must be deemed to be an innocent purchaser, and therefore entitled to a patent to the land. When he contracted with the railway company, and received his deed for the land, no one was in possession thereof; and therefore no facts exist which would justify the court in holding, as a question of law, that there was error in the action of the department in issuing a patent to the defendant. The ultimate issue between the contestants is, of course, the matter of the possession of the land. The facts of the controversy present the question of the effect of the state statute of limitations and of estoppel by laches,

it being shown in the evidence that Jessie C. Brett has been in possession of the land for more than 10 years last past.

Since the taking of the evidence upon the issue joined on the bill as originally filed, the complainants have submitted a motion for leave to amend the bill in order to present the questions arising under the statute of limitations and the alleged laches of the defendant. After consideration of the motion, I have concluded to refuse the same. The complainants are in possession of the land, and, if the defendant begins proceedings for dispossessing them the plea of the statute and of estoppel can be presented by the present complainants as a defense thereto, and the issues thus presented can thus be better heard and disposed of than in the present suit.

Treating the bill now before the court as being intended to present solely the question whether there was error of law in the action of the land department in issuing a patent to the defendant, Meisterling, the conclusion reached is that the department did not err, as a matter of law, in so issuing the patent, and thereby vesting in the defendant, Meisterling, the legal title to such land; and, so holding, the bill must be dismissed at cost of complainants, without prejudice to the right of the complainants, or either of them, to rely upon the statute of limitations and estoppel by laches as a defense to any proceedings brought to obtain possession from them of the land in question.

BISHOP v. BOSTON & M. R. R.

(Circuit Court, D. Massachusetts. October 17, 1902.)

No. 1,117.

1. FEDERAL COURTS—JURISDICTION—ACTION BY ADMINISTRATOR—DIVERSE CITIZENSHIP.

For the purpose of determining the jurisdiction of a federal court on the ground of diverse citizenship, in an action by an administrator for the wrongful killing of his intestate, the citizenship of the administrator, and not of the beneficiaries of the action, controls, and a complaint failing to allege the citizenship of the administrator is insufficient.

Daniel B. Beard, for plaintiff.

Henry F. Hurlburt, for defendant.

LOWELL, District Judge. By agreement of parties in this case, only the second count of the declaration need be considered. It sets out that the plaintiff is administrator of one De Gruchy, late of Nova Scotia; that the intestate left, as his next of kin, parents, both citizens of Nova Scotia; and that he was killed by the defendant, a Massachusetts corporation. The action is brought under Pub. St. c. 112, §§ 212, 213. The defendant has moved to dismiss on the ground that it does not appear that the plaintiff and defendant are not citizens of the same state, to wit, Massachusetts.

¶ 1. Citizenship of executors and administrators as affecting jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 252.

See Courts, vol. 13, Cent. Dig. §§ 858, 878.

Speaking generally, the administrator is the real party to a suit brought in his name, so that his citizenship determines the jurisdiction of the circuit court, rather than the citizenship of his intestate, or that of the intestate's next of kin. *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 2 L. Ed. 629; *Dodge v. Perkins*, 4 Mason, 433, Fed. Cas. No. 3,954; *Insurance Co. v. Rhoads*, 119 U. S. 237, 9 Sup. Ct. 797, 33 L. Ed. 221. The plaintiff contends that this rule does not apply to a case where, as here, the administrator sues, not for the benefit of the estate, but for the use of the next of kin. In *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108, suit was brought in the name of the judge, by a British creditor of the testator, upon a bond given by the executor. Both the judge and the defendant were citizens of Virginia, but the supreme court held that the circuit court had jurisdiction, upon the ground that there was diversity of citizenship between the real parties to the suit, the British creditor and the defendant. *Browne v. Strode* was cited with approval by the supreme court in *Stewart v. Railroad Co.*, 168 U. S. 445, 449, 18 Sup. Ct. 106, 42 L. Ed. 537,—an action by the administrator similar in many respects to the case at bar; and the court there said, "For the purposes of jurisdiction in the federal courts, regard is had to the real, rather than to the nominal, party." While the *Stewart Case* did not decide the point here raised, the supreme court in that opinion recognized an analogy between suits brought in the name of the administrator for the benefit of the next of kin, suits brought in the name of a state for the same purpose, and suits brought in the name of a state or of a judge of probate for the benefit of parties interested in the estate. The language seems to imply that, in the case at bar, jurisdiction depends upon the citizenship of the person for whose benefit the suit is brought, and not upon that of the administrator. On the other hand, if the citizenship of the person for whose benefit the suit is brought determines the jurisdiction of this court, that person must be named, and his citizenship stated. The administrator cannot sue, at his choice, upon his own citizenship, or upon that of the beneficiary. If the citizenship of one gives jurisdiction, that of the other is irrelevant. Suits like the case at bar are not uncommon in this court. Several now pending must be dismissed at once if this plaintiff prevails, for they do not allege the citizenship of the beneficiary or beneficiaries. Indeed, it is sometimes inconvenient that the names of the next of kin should be stated and proved as part of the plaintiff's case in an action of this sort. With considerable doubt, I have determined to follow the practice of this court, which seems to be approved in *Railroad Co. v. Hurd*, 47 C. C. A. 615, 108 Fed. 116, 118, 56 L. R. A. 193, rather than the somewhat vague language of the supreme court in *Stewart v. Railroad Co.*

The motion to dismiss for want of an allegation of the administrator's citizenship is granted.

THORNTON V. SECURITY INS. CO.

(Circuit Court, M. D. Pennsylvania. September 11, 1902.)

No. 1.

1. FIRE INSURANCE—CONDITION OF POLICY—CARE OF GOODS AFTER FIRE.

A provision of a fire insurance policy that "if fire occurs the insured shall * * * protect the property from further damage, and forthwith separate the damaged from the undamaged personal property, and put it in the best possible order," is an absolute requirement, which must be observed, unless waived or excused, as a condition precedent to any recovery on the policy.

At Law. Action on fire insurance policy. On rule for new trial.

E. N. Willard and John McGahren, for plaintiff.

Jno. T. Lenahan and M. J. Martin, for defendant.

ARCHBALD, District Judge. It was provided by the policy in suit that "if fire occurs the insured shall * * * protect the property from further damage, and forthwith separate the damaged from the undamaged personal property, and put it in the best possible order." There was evidence from which the jury might have found that this was not observed by the plaintiff in the present instance, and the court was therefore requested to charge in the defendant's third point that, if he failed in this duty, he was not entitled to recover. The court affirmed the duty, but denied the result claimed, charging simply that, while the plaintiff could not recover for any loss which was occasioned by his neglect to care for the property, he might have a verdict, notwithstanding it, for whatever there was over and above it. The question is whether this instruction was correct. The authority relied upon to sustain it is *Wolters v. Assurance Co.*, 95 Wis. 265, 70 N. W. 62, but the decision in that case has reference to an entirely different provision of the policy. The stipulation there was that the company should not be liable for loss caused directly or indirectly by the neglect of the insured to use all reasonable means to save and preserve the property at the time of the fire. This, it is submitted, was an unnecessary provision, and must be regarded as introduced out of extra precaution. Every policy holder is bound to do all that he reasonably can, in case of a fire, to preserve and protect the property insured, and cannot, therefore, hold the company liable for loss which is traceable to a disregard of that duty. But it was rightly held, construing this provision, that, as there was nothing which made the neglect of the insured an avoidance of the policy, the stipulation was sufficiently enforced by directing the jury to disallow for the loss of anything that was occasioned by it. But the case cited does not touch the one in hand. The law which is really applicable is to be found in *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525. It was made the duty of the owner there, as here, if a fire occurred, to "forthwith separate the damaged and undamaged personal property, put it in the best possible order, [and] make a complete inven-

† 1. See Insurance, vol. 28, Cent. Dig. §§ 1291, 1292.

tory of the same"; and, having failed to do so, it was held that this was a breach of the conditions of the policy, and worked a forfeiture. "The conditions referred to are substantial and important," says Pinney, J., "and are designed, among other things, to enable the company to fairly investigate and ascertain the loss, and to detect dishonesty and fraudulent practices. They were conditions for the protection of the company, to be performed after the loss, and until performed, or performance had been duly waived, no recovery could be had on the policy. We must regard these provisions as having been deliberately agreed to, and with the understanding that they were material, and would be performed accordingly; and it is the duty of the court to give full effect to them as written." There can be no question as to the soundness of these views. The stipulation in question is absolute, and must be observed as a condition precedent to a recovery. It is not introduced into the policy so much for the purpose of keeping down the loss as to enable the company to ascertain with some degree of accuracy just what the loss is. And it must be as strictly observed as any of the other provisions with which it is directly associated in the context, such as the immediate notice of the fire, the furnishing of satisfactory proofs of loss within a specified time, or the submission to an examination under oath, and the production of books and papers, if required. All these are unquestionably to be complied with, unless excused, and they are not to be distinguished in character from the one under discussion. It is no answer to say that the plaintiff complied with these requirements so far as he was able; being prevented, as he claims, from anything further, by the interference of the company's adjuster and local agent. That was a question for the jury, and should not have been withdrawn from them, as it was, by the instructions given. They should have been expressly told, in the language of the point, that if the plaintiff failed in his duty, in not separating the damaged and undamaged goods, he was not entitled to recover.

The rule is made absolute, and a new trial is awarded.

In re HAMILTON FURNITURE & CARPET CO.

PENINSULAR STOVE CO. v. MITCHELL.

(District Court, D. Indiana. October 6, 1902.)

No. 1,168.

1. BANKRUPTCY—FRAUDULENT PURCHASES—RESCISSION BY SELLER—EVIDENCE.

Where a bankrupt, prior to his failure, represented to a commercial agency that it was worth \$32,875 over all liabilities, when in fact its property was not greater than 50 to 60 per cent. of its liabilities, and, on the purchase of goods, falsely informed the seller's traveling salesman that it was perfectly solvent and had \$25,000 paid-up capital, the seller was entitled to disaffirm the sale, and recover the goods from the buyer's trustee in bankruptcy, without proof that the buyer at the time of purchasing the goods actually intended not to pay for them.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 219.

In Bankruptcy.

W. R. Coffroth, for petitioner.

Stuart, Hammond & Sims, for trustee.

BAKER, District Judge. The petitioner, the Peninsular Stove Company, filed its petition in the nature of a bill in equity against William C. Mitchell, trustee of the estate of the Hamilton Furniture & Carpet Company, which had been adjudged a bankrupt on March 10, 1902, for the rescission of a contract of sale of a lot of stoves made by it to the bankrupt on December 27, 1901, and for the return of the stoves, or their value, on the ground that the contract of sale had been induced by the false and fraudulent representations of the bankrupt. The sale was made through a traveling salesman of the petitioner, who made inquiry of the bankrupt as to its solvency, and he was informed by the purchasing officer of the bankrupt that the company was perfectly solvent, and had \$25,000 of paid-up capital behind it. The traveling salesman took the order for the goods, and reported it, with the representations of the bankrupt, to the petitioner. The petitioner then obtained a report from the Dun Mercantile Agency, of which it was a patron, of the financial standing of the bankrupt. The mercantile agency furnished to the petitioner a copy of a statement in writing made to the agency on February 1, 1901, by the bankrupt, which sets out the assets and liabilities of the bankrupt, showing that it was worth \$32,875 over and above all liabilities. The petitioner was induced by these statements, which it believed and relied upon as true, to sell and ship to the bankrupt between the 6th and 31st days of January, 1902, stoves to the amount and value of \$550.27. The representations of the bankrupt were false, and were known to have been so at the time they were made, and the petitioner, relying upon them as true, sold and delivered the stoves to the bankrupt. The bankrupt was grossly insolvent on February 1, 1901, and continued to be insolvent from that time until it was adjudged to be a bankrupt. From February 1, 1901, until it was adjudged a bankrupt, it was not possessed of property and assets to a greater amount than 50 or 60 per cent. of its liabilities. On these facts the referee decreed that the contract of sale should be rescinded, and the trustee was ordered to pay to the petitioner the value of the goods, which had been sold under an order of the court. The trustee has taken an appeal, and asks the court to review and reverse the finding and order of the referee. The right to such review and reversal is bottomed on a single proposition, thus stated:

"To entitle the petitioner to rescind the contract set forth in the intervening petition, it was incumbent upon it to show that the purchase was made by the bankrupt while insolvent, with the preconceived design then present in its mind not to pay for the stoves."

It is well settled that where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the seller, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and

recover the goods. *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993. This is but a modern application of that ancient doctrine that where a party by false representations as to his solvency, knowingly made, induces the owner of goods, who, in ignorance of their falsity relies upon such representations, to sell them, he is entitled to disaffirm the contract and recover the goods. Fraud renders all contracts voidable *ab initio*, both at law and in equity. No man is bound by a bargain into which he has been deceived by fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and induce the assent. In the present case the fraud consisted in representations made by the bankrupt that it was solvent, and was worth more than \$30,000 above all liabilities, which representations, when made, were known to be false, and were made to influence the conduct of the petitioner. The petitioner believed them to be true, and, relying on their truth, was induced to sell its goods to the bankrupt, which was then grossly insolvent, as it knew, not having the ability to pay more than 50 or 60 cents on the dollar of its indebtedness. A party induced to sell goods by so gross a fraud is entitled to disaffirm the sale and recover the goods or their value, unless, with knowledge of the fraud, he has affirmed the sale, or unless he has been guilty of laches in asserting his right to disaffirm, or unless the rights of innocent third parties have intervened. *Turner v. Ward*, 154 U. S. 618, 14 Sup. Ct. 1179, 23 L. Ed. 391. The petitioner has done no act in affirmance of the sale. It promptly disaffirmed the sale on learning of the fraud, and no rights of innocent third parties have intervened. Where a sale of goods is induced by false and fraudulent representations, intention to pay for them does not sanctify the fraud, and the party defrauded is entitled to rescind without regard to such intention. In such a case of active and aggressive fraud, the question whether or not the wrongdoer intended to pay is immaterial. *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40. The trustee holds the goods affected with the fraud of the bankrupt. Neither law nor morals will justify the trustee in holding goods obtained by the fraud of the bankrupt for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded. *Oil Co. v. Hawkins*, 20 C. C. A. 468, 74 Fed. 395, 33 L. R. A. 739. The written statement made by the bankrupt to the Dun Mercantile Agency of its financial standing was made for the purpose of being communicated to wholesale traders, and with the intent to gain credit, and to have it relied upon as true; and the petitioner had the same right to rely upon it as though it had been made directly to itself. It was a continuing representation so long as the bankrupt gave no notice of a change in its financial standing. *Eaton Coal & Burnham Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389. It seldom happens that a case of palpable fraud so clearly established is presented for consideration.

The order of the referee is affirmed, with costs.

STATE OF WASHINGTON v. ISLAND LIME CO.

(Circuit Court, D. Washington, N. D. August 13, 1902.)

No. 976.

1. REMOVAL OF CAUSES—FEDERAL QUESTION—PLEADING.

An action by the state to recover possession of a lot of land in section 36, and the value of limestone extracted from a quarry therein, cannot be removed to a federal court on the ground of involving the federal question whether a limestone quarry is excepted as mineral land from the grant by congress to the state of school sections; the complaint merely stating that plaintiff is owner in fee simple of the land, and has a right to possession, and alleging a wrongful ouster by defendant, without setting forth the facts or legal grounds on which plaintiff's claim is based, as the complaint, by itself, unaided by judicial inference and notice, must show that a federal question is involved.

This action was commenced in the superior court of the state of Washington for San Juan county to recover possession of lot 1 in section 36, township 37 N., range 3 W. of the Willamette meridian, and also to recover the value of a quantity of limestone extracted from a quarry found in said land. The defendant removed the case into this court, and in its petition alleged as ground for removal that said action is of a civil nature, and arises under the constitution and laws of the United States. Heard on a motion to remand. Motion granted.

W. B. Stratton, Atty. Gen., for plaintiff.

Byers & Byers and Burke, Shepard & McGilvra, for defendant.

HANFORD, District Judge. At the time of hearing arguments upon the motion to remand this case to the state court in which it was commenced, the defendant asked for leave to file an amended petition for removal, and the court reserved its decision for the purpose of allowing time sufficient for the defendant to prepare and submit the proposed amendment, which has been done; and now, having considered the new petition and the written argument by defendant's counsel, it is the opinion of the court that the objection to the jurisdiction of this court has not been, and cannot be, overcome, and that leave to file the new petition should be denied, and the motion to remand granted. I am constrained to so decide by the decision of the supreme court in the case of *Milling Co. v. McFadden*, 180 U. S. 533, 536, 21 Sup. Ct. 488, 45 L. Ed. 656, and the previous decisions of the supreme court which are reaffirmed in that case. I am fully satisfied that in fact this case does necessarily involve a disputed federal question, viz., whether a limestone quarry is excepted, as "mineral" land, from the grant made by congress to this state of sections 16 and 36 of the public lands within the state, for the support of the public schools. This question will have to be decided, and the plaintiff will win or lose the case by the decision

¶ 1. Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

thereof; but it does not appear, by the plaintiff's statement in its pleading, that said question constitutes the real subject-matter of the controversy. The court knows that it is so, because it has knowledge of the provisions of the public statutes and the history of the organization of this state; and, aided by that knowledge, it is able to draw certain inferences from the record, which inferences are confirmed as facts by the defendant's allegations. The defendant is right in its contention that the grant to the state of the lands commonly referred to as "school sections" is contained in a public law, of which the court must take judicial notice, and that the court also has judicial knowledge of the provisions for acquiring title to stone quarries found in the public lands of the United States, contained in the laws enacted by congress; but the difficulty in the way of taking cognizance of the case lies in the fact that the plaintiff has not in its pleading claimed title to the land which is the subject of controversy herein by virtue of said grant, and the court is not at liberty to assume that the controversy is hinged upon the question above stated, nor to make a finding of facts entitling the defendant to remove the case from the state court into this court, based upon any allegations or evidence made or produced by the defendant. The complaint does allege that the plaintiff is the owner of the land, that it has a fee simple title and a right to the immediate possession, and alleges a wrongful ouster by the defendant. It (the complaint) does not set forth the facts or legal grounds upon which the plaintiff's claim of title is based, but the rules of pleading do not require that it should do so. 7 Enc. Pl. & Prac. 332, 333. Therefore the complaint is not obnoxious to a demurrer, and a judgment in favor of the plaintiff, if properly entered, for want of an answer, would be sustained by the court having appellate jurisdiction if the case should be brought before it by writ of error, and the appellate court would not be required to decide or consider any question of federal law. This being so, the plaintiff cannot be justly charged with the commission of a fraud in concealing the real controversy by an insufficient statement of the facts constituting its cause of action, and the court is not authorized to grasp jurisdiction of the case upon the ground that by refusing to do so the plaintiff would be permitted to accomplish by unfair practices the deprivation of the defendant's legal right to remove the case into this court.

The foregoing is not the reasoning of my own mind, nor in line with previous decisions of this court, but accords with what I now understand to be the law as it has been declared by the highest authority. The decisions of this court and of the circuit court of appeals for the Ninth circuit in the case of *McFadden v. Milling Co.* (C. C.) 87 Fed. 154, and *Id.*, 38 C. C. A. 354, 97 Fed. 671, were reversed, on the question of jurisdiction, by the supreme court (180 U. S. 533, 21 Sup. Ct. 488, 45 L. Ed. 656); and the decision of this court in the case of *Wood v. Drake*, 70 Fed. 881, was in effect overruled by the supreme court in the case of *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738, 42 L. Ed. 76. The case of *Railway Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79, was an action to recover compensation for a right of way through unpatented public lands of

the United States, to which Ziegler, the plaintiff in the case, claimed the rights of an owner under the pre-emption law; the railway company having appropriated the right of way without the plaintiff's consent. The supreme court decided that this court rightfully exercised jurisdiction in that case, although the complaint failed to allege that there was any disputed question of federal law to be decided, or that the case involved any controversy based upon conflicting claims under the laws of the United States. The opinion of the court placed the decision upon the ground that the complaint was aided by the court's judicial knowledge of the act of congress granting rights of way to railway corporations, and by presuming that the defendant would claim the right of way by virtue of the said act of congress, and the complaint, being thus aided by judicial knowledge and presumptions, "did disclose a cause of action arising under the laws of the United States, and cognizable by the circuit court." That decision of the supreme court, therefore, seems to support the defendant's contention in this case, for I am not able to distinguish this case in any such way as to avoid the principle of that decision, viz., that the court should take into account the public statutes of which it has judicial knowledge, and that the case disclosed by a plaintiff's statement is what it appears to be when viewed in the light of the court's judicial knowledge. But on the other hand, I am not able to distinguish this case from the later case of *Milling Co. v. McFadden*. The opinion in that case plainly says that the circuit court must not make a plaintiff's case other than he has made it, by taking judicial notice of facts which he did not choose to rely on in his pleading, and that the right to remove a case commenced in a state court to a United States circuit court must be tested by the rule that a case is not cognizable in a United States circuit court unless it appears by the complaint that a federal question is "directly involved, so that the state court could not have given judgment without deciding it. * * *" I have already shown that by application of that test this case is excluded from the cognizance of this court.

Case remanded.

THE McCALDIN BROTHERS.

(District Court, E. D. New York. July 24, 1902.)

1. COLLISION—MOORED VESSELS—FOG.

The tug *Stone*, with three scows, was passing out from North river to the dumping grounds, when she was compelled, by a dense fog, to seek refuge, and made the scows fast to the breakwater on the Brooklyn shore. While there, the tug McCaldin Brothers, also seeking a place of safety, and making her way along the breakwater, came into collision with and injured one of the scows. She was going at such speed that she was unable to stop after coming near enough to see the dock. She was blowing fog signals as she approached, but the *Stone*, which lay alongside, but a little back of, the scow, made no response, and took no steps to make known her presence or that of her tow. The place was one where it was customary for vessels to find refuge in such weather.

¶ 1. Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.

Held, that both tugs were in fault,—the Stone for failing to ring her bell or otherwise answer the fog signals of the McCaldin Brothers, which she must have known was approaching, and the latter for excessive speed under the circumstances.

In Admiralty. Suit for collision.

Peter S. Carter, for libelants.

James J. Macklin, for claimant.

THOMAS, District Judge. On February 9, 1900, about 4 o'clock in the morning, the steam tug Stone took three scows on a hawser from Forty-Seventh street, North river, to tow them to the dumping grounds. Upon arrival near the Battery, a fog suddenly arose, and was of such a nature that the tug landed the scows at the breakwater or seawall at Merchants Stores, Brooklyn, in such a manner that scows Nos. 5R and 6R were headed downstream, while scow No. 10R, headed upstream, lay alongside the wall, the tug being on her port side, with her bow some 40 feet aft of the bow of 10R. In this position the scows lay, unable to go to sea. At about half past 9 in the morning the steam tug McCaldin Brothers, having shortly before left her dock in the Atlantic Basin, was making her way along the docks for the purpose of going into Erie Basin, with an alleged speed of about $2\frac{1}{2}$ miles an hour, and came onto the bow of No. 10R, breaking in the heavy forward beam, and doing the injury for which the libel is filed. The fog was so dense that the McCaldin Brothers did not see the dock until she was within about 40 or 50 feet of it, whereupon she reversed her engines, but her headway was not stopped before the contact. Hence her speed was such that she could not be stopped if she came upon another vessel, or probably the dock itself. Although the captain and some others of the crew were in the pilot house of the Stone, they were utterly oblivious and indifferent. They gave no signals, by bell or otherwise; made no effort to discover vessels that might be approaching the dock, or to give warning of the presence of the tow; and this condition had lasted for about $5\frac{1}{2}$ hours. The McCaldin Brothers was blowing fog whistles as she approached, but received no response from the Stone. The scows lay so low in the water that they were less easily discoverable, and, if anything could be seen, it was the smokestack of the Stone, which, as already stated, was some 40 feet abaft the upper end of the scow. But the density of the fog was such that it is doubtful whether the Stone could have been seen until about the time of the collision. Considering the density of the fog, the necessity of the Stone and her tow and the McCaldin Brothers to find refuge, the fact that the scows, heavily loaded, lay low in the water, so that they could not be seen at other than a nearby point, that the McCaldin Brothers was advancing at a speed that precluded her stopping when obstructions came in view, and that the tide was slightly ebb, the question is, was the speed of the McCaldin Brothers negligent, and should those on the Stone have taken notice of the McCaldin tug's fog signals? In *The Albany* (D. C.) 91 Fed. 805, it was held that the ferryboat Albany was negligent because, with too great speed, she approached the pier where a cattle boat was tied up, and that the cattle boat was not in fault in fail-

ing to give signals, as she had no occasion to expect other vessels at that point. In *The Granite State*, 3 Wall. 310, 18 L. Ed. 179, it was determined that, where a barge was fast to a wharf, out of the track of other vessels, and moored, as regards place and signals, or want of them, according to the port regulations, and a steamer navigating a channel of sufficient width for her to move and to stop at pleasure collided with the barge, the steamer was solely liable for the damage thus done. The facts of the case in some respects were very similar to those of the case at bar. The collision took place at night, between a steamer and a barge lying low and concealed in the water; but there is one broad distinction between the cases. In the present case the tow was made fast to the breakwater at Merchants Stores, because it was a customary place of refuge; and there was every reason to expect that, with the fog, other vessels would seek safety at or near the neighborhood of that point, making their way along the breakwater, guided by the loom of the dock. The McCaldin Brothers was doing this very thing. She was in trouble on account of the dense fog. She was sounding her fog whistle to protect herself and others, and in her helplessness, as regards the discovery of objects, the most ordinary care required that the *Stone* should exhibit some slight pains to warn the McCaldin Brothers and guard herself. It is not intended to decide that the *Stone* should have continued to ring a bell, or give signals of any kind, but that she should have responded to the nearby signals of the McCaldin Brothers by ringing a bell. With three large scows, the *Stone* was in the very way of incoming vessels, and the warnings of the approaching McCaldin Brothers must have been heard; yet those in the pilot house of the *Stone* did not use the slightest semblance of care, but remained in a state of indolence and inattention, dangerous to all. Nor does it seem that there was necessity for the McCaldin Brothers to approach the dock at the speed at which she was going, even though it was no more than $2\frac{1}{2}$ miles an hour. Her master knew, or should have known, that he was in very close proximity to the dock. In fact, he saw the loom of the dock when he was some 40 or 50 feet away from the scow, and, as the blow was head on, the tug must have been very nearly parallel to the breakwater. It is urged that the bow of the scow was heading into the stream, but it is quite improbable that the scow made much departure from the line of the breakwater. Experience teaches that tugs approach docks at very much more moderate speed than the McCaldin Brothers was observing, and it comes frequently to the attention of the court that tugs hold themselves with little or slight motion for a considerable time, on such a tide, in proximity to the face of the pier; and there is no doubt that the McCaldin Brothers could and should have approached with less speed.

The owners of the *Stone* have been brought in under the fifty-ninth rule. It is determined that the libelants should have a decree for their damages against the tug McCaldin Brothers, and also against the owners of the *Stone*, and that each party defendant should bear one half of the damages and costs.

STEWART v. WISCONSIN CENT. RY. CO.

(Circuit Court, N. D. Illinois. March 27, 1902.)

No. 23,065.

1. RAILROADS—CLAIMS AGAINST RECEIVERS—JURISDICTION TO ENFORCE AGAINST PURCHASER.

A federal court, which has sold railroad property in foreclosure proceedings, requiring the purchaser to assume and pay such claims against its receivers as it might subsequently direct, and reserving the right to retake and resell the property in default of such payment, has exclusive jurisdiction to enforce such requirement; and the purchaser has the right to invoke such jurisdiction for his protection against actions in a state court on claims against the receivers.

2. FEDERAL COURTS—INJUNCTION TO STAY PROCEEDINGS IN STATE COURT.

Rev. St. § 720, does not prevent a federal court from granting an injunction to stay proceedings in a state court for the protection of its own previously acquired jurisdiction.

In Equity. Upon petition of the Wisconsin Central Railway Company, purchaser of the line of railway of the defendant company under decree of foreclosure, to enjoin Peter Welgos from the prosecution of his suit against the purchaser, in the circuit court for the county of Cook.

JENKINS, Circuit Judge. By decree of May 30, 1899, the entire property of the defendant company was directed to be sold, and was sold on July 7, 1899, to the petitioner, the Wisconsin Central Railway Company. The sale was confirmed, and the purchaser entered into possession on July 18, 1899, and has since continued in possession. The decree provided that the purchaser should assume any unpaid indebtedness or liability of the receivers incurred in the management and operation of the railroad since September 27, 1893, and, upon refusal to pay any such indebtedness or liability established, the court, upon the petition of the claimant, would enforce the claim against the property, and for that purpose jurisdiction of the cause was retained, and the right reserved to the court to retake and resell the property to compel payment of such claims. The decree also provided for the giving of notice to all claimants to prove their claims before the circuit court within a time specified, of which notice was to be given, and which time, it is said, expired on February 15, 1900.

Peter Welgos received injuries through the operation of the railway by the receivers on July 1, 1898, and on the 28th of November of that year brought suit against Whitcomb and Morris, the receivers, in the superior court of Cook county, to recover therefor. This cause was removed into the circuit court for the Northern district of Illinois, and was tried to a jury, and upon the trial a request for a nonsuit was allowed. On December 27, 1899, after confirmation of the sale, Welgos commenced another action in the circuit court of Cook county, against the receivers, the Chicago Terminal Transfer

† 2. Restraining proceedings in state courts, see notes to *Garner v. Bank*, 16 C. C. A. 90; *Trust Co. v. Grantham*, 27 C. C. A. 575.

Railroad Company, the lessor of the Wisconsin Central Company, the Wisconsin Central Company, the Wisconsin Central Railway Company, the purchaser, and the Wisconsin Central Railroad Company, charging all such defendants with the ownership of the track, and the use, occupation, and management of the road, and that the injury was caused by the negligence of the employés; and service of process on January 6, 1900, was made upon the Wisconsin Central Railway Company alone. The Wisconsin Central Railway Company now moves the court for an injunction restraining the prosecution of that suit against it.

The purchasing company took this property discharged of all claims against it save as expressed in the decree of sale. The receivers were not formally discharged upon confirmation of the sale and delivery of possession, because such discharge might abate suits pending against them; but they were practically discharged except for that purpose, and for the purpose of accounting. Their management of the property then ceased. As against the purchaser, the court reserved the right to retake and resell the property in default of payment of such claims against the receivers, which the court might adjudge and direct to be paid, and there was appointed a method by which all such claims should be marshaled, adjusted, and determined. Manifestly the federal court, which rendered this decree, and so reserved jurisdiction, alone could retake and resell this property, and alone could order payment of any adjudged claim.

It is said that one may not be enjoined from prosecuting his suit by reason of section 720, Rev. St., which provides as follows:

"The writ of injunction shall not be granted by any court of the United States to stay the proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It may not be denied that the language of this statute is quite comprehensive; but the statute is only declaratory of that comity which has always prevailed,—that one court will not invade the jurisdiction of another, or interfere with the proceedings of the court whose jurisdiction first attached. The statute does not, however, apply to proceedings incidental to jurisdiction previously acquired by a federal court for other purposes than that of enjoining proceedings in a state court. It is to be remarked that this court had jurisdiction to establish this claim, and so had when the suit in the state court was commenced, and would not by its injunction invade a jurisdiction already acquired by a state court; that the railway company, by its purchase, became a party to this suit, is bound by the decree, and has a right to have its provisions enforced in its behalf; and by the injunction asked for the court would only be protecting its own jurisdiction. In *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 354, the supreme court said:

"A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court."

And it has been uniformly ruled by the federal courts that in such a case as this the statute does not apply. *Jessup v. Railroad*

Co. (C. C.) 44 Fed. 663; Central Trust Co. v. St. Louis, A. & T. R. Co. (C. C.) 59 Fed. 385; Terre Haute & I. C. R. Co. v. Peoria & P. U. R. Co. (C. C.) 82 Fed. 943; Fidelity Ins., Trust & Safe-Deposit Co. v. Norfolk & W. R. Co. (C. C.) 88 Fed. 815; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C.) 110 Fed. 10; Garner v. Bank, 16 C. C. A. 86, and notes (s. c. 67 Fed. 833). This doctrine is established in this circuit by the ruling of Judge Grosscup in *Terre Haute & I. R. Co. v. Peoria & U. R. Co.* (C. C.) 82 Fed. 943, and must be held to be the law of this court. The cases of *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345, and *Sargent v. Helton*, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412, relied upon by the respondent, are not considered applicable, for the reason that the state court in each of those cases had acquired jurisdiction of the subject-matter of the suit before jurisdiction had been taken by the federal court. Here, jurisdiction had been acquired over the estate in the federal court before any suit in the state court; and the federal court, and the federal court alone, had the power under its decree to establish claims against the property sold, and to retake from the purchaser, and to resell, the property acquired by it under the decree.

The petition must, therefore, be allowed.

WALKER et ux. v. WILMINGTON STEAMBOAT CO.

(Circuit Court, E. D. Pennsylvania. August 22, 1902.)

No. 11.

1. INJURY TO PASSENGER—NEW TRIAL—VERDICT CONSISTENT WITH EVIDENCE.

In an action for an injury to a passenger on a steamboat, resulting from its running into the dock through the refusal of the port reversing engine to act, evidence examined, and held not to so far sustain the burden cast on the carrier of explaining the accident and relieving itself of the imputation of negligence as to require the setting aside of a verdict for plaintiff and the granting of a new trial.

Rule for New Trial.

Action at law for damages brought by Andrew C. Walker and Martha, his wife, against the Wilmington Steamboat Company for injuries received by the wife while a passenger on board one of the boats of the said company. The plaintiffs were returning from an excursion on board the *City of Trenton*, a steamboat operated by the defendant company between Trenton and Philadelphia; and as the boat was about to make a landing at the dock in the latter place, instead of stopping as it should, it ran into the bulkhead on shore with such severity as to stove in the bow of the boat. Mrs. Walker at the time was descending the main stairway from the upper deck, and was thrown violently forward by the shock, causing, as it was claimed, severe and more or less permanent bodily injuries. It was shown on behalf of the defendant that the *City of Trenton* was a new boat, built and equipped by builders of the best reputation, and fully provided with all the best-known machinery and appliances, and that before being put in commission, but a short time previous, it had been thoroughly inspected and tried. When the accident occurred the boat was in charge of a skillful pilot, who gave the proper directions and signals in order to make a safe landing. The engineer testified that the boat did not stop because the port reversing engine refused to act when he gave it steam. Anxious to know what was the difficulty, he said that he examined the engine immediately afterwards, and upon taking

apart the choke or cushion valve, through which the steam from the cylinder exhausted, he found a small piece of soft-rubber packing clogging the valve and preventing the exhaust. To this he attributed the refusal of the engine to respond. Upon cross-examination he further testified, however, that he found one of the jam nuts on the piston rod slack; it was not enough to notice with the eye; he detected it with his fingers, and tightened it with a slight turn of the wrench. It was not sufficient, according to his statement, to have interfered with the working of the machine. It was further shown that the rod or link was lengthened or shortened by a sleeve nut which was held in place by a jam nut above and below; if, after the rod was properly adjusted, it was lengthened or shortened, the operation of the engine would be interfered with. But it was testified by other witnesses, who were expert engineers, that one jam nut was sufficient to hold the sleeve nut in place, the second nut being merely for additional security. The jury found a verdict in favor of the husband for \$1,000, and \$3,000 for the wife, and, in response to questions submitted by the court, made answer as follows: "Q. 1. What was the cause of the accident complained of in this case? A. Failure of the port reversing cylinder to reverse the port engine. Q. 2. Was the accident due to any want of care on the part of the defendant? A. Yes. Q. 3. If you answer 'Yes' to the last question, what want of care was there? A. As a skillful and competent engineer, lack of proper attention to careful examination of the engines, appliances, and operation of the same, under his charge. Q. 4. Was the accident caused by anything which could have been foreseen and prevented by the defendant by the exercise of due care? A. Yes." Defendant moved for a new trial on the ground that the verdict was not consistent with the evidence.

J. H. Backes and Alfred E. Peterson, for the rule.
Eugene Raymond, opposed.

ARCHBALD, District Judge (after stating the facts as above).¹ Although the defendant company was not an insurer of the safety of its passengers, the burden of explaining the accident and relieving itself from the imputation of negligence was necessarily upon it, and it was for the jury to say whether it had done so. According to the testimony of the engineer, the immediate cause of the accident was the refusal of the port reversing engine to act when he gave it steam in response to the signal from the pilot as the boat approached the dock. This, as he claimed, was due to a small piece of soft-rubber packing, which, upon examination immediately afterwards, he found lodged in the choke or cushion valve, choking the exhaust. He admitted, however, that in the course of the same examination he discovered a jam nut slack, which he said he tightened with a slight turn. The purpose of these jam nuts is to prevent the loosening of the sleeve nut which regulates the length of the links or rods. If the links are too long or too short, the engine will not work; and it was the theory of the plaintiffs' counsel that that was the cause of the accident, and not what the engineer attributed it to. It was testified by the engineer that jam nuts may be loosened from vibration, and have to be examined from time to time. But there are two of them,—one above and one below the sleeve nut; and it was contended on the part of the defendant that, as testified by some of the witnesses, the loosening of a single one would have no possible effect. On the other hand, if I understood it aright, there was a physical demonstration to the contrary in the presence of the jury, with a link or rod produced from a similar en-

¹ Specially assigned.

gine. The jury, in answer to a special question put them by the court as to what want of care there was, if there was any, substantially found that there was a lack of proper attention on the part of the engineer to carefully examine the appliances and operation of the engines under his charge. This necessarily negated the theory that a piece of packing got caught in the choke valve, because admittedly that was not a matter that could have been discovered by any outward inspection, however complete. The jury plainly did not believe the testimony of the engineer to that effect, and it must be confessed that there was considerable to discredit it. The only question, then, is whether the cause of the accident as given by the jury was consistent with the evidence, and warrants the verdict which they have rendered. It is said that there were several practical engineers in that body, and one member who was in the rubber-packing business, and that they were therefore peculiarly fitted to dispose of the case. But be that as it may, I am not prepared to disturb the result. It was not for the plaintiffs to furnish a theory that would account for the accident, but for the defendant to show that it came from something which could not reasonably have been prevented. Even if there was nothing to contradict the evidence produced by the company to show that it had performed its duty, it would still have been for the jury to say whether they were satisfied with it; and there can be no just cause for complaint if they have rejected some of the facts testified to, and given a significance to others which fails to exonerate the company, provided only that it is consistent and warranted. While it is true that the engineer said the jam nut was not loose, but only slack, and was tightened with a slight turn, it may be fairly questioned whether, in the effort to clear himself from blame, he did not very much minimize the matter. These nuts, as he said, needed to be examined once or twice a day; and, if so, there would also seem to be a much greater importance in keeping them tight than the defendant's witnesses are inclined to concede. And if to this we add the demonstration in the presence of the jury, to which I have referred,—that a single jam nut will not keep the sleeve nut in place,—and the undoubted effect on the working of the engine from the lengthening or shortening of a link, we have not a little to sustain the conclusion reached by the jury that the loose jam nut was the source of the accident, and not a piece of loose packing in the choke valve, in which they did not believe.

The rule for a new trial is discharged.

In re EISENBERG.

(District Court, S. D. New York. September 24, 1902.)

1. **BANKRUPTCY—PERSON ENTITLED TO BENEFIT OF STATUTE—INSANE PERSONS.** Bankr. Act, § 4a, declares that any person who owes debts, except a corporation, shall be entitled to the benefits of the act, as a voluntary bankrupt; and section 59a provides that any qualified person may file a

¶ 1. What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

petition to be adjudged a voluntary bankrupt. *Held* that, as an insane person is disqualified from performing the duties and assuming the burdens and obligations which accompany the benefits to be derived from the bankrupt act, he was not a qualified person, entitled to the benefits thereof.

In Bankruptcy.

Edward Kaufmann, for petitioner.

Blumenstiel & Blumenstiel, for creditors.

ADAMS, District Judge. This is the return of an order to show cause why some of the creditors of a lunatic should not be restrained from prosecuting certain actions at law now pending in the courts of the State of Maryland against the committee of the person and estate of the alleged bankrupt, wherein the sum of \$800 belonging to the estate of the alleged bankrupt has been attached.

The committee, Abraham H. Eisenberg, who was appointed by order of the Supreme Court of this state on the 23rd day of July, 1902, filed the petition in bankruptcy on behalf of the lunatic, and an ex parte adjudication made in the ordinary course, but now the attaching creditors appear specially and claim that the court did not have jurisdiction to entertain the petition and make the adjudication.

The question presented is apparently a novel one, no authorities having been found which pass upon it. No direct provisions were made in the Act for proceedings by or against lunatics excepting under section 8 where it is provided that the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane.

It is provided in section 4a, that any person who owes debts, except a corporation, shall be entitled to the benefits of the Act as a voluntary bankrupt, and such general language would seemingly include the case of a lunatic, but a later section (section 59a) provides that any qualified person may file a petition to be adjudged a voluntary bankrupt, and the broad language of the earlier section is thus limited in a manner which would apparently exclude a lunatic, who manifestly is not qualified to perform the duties and assume the burdens and obligations, which accompany the benefits to be derived from the Act. For example, a primary requisite on the part of those seeking the aid of the Act is their willingness and ability to surrender all their property for the benefit of their creditors and it would be obviously impossible for a person non compos mentis to make a valid surrender. And it would be equally impossible for his committee in this case to make such a surrender because the title, under the laws of New York, remains in the lunatic, the committee being merely a bailiff to take charge of the lunatic's property and administer it subject to the direction of the court appointing him. In *re* Otis, 101 N. Y. 580, 5 N. E. 571; *Pharis v. Gere*, 110 N. Y. 336, 18 N. E. 135, 1 L. R. A. 270; In *re* Strasburger, 132 N. Y. 128, 30 N. E. 379; *Kent v. West*, 33 App. Div. 112, 53 N. Y. Supp. 244. The lunatic, moreover, evidently could not perform the duties devolved upon him by section 7 of the Act, nor be subjected to ne exeat or

contempt proceedings, and the committee obviously could not properly be substituted for him in any of these or other matters which would demand the personal attention or responsibility of a bankrupt.

In the English Bankruptcy Acts, special provisions have been made with respect to proceedings involving the estates of lunatics, yet the administration of the law has been beset with difficulties and doubts still exist with respect to the validity of adjudications against lunatics. Williams, Bankr. Prac. (7th Ed.) pp. 5, 61, 350, 370, 440, 457, 458. In *Re Farnham* [1895] 2 Ch. Div. 799, decided in 1895, it was assumed, for the purpose of disposing of a property question, that the lunatic had been validly adjudicated a bankrupt. That was an involuntary case in which an adjudication was made after the lunacy was found by inquisition. In considering the matter, the court said that the trustee in bankruptcy took the estate subject to the powers of the judge in Lunacy under the Lunacy Act of 1890. That Act conferred upon the judge similar powers with respect to the lunatic's estate to those conferred by statute upon the Supreme Court of this state, which appointed this committee and, by analogy, as the property here remained in the possession of the Supreme Court of the state and the committee was only its agent, not the agent of the lunatic, no proper action could, in any event, be taken without that court's direction, which would defeat this committee's action. I do not think, however, that the decision need rest upon the absence of such direction.

It must be assumed that Congress was familiar with the difficulties that would be encountered by the courts in attempting to administer in bankruptcy the affairs of lunatics and did not intend to include cases other than those mentioned in section 8 where provision is made for the continuance and settlement of estates of which the courts had acquired jurisdiction before the insanity occurred.

I conclude that the court did not obtain jurisdiction in this matter and that the adjudication must be set aside and the motion for the restraining order denied.

CHAMPLAIN CONST. CO. v. O'BRIEN et al.

O'BRIEN et al. v. CHAMPLAIN CONST. CO. et al.

(Circuit Court, D. Vermont. July 22, 1902.)

In Equity. On settlement of decree. For former opinions, see 104 Fed. 930, 107 Fed. 333, 117 Fed. 271.

WHEELER, District Judge. The parties have been heard upon settlement of the decree as to items which might be thought to have been overlooked, and upon exhibits filed with the clerk as a part of the record by leave of court. The 5 cents per yard of rubble embankment to be paid by the defendant Clement should be for 941,403 yards, amounting to \$47,070.15, instead of for 1,016,125, as amounting to \$50,806.15, which were wrong figures, taken from an erroneous

exhibit. McHale & O'Connor were subcontractors for masonry at same prices. They had done work prior to September 1, 1900, amounting to \$54,398.70, for which they had been paid 90 per cent. by the contractors, and on which 10 per cent., amounting to \$5,439.87, had been reserved by the company. The September estimates had not been paid, either by the company to the contractors, or by the contractors to them, when the work was taken over October 12th, and the company made a contract directly with them for continuing their work to include that done in September and after, and estimates and payments were made directly to them for such work, notwithstanding a letter, in the nature of objections, of October 20, 1900, not produced, and shown but by a letter from the company to the contractors of October 22d, which is one of the exhibits filed with the clerk. By a letter to the treasurer of the company, the contractors withdrew all objection to payment of the 10 per cent. reserved on work before September to these subcontractors, whereupon that amount was paid to them, and they, by a general release, also filed as an exhibit with the clerk, discharged the company from all claims. The estimates to these subcontractors under the new contract are said to be included with the final estimate as of October 12th to the contractors, and therefore it is claimed that the amounts paid thereon to these subcontractors should be treated as payments to the contractors. The 10 per cent. reserved on work before September was so paid upon the direction of the contractors that apparently it should be treated as a payment to them. What was estimated to them, under the contract, up to October 12th, accrued to and was due to them, and the company had no right to make, and could not discharge itself by, payment to any one else, especially after notice to the contrary. The subcontractors are not parties here, and matters between them and the contractors, or between them and the company, cannot be adjusted or passed upon without them.

Allusion has been made to a supposed error in respect to use of dump cars mentioned before as deducted from estimates, as if the company was left without the credit of half their value for the use. But the treasurer charged the use against cash payments, and what was so charged too much is corrected by deduction from the payments, leaving the right amount included in the payments allowed and reckoned. The charges against the contractors were not committed to the discretion of the chief engineer.

O'Brien has testified that when he was complaining to the president and chief engineer about the measurement of the rubble embankment, he said: "Mr. Clement, I will put a gang of men on there, and if I can find that there is more due us than what you have allowed, I shall insist in your paying for the engineers," and that Mr. Clement said: "I will pay for the engineers any way you put them on," and that he put on engineers under that arrangement, resulting in the joint measurement and increased allowance by the chief engineer. The contractors claim that these engineering expenses have been overlooked, and should be allowed. They were not work done under the contract, nor extra work directed by the chief engineer, or reported for the ensuing estimates as such, according to the contract.

If anything, it was a personal agreement by the defendant Clement. There is no allegation in the bill as to this, as there is in respect to the agreement by him to pay 5 cents per yard additional on the rubble embankment, on which issue was joined by denial in the answer, but it is a mere incidental statement in the testimony as to how the joint measurement came about and was carried on. There is nothing in the case as it stands to apply the testimony to.

Some other claimed corrections of the contractors are covered by the chief engineer's estimates under the contract, and some are for extra work not ordered by him, or reported to him according to the contract. Some stone and stone cutting claimed for may belong in the subsequent estimates to McHale & O'Connor, and some allowances claimed by the company are not made to appear to be other than those deducted by the treasurer from payments made upon the estimates, or those before allowed. The correction indicated would seem to make the result as near right as practicable upon the case as presented. They increase the net payments to \$790,333.13, and leave due from the company, \$112,624.62, and from defendant Clement, \$47,070.15, as of October 12, 1900, and from the company for use of plant, \$30,000, as of July 3, 1900, when delivery of it over commenced.

Decretal order modified accordingly.

In re HINES.

(District Court, S. D. West Virginia. August 18, 1902.)

1. **BANKRUPTCY—COSTS—EXEMPTION.**

Bankr. Act 1898, § 36, providing that the act shall not affect an allowance to bankrupts of the exemptions allowed by the state statute, does not authorize the retention of such exemptions against the court costs in voluntary bankruptcy; section 51, cl. 2, requiring the collection of fees of the clerk, referee, and trustee before filing of the petition, except on a showing in voluntary bankruptcy that petitioner is without, and cannot obtain, the money with which to pay such fees.

On July 1, 1902, Floyd O. Hines filed a petition in bankruptcy in the office of the clerk of the district court for the Southern district of West Virginia, accompanied by an affidavit of his inability to pay the costs. "Schedule B (2)," filed with petition, showed that said Hines had personal property of the value of \$77, including \$5 in cash, and \$20 in cash in the hands of the Chesapeake & Ohio Railway Company, due him as wages. He exempted this personal property, including the \$5 cash in his hands and the \$20 in the hands of the Chesapeake & Ohio Railway Company. On July 22, 1902, the referee, R. M. Baker, made a ruling, holding "that a bankrupt cannot exempt as against the costs of the clerk and referee and other court costs, and any money he has should be applied first to the payment of the costs of the bankruptcy proceedings before taking out the amount of exemptions claimed, especially where the exemption claimed is in money." And the question thus decided by the referee was certified to the judge for his opinion.

KELLER, District Judge (after stating the facts as above). Section 6 of chapter 3 of the bankruptcy act provides that "this act shall not affect an allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." It seems clear that the provision of this section was intended to protect property and effects in the hands of the bankrupt, to the extent provided by the exemption laws of the state wherein was his domicile, against the claims of creditors which might be filed in the bankruptcy proceedings. It does not appear to be reasonable to hold that such exemptions may be retained as against the actual and necessary court costs of the bankruptcy proceedings, initiated by the voluntary filing of a petition by such bankrupt. Not only does this seem unreasonable, but the words of the act itself seem clearly, to my mind, to negative any such construction of the section above quoted.

Section 51, in speaking of the duties of clerks, provides as follows:

"* * * (2) Collect the fees of the clerk, referee and trustee, in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees."

A fair construction of the above language indicates that it was the intention of the act to allow voluntary bankrupts to file their petition without the payment in advance of the fees therefor, only in case they did not have, and could not obtain, the money with which to pay such fees. In other words, if the bankrupt was absolutely without money or effects of any kind, but was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees. This is a matter which has been decided by several different district courts, and the following authorities are cited; *In Re Collier* (D. C.) 93 Fed. 191, it was held that an affidavit of inability by the petitioner to pay the fees is not conclusive of his poverty; and, if circumstances appear casting doubt upon the truth of the affidavit, the question may be sent to the referee, to investigate and report the facts as to petitioner's ability to deposit the fees. Also "a person employed by a railroad company at a salary of \$30 per month, such salary being exempt from execution by the laws of the state, is not entitled to take the benefit of the bankruptcy law without depositing the fees required by the act, on an affidavit that he cannot obtain the money with which to pay such fees; and his petition will be dismissed unless the fees are deposited within a reasonable time. The exemptions allowed by the act do not excuse the payment from them of the fees of the bankruptcy court." *In Re Bean* (D. C.) 100 Fed. 262, it was held that "the liability of a voluntary bankrupt to pay the fees required by Bankr. Act 1898, § 51, cl. 2, does not depend upon his having property which is not exempt, but he is excused from such payment only in case of absolute inability. He may be ordered to pay such fees out of pension money remain-

ing in his hands at the time of filing petition." "The exemptions allowed by the law do not excuse the payment from them of the fees of the bankruptcy court, so as to permit the suit to proceed on an affidavit of inability to advance the costs, as required." Branden. Bankr. (2d Ed.) p. 145, § 26. These authorities are abundant to show that the holding of the referee in this case is correct. The petitioner is not a pauper in the sense of the bankruptcy act. Exemptions allowed by the statute were not intended to cover exonerations from the payment of the fees provided for the court officers by that act. Having held that the statute does not confer upon a voluntary petitioner in bankruptcy the unqualified right to proceed upon his own affidavit as to his poverty, it follows that if, from the schedule filed by such petitioner, facts appear which are at variance with such affidavit, an order should be made requiring the bankrupt to deposit such fees before proceeding further with the case.

The ruling of the referee herein is approved in full.

In re YOST.

(District Court, M. D. Pennsylvania. October 13, 1902.)

No. 118.

1. BANKRUPTCY—FRAUDULENT CONVEYANCE—EXEMPTION.

A bankrupt, while in failing circumstances, disposed of all his valuable assets, receiving a judgment note for part of the consideration. A judgment was entered on the note a few days after it was given, and the judgment was transferred to another on the record. Thereafter the bankrupt made an assignment for the benefit of creditors, and then attempted to discount the judgment so previously assigned, stating to the attempted transferee that he was afraid the original transfer would not stand, and that, while the assignee of the judgment had paid over the money, it was withheld so that if the bankrupt's creditors got hold of it it was to be refunded, otherwise the bankrupt was to have it. *Held*, that the original transfer of the judgment was fraudulent and void as to creditors of the bankrupt, and hence he was not entitled to his state exemption.

In Bankruptcy. Exceptions to report of referee allowing exemption.

Henry P. Fletcher, for exceptions.

W. R. Keefer and Geo. W. Atherton, for bankrupt.

ARCHBALD, District Judge. This record is in rather an unsatisfactory shape. The referee has found no facts, and I have therefore to pass upon the evidence which has been returned by him, without any knowledge of the witnesses by which to judge of their credibility. The exceptions to the allowance of the exemption are based on the alleged fraudulent transfer by the bankrupt of certain of his property just prior to the time he was put into bankruptcy. It seems that on December 19, 1901, being in failing circumstances, he disposed of all his available assets, and, among other things, of the machinery in his mill, to U. G. Stover for \$650. Of this \$300 was paid in cash, and a judgment note for \$350 given for the balance.

which was made payable April 1st following. Judgment was entered in the common pleas of Franklin county on this note a few days afterwards, and on December 24th it was transferred of record to Joseph E. Lehman. It is claimed that this transfer was colorable and fraudulent, with the design on the part of Mr. Yost to put the note out of the reach of his creditors. As evidence of this the testimony of Mr. Stover is relied upon. He states that about the 1st of January, after the date of the assignment made by Yost under the state law for the benefit of creditors, Yost came to him, and asked him to discount the note, saying that he wanted to get the money to go away, and offered to throw off \$15. Stover asked whether it had not been assigned to Lehman, and Yost said that it had been, but he was afraid the transfer would not stand; that while Lehman had paid over the money it was withheld, so that, if his creditors got hold of it, it was to be refunded, and, if not, he (Yost) was to have it. On the other hand, Mr. Keefer, who was Yost's attorney, testifies that at the time of the transfer to Lehman he paid Yost for Lehman \$250 in cash, and retained the other \$100 to apply on an indebtedness which Yost owed him (Keefer), thus making up the \$350, the face of the note. Neither Lehman nor the bankrupt was called to give his version of the transaction, so that the evidence of Mr. Keefer is the only attempted contradiction of Stover. But it does not necessarily do so. There is in fact no great difficulty in reconciling the two. Admitting that the money was paid over as Keefer testifies, yet, if it was paid with the understanding that if the assignment to Lehman was avoided by creditors the money would be refunded, the transfer was not absolute, but conditional, and the validity of the arrangement is open to question.

The mere fact that the bankrupt while in failing circumstances disposed of this and other of his assets does not necessarily impress upon the transaction the stamp of fraud. As I had occasion to point out in *Githens v. Shiffler* (D. C.) 112 Fed. 505, a fair and open disposition by a man of his property is not necessarily fraudulent, although it may incidentally have the effect of leaving nothing which creditors can get hold of, and even though it was made for the purpose of preferring some obligations rather than others. It is only where the intent is to get the property out of the reach of creditors that it is void at law as well as by the statute of Elizabeth.

Notwithstanding this saving observation, however, I cannot escape from the conclusion that the transfer in the present instance was colorable only, and therefore covinous. Not only do we find the bankrupt dealing with the note as his own, and attempting to arrange with Stover for its payment at a discount, after it had been apparently assigned to Lehman, but we have his admission, according to the testimony to which I have alluded, that there was a special arrangement with regard to it, by which, although Lehman had paid over and parted with the face of the note (\$350), the money was so held that he would get it back if creditors successfully attacked the transfer, while if it escaped them it was to go to Yost. If the parties themselves had such doubts about the validity of the transaction that they found it necessary to so provide, how much

more may we? If made in good faith and for a valuable consideration, there was no need of any further stipulation with regard to it. But when the possibility of its being challenged by creditors is recognized, and the money is to be so held by some one that it is to belong to neither party until that question is disposed of, it is difficult to see how we can regard it as other than an attempt to put out of the reach of creditors, for the benefit of the bankrupt, an available asset, not yet due, which would otherwise go to them. This made it fraudulent, even though based on a full consideration. *Ferris v. Irons*, 83 Pa. 179. If it had been shown that the doubts which the parties experienced had reference to the legal authority of Yost to transfer the note in view of his failing circumstances and the somewhat stringent and not altogether understood provisions of the bankrupt law, a different question might be presented. But as it is I must regard the assignment as a fraudulent disposition of property by the bankrupt which forfeits his right to the exemption otherwise given him by the state law. *Huey's Appeal*, 29 Pa. 219; *Imhoff's Appeal*, 119 Pa. 350, 13 Atl. 279; *In re Kreider's Estate*, 135 Pa. 578, 19 Atl. 1073.

The exceptions are sustained, the report of the referee is set aside, and the case sent back, with instructions to disallow the exemption claimed by the bankrupt.

In re DUBLE et al.

(District Court, M. D. Pennsylvania. September 26, 1902.)

No. 132.

1. BANKRUPTCY—CLAIMS FOR RENT IN PENNSYLVANIA—DISTRRAINT—EFFECT—CUSTODIA LEGIS.

Where, at the time of the failure of a bankrupt firm, it owed more than a year's rent, and after the firm had been adjudged a bankrupt, but before the selection of a trustee, the landlord distrained for the full amount due, she was not entitled to a preference out of the proceeds of the bankrupt estate by reason of such distraint proceedings, since at the time they were begun the property was in custodia legis, but was confined to the year's rent given by the Pennsylvania statute in case of an execution.

In Bankruptcy.

T. M. B. Hicks, for exceptions.

E. C. Duple, opposed.

ARCHBALD, District Judge. The bankrupts at the time of their failure occupied the store where they were doing business at a rent of \$1,500 a year, payable quarterly, and on January 1, 1902, were \$1,910 in arrears. On February 7th they were adjudged bankrupts on their own petition, and a meeting of creditors was called for February 20th for the purpose of selecting a trustee; but before this had taken place, on February 19th, Mrs. Elliot, the landlord, distrained for the full amount of the rent due. By arrangement between the parties the goods of the bankrupts on the premises were subse-

quently sold by the trustee, and \$3,100 realized, out of which the landlord claims the full amount of her rent, with costs. The referee allowed one year's rent (\$1,500) as a preferred claim under the Pennsylvania statute (Act June 16, 1836, § 83; P. L. 777), but refused the rest, holding that at the time of the distress the goods of the bankrupts were in the custody of the law, and that the landlord, therefore, took nothing thereby. In this view I entirely concur.

A landlord in Pennsylvania has the right to distrain for rent in arrear on any goods on the demised premises, and when a distress is properly made the goods are bound for the rent, whatever it may be, even to the extent of the whole term, if due. *Goodwin v. Sharkey*, 80 Pa. 149. But to be of avail the right must be exercised, and it cannot be where the goods have been taken into legal custody. *Pierce v. Scott*, 4 Watts & S. 344. No doubt, in case of an execution against the tenant, a distress may be made at any time before actual levy (*McHugh v. Maloney*, 4 Phila. 59); but it cannot be after that, and it is to compensate for that which is thus taken away that the landlord is given a priority by the statute out of the proceeds in case of a sale, not exceeding one year's rent. *Greider's Appeal*, 5 Pa. 422. This preference is preserved under the bankrupt act, the taking of the tenant's goods by virtue of its provisions being regarded as within the equity of the statute. *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451; *In re Hoover* (D. C.) 113 Fed. 136; *Wilson v. Trust Co.* (C. C. A.) 114 Fed. 742. But the right of the landlord to invoke the statute is necessarily based upon the theory that the proceedings in bankruptcy amount to a taking, and if that be so the right to distrain is thereby cut off. It may be that this is assumed rather than decided, and perhaps it involves a reasoning in a circle to so argue, but there can be no doubt as to the correctness of the conclusion, however reached.

It is not necessary to determine the effect of involuntary proceedings, but in case the petition is a voluntary one, as here, the result is clear. By the adjudication which immediately follows, it is definitely decided that the person is a bankrupt, that the court has jurisdiction, and that the proceedings are well brought. The estate of the bankrupt is thereby drawn into liquidation under the supervision of the court according to the provisions of the bankrupt law, with which nothing can be allowed to interfere. If proceedings have been instituted against the property by execution or otherwise prior to the filing of the petition, they may be enjoined and stayed, while by express enactment all liens obtained through the medium of legal proceedings within four months are made null and void. With such complete control over the property of the bankrupt as is thus given it is difficult to see why it is not to be regarded as in the actual custody of the law. It is not necessary, as is argued, that the trustee should take possession in order to complete it. This is a mere matter of formal investiture, which follows as of course when he has been chosen, his title, according to the act, relating back to the date of the adjudication. Where the property is widely scattered, as it may be in many instances, some time may elapse before actual possession is taken, and it can hardly have been the purpose of the act to

leave it open, in consequence, to seizure, by distress or otherwise, meanwhile.

The case of *Butler v. Morgan*, 8 Watts & S. 53, on which the exceptant relies, affords no support for her contention, when confined to its own facts. "The only question presented for our consideration in this case," says the court, "is whether the landlord could, during the operation of the late bankrupt act of congress (1841), distrain on the goods of his tenant found on the leased premises for rent due and in arrears, after the latter had petitioned for the benefit of the bankrupt act, and before he had been declared a bankrupt." It was decided that he could; but, however that may be, the distinction between that case and the one in hand is that, there, there had been no adjudication and here there had. It is true that the court, relying on certain English authorities, goes on to say that the landlord may distrain for the whole rent due, whatever its amount, even after the tenant has been declared a bankrupt and an assignment of his property has been made, the goods on the premises being liable notwithstanding the transfer. But as was said by Cadwalader, J., in *Re Appold*, 1 N. B. R. 621, Fed. Cas. No. 499:

"Under the present system of bankruptcy in the United States (Act 1867), the estate in the hands of the assignee is more determinedly in legal custody than under the English system. There is therefore, I think, reason to doubt the applicability of the English decisions that a landlord's right to distress continues after an assignment under the bankruptcy of his tenant."

This is my own view of the law. Following it, it was held in *Re Gerson*, 1 Nat. Bankr. N. 315, 2 Am. Bankr. Rep. 170, that a landlord who distrained after the filing of an involuntary petition and before adjudication took nothing by the proceeding, being confined to the priority given him by the statute. This is in entire conflict with the case relied upon by the exceptant, which also runs counter to the accepted doctrine that an adjudication disposes of the tenancy, so far as the estate of the bankrupt is concerned, subsequently accruing rent not being provable against it. *Coll. Bankr.* p. 393. In view of this, I cannot regard the case as a correct exposition of the law, and must decline to follow it.

The exceptions are overruled, and the report of the referee is confirmed.

THE COLORADO.

THE T. L. STURTEVANT.

(District Court, E. D. New York. August 5, 1902.)

1. COLLISION—STEAM VESSELS—FAILURE TO MAINTAIN PROPER LOOKOUT.

Two steam vessels, which came into collision on converging courses in East river, no signal having been made by either, both held in fault for the failure to maintain a proper and efficient lookout.

In Admiralty. Suit and cross-libel for collision.

Wilcox & Green, for libelants.

James J. Macklin, for claimants.

THOMAS, District Judge. On the 2d day of February, 1900, at 7 p. m., on a flood tide, the ferryboat Colorado came in collision with the steam lighter Sturtevant, in the East river, and for the injuries severally received by the vessels the libel and cross-libel herein are filed. When the Colorado was coming from her slip at Elizabeth street, she gave one long slip whistle. Then the Sturtevant was somewhat above the Brooklyn Bridge, but had not passed the ferry slip. No signals were exchanged between such vessels. At the same time the ferryboat Republic, bound diagonally across the river for Main street, Brooklyn, issued from the slip adjoining at Catherine street. The Colorado passed under her stern. Thereafter the Republic exchanged a single whistle with the Sturtevant. At about the time the Sturtevant was crossing the bows of the Republic, the Minneola came from Main street, Brooklyn, bound for the Catherine street slip in New York. The Sturtevant passed in front of the Minneola, whether with or without signals it is unnecessary to determine, and shortly thereafter the Sturtevant and Colorado came together somewhere near the center of the river. The intended courses of the Colorado and the Sturtevant were up the river, and with the flood tide prevailing it was to the advantage of each vessel to be nearer the center of the river than either shore. The claim of the Sturtevant is that when she was near the center of the river, and in advance of the Colorado, the latter, having turned upstream, was discovered on the lighter's port quarter, and that she immediately struck the lighter about 20 feet from the stern, scraping along her side to a point some 20 feet aft the bow. The claim of the Colorado is that when she came from her slip the Sturtevant was about abreast of her, and some 200 feet from the Brooklyn shore; that later, when the Colorado had passed up to the neighborhood of slip 42, the Sturtevant was suddenly seen coming up from behind on the starboard side, and the latter's bow, 5 feet aft the stem, struck the ferryboat at a point about 75 feet from her bow, and some 10 or 15 feet forward of the wheel; and that the port side of the lighter then swung against the ferryboat, producing the other injuries which she undoubtedly received along her port side. There is the usual diversity of evidence, but there is no difficulty in reaching the following finding of facts: That the Colorado, bound for a slip which should take her up the center of the river, passed under the stern of the Republic, and attempted to reach a somewhat central position in the river; that meantime the Sturtevant, somewhat to the Brooklyn side of the center of the river, but by no means as far as stated by the witnesses on the Colorado, exchanged signals to pass in front of the Republic, and did so, and then went to port, pursuant to signals or otherwise, in order to cross the bow not only of the Republic, but also of the Minneola, so that, while the Colorado was approaching the center of the river, for the purpose of straightening up for her slip, the Sturtevant was going to port to avoid the Republic and the Minneola. It is less certain what each vessel did as they came nearer together. The evidence of Durkee, a skilled mariner, and disinterested witness, is helpful. He testifies that the Colorado earlier was astern of the Sturtevant, both headed to the eastward, on courses 150 feet

apart, and that at the time of the collision the bow of the Sturtevant was aft the bow of the Colorado. In such case the Colorado's bow had passed, and she herself was passing, the Sturtevant, at the time of the collision. Durkee further states that the Sturtevant suddenly came to port, thereby changing her course fully four points. But, standing on the Colorado, he might not be able to know whether she went to starboard or the Sturtevant came to port. He would not say that the Colorado was under a steady wheel. He states that, while he was still forward, he saw the red light, and later the green light, of the Sturtevant open. This would be decisive, if it were not that the Colorado, passing and crossing the Sturtevant's bow, would open the latter's lights to the extent Durkee saw them. It is evident that at the time the Sturtevant was going to port, if she did, the Colorado had not passed her, but was abeam of her. Inasmuch as the Colorado was the faster vessel, the Sturtevant could not have changed her course to port, traveled the distance of 150 feet, and struck the Sturtevant 75 feet aft of the Colorado's stem, unless the deflection had begun before the Colorado's pilothouse was forward of the Sturtevant. The Colorado was 185 feet and the Sturtevant 86 feet in length. The Colorado, at the outstart, was overtaking, and should have observed the Sturtevant's diagonal approach earlier than she did. But the Sturtevant must have seen that she and the Colorado were drawing towards each other, for the Colorado's bow projected beyond the Sturtevant's stem at the time of the collision. It is inconceivable that the vessels should not have discovered each other upon converging courses had proper lookout been kept. But each pilot claims that he was surprised.

The damages and costs will be divided.

In re GRAVES.

(District Court, E. D. Wisconsin. August 13, 1902.)

1. CRIMINAL LAW—CHANGE OF SENTENCE.

Where the execution of a sentence to imprisonment in the Detroit House of Correction had commenced when the warden refused to carry out the sentence because not allowed to receive federal prisoners for such term under the state law, the court, at the same term at which the sentence was imposed, had authority to recall the prisoner, set aside the sentence, and impose one for a shorter term in another house of correction.

On Application for Writ of Habeas Corpus.

Phillips & Neillson, for petitioner.

SEAMAN, District Judge. The petitioner is imprisoned in the Milwaukee House of Correction under sentence and commitment by the district court of the United States for the Northern district of Illinois upon indictment for violation of sections 5430, 5431, Rev. St. U. S., and plea of guilty entered therein, to serve at hard labor for a period of 1½ years from the date of sentence, June 23, 1902, and applies for writ of habeas corpus, alleging that such imprisonment is

unlawful upon the following ground: That the petitioner was previously, on June 16, 1902, sentenced on the same charge "to imprisonment in the house of correction of the city of Detroit, in the state of Michigan, for the period of two years," and was thereupon committed "and entered upon the service of said sentence, and was for a number of days imprisoned" thereunder. The question thus raised is not complicated by any hardship imposed upon the prisoner by the resentence, nor by any excess or want of jurisdiction in the original sentence, for the term was clearly within the statute; and the only objection suggested to its execution was the refusal of the warden to carry out the sentence because not allowed to receive federal prisoners for such term under the state legislation. It involves only the inquiry whether the court possessed the power to recall the prisoner, set aside the sentence, and impose another modified sentence during the same term, notwithstanding the fact alleged that execution of the former sentence had commenced; and, whatever diversity of opinion appears in other jurisdictions, the doctrine is established in the federal courts that such power exists, and that it is applicable as well where the original sentence was in excess of jurisdiction. *Bassett v. U. S.*, 9 Wall. 38, 41, 19 L. Ed. 548; *Ex parte Lange*, 18 Wall. 163, 167, 21 L. Ed. 872; *Reynolds v. U. S.*, 98 U. S. 145, 168, note, 25 L. Ed. 244; *In re Bonner*, 151 U. S. 242, 259, 14 Sup. Ct. 323, 38 L. Ed. 149; *Williams v. U. S.*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; *Ex parte Waterman (D. C.)* 33 Fed. 29; *U. S. v. Harman (D. C.)* 68 Fed. 472. In *Ex parte Lange*, supra, the doctrine so stated is distinctly recognized, but the case is distinguished as one where the statute authorized imprisonment, or fine, in the alternative only, and the sentence imposed both; and the majority opinion merely holds that new sentence of imprisonment alone cannot be imposed after payment of the fine, which operated as a satisfaction of the prior judgment. The sentence under which this petitioner is imprisoned is in all respects more favorable to him than was the original sentence, and escape therefrom is sought on the ground of change in the place of imprisonment after he had "entered upon the service" of the first sentence.

As the place of imprisonment was discretionary, and in no sense affected the jurisdiction, and the power of the court over its own judgment within the term is undeniable (*Ex parte Lange*, supra), I am clearly of opinion that the sentence and commitment in question are valid, and, no ground appearing to grant the petitioner the benefits of a writ of habeas corpus, the application is denied.

In re HENRY ZELTNER BREWING CO.

(District Court, S. D. New York. August 25, 1902.)

1. BANKRUPTCY—CORPORATIONS—ACTS OF BANKRUPTCY.

A corporation which in fact has sufficient property to pay its debts does not become insolvent within the meaning of the bankruptcy act of 1898, nor does it commit an act of bankruptcy, by submitting to the appointment of a receiver by a state court.

In Bankruptcy. On petition in involuntary bankruptcy.

A. Blumenstiel, for petitioning creditors.

John Oscar Ball (Henry A. Forster, of counsel), for respondent.

ADAMS, District Judge. The facts in this case appear in a stipulation between the parties, marked Exhibit 1, and the papers referred to therein, marked Exhibits 2, 3 and 4. It is not necessary to restate them. The question to be determined is whether the corporation committed an act of bankruptcy.

The petition alleges that the corporation on the 7th day of February, 1902, and within four months next preceding the filing of the petition, with intent to hinder and delay its creditors, conveyed and transferred all its property, in that, through its directors and officers, then existing, it caused an application to be made to the Supreme Court of the State of New York for the appointment of a receiver, which receiver was thereupon appointed, duly qualified and took possession, with the consent of the Brewing Company, of all of its property, and proceeded to conduct its business; it is further alleged that all the creditors have been enjoined from taking any proceedings to collect the debts, and that at the time of the said application and appointment of Receiver, the corporation was insolvent.

The decision turns upon the alleged insolvency. The creditors contend that notwithstanding a stipulation between the parties to the effect that the corporation was actually solvent at the time of the proceedings in the State Court, and now owns sufficient property to pay its debts, it must be regarded as insolvent under the definition of section 1 (15) of the Act, because it suffered all of its property to be placed in the hands of a receiver in the State Court, and after doing so had none with which it could pay its debts, and therefore had brought itself within the purview of the Act.

As matter of fact, the corporation is not without property to pay its debts. The property is beyond the immediate reach of creditors by judgment and execution, but is in the custody of the law for their benefit, and in due course all the creditors will have the benefit of the pending proceedings. It is urged that under the laws of the State, the proceeding has been improperly resorted to by the officers and directors resigning their positions in order to bring the Statute under which a receiver was appointed into operation, but that is obviously a matter for consideration by the State Court. I regard as unsound the argument on behalf of the petitioning creditors, that a corporation which is solvent in fact becomes insolvent in contemplation of the Bankruptcy law upon the appointment of a Receiver in a State Court, and the authorities are opposed to such a construction of the Act. In *re Baker-Ricketson Co.* (D. C.) 97 Fed. 489; *Vaccaro v. Bank*, 43 C. C. A. 279, 103 Fed. 436; In *re Empire Metallic Bedstead Co.* (D. C.) 95 Fed. 957; *Id.*, 39 C. C. A. 372, 98 Fed. 981; *Davis v. Stevens* (D. C.) 104 Fed. 236; In *re Harper & Bros.* (D. C.) 100 Fed. 266. The petition is dismissed.

ADAMS v. SHIRK et al.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 833.

1. APPEAL—RES JUDICATA.

The question of res judicata cannot be considered on appeal, it not having been in issue below.

2. FEDERAL COURTS—OBJECTIONS TO JURISDICTION—BURDEN OF PROOF.

Under Act Cong. March 3, 1875 (18 Stat. 470), providing that if in a suit in a circuit court of the United States it shall appear to the satisfaction of such court at any time that the suit does not really involve a dispute properly within said court's jurisdiction, or that the parties have been improperly or collusively made or joined to create a case cognizable by said court, it shall dismiss or remand the suit, while the question of whether there is a real diversity of citizenship need be raised in no particular manner, except that it shall be on notice, plaintiff's allegation that he is a citizen of a certain state, other than that of which defendant is a citizen, is prima facie true, and is not overcome by a simple denial in the plea in abatement that plaintiff is a citizen of such state, but defendant has the burden of showing that there is not a diversity of citizenship.

3. CITIZENSHIP—EVIDENCE.

Plaintiff is not shown to be a citizen of Illinois by his testimony: "Prior to 1896 I resided in Chicago. Since that year my residence has been, and now is, at Indianapolis, Indiana. I live at * * * in Indianapolis. I have an office in Chicago. I belong to two clubs in Chicago, and, although I am a nonresident member, I pay the dues of a resident member. At one of the clubs I have a room. * * * My wife is now in California. * * * I was in Europe last summer, and always register as being from Indianapolis."

4. MORTGAGED PREMISES—OWNER OF LEGAL ESTATE.

As against others than the mortgagee, the mortgagor is the legal owner of the estate, so that when making a lease he may reserve a covenant against assignment without written consent.

5. LEASES—DENYING LANDLORD'S TITLE.

The lessee may not deny that the landlord had a good title when the lease was made, nor the assignee of the lease deny that the landlord's title was good at the time of the assignment.

6. SAME—RECOVERY OF RENT BY GRANTEEES.

Under Starr & C. Ann. St. Ill. c. 80, § 14, preserving to the grantees of the reversion the same remedies for the recovery of rent that the lessor had, the lessor and those to whom he has granted undivided interests, less than the whole, may together maintain action for the rent.

7. SAME—ASSIGNMENT—CONTRACT BETWEEN ASSIGNEE AND LESSOR.

Though a lease contain a covenant that the lessee shall not assign without written consent of the lessor, and that any assignment shall contain an assumption by the assignee of the terms of the lease, yet if, without such written consent, there is an assignment by which the assignee agrees that he accepts and assumes all the terms of the lease, and will perform all its covenants and agreements, there is a contract to this effect between the assignee and the lessor, and his grantees of interests in the premises, on their accepting rents from the assignee.

8. SAME—RELEASE OF COVENANTS BY LESSEE.

Where the assignment of a lease contains, as provided by the lease, an assumption of the terms of the lease, and an agreement to perform its covenants, such agreement, being one with the lessor, on acceptance

¶ 3. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.

¶ 5. See Landlord and Tenant, vol. 32, Cent. Dig. §§ 166, 171, 176.
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by him of the rent from the assignee, cannot be afterwards released by the lessee.

9. USURY—ASSUMPTION OF CONTRACT.

There is no usury in the assumption of a valid contract providing for 8 per cent. interest, though between the making and the assuming of the contract legal interest was reduced from 8 per cent. to 7 per cent.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In March, 1891, Smith took a 99-year lease of certain real estate in Chicago from Elbert W. Shirk, in whose name the legal title then stood. The lessee agreed to pay rent, taxes, special assessments, and insurance. The lease contained covenants that the lessee would not assign without the written consent of the lessor; that, if an assignment were made, it should be evidenced by an instrument in writing containing a clause sufficient in law to the effect that the assignee personally accepts and assumes all the terms, covenants, and agreements in the lease, and will personally comply with and be bound by them; and that the lessor might declare a forfeiture for breach of any of the lessee's covenants. In December, 1895, Smith assigned the unexpired term to Adams, plaintiff in error. The assignment was evidenced by a written instrument executed by Smith and Adams, which contained the clause provided for in the lease, whereby Adams assumed all the terms, covenants, and agreements in the lease, and agreed personally to comply with and be bound by them. A written consent to the assignment was indorsed thereon, signed by Elbert W. Shirk, Milton Shirk, and Alice S. Edwards. Under these writings Adams entered and retained possession until February, 1897, when he assigned the unexpired term to Petterson. In March, 1891, when the lease was made, the realty was under mortgage, which was paid off in April, 1895. In November, 1891, Elbert W. Shirk conveyed an undivided one-third interest in the realty to his mother, Mary Shirk, an undivided two-ninths interest to his brother, Milton Shirk, and a like interest to his sister, Alice S. Edwards. This was in fulfillment of the purpose of the purchase, in which he acted for himself and his relatives named, but there was nothing in the deed to him to indicate that others were interested in the purchase. Mary Shirk died testate in August, 1894. By her will she gave and devised all her estate, real and personal, to her three children named, as trustees, to pay debts and legacies, and to hold the residue intact as one fund, the income of which should belong to the three children for their own use, until the expiration of the trust on the death of the last survivor, when the principal should be divided per stirpes among their children then living. The will also gave the trustees full power to sell, convey, and rent real estate in which the testatrix had an interest, and to deal with her business interests at their discretion. When the lease was made, the Illinois statute authorized 8 per cent. interest, which was reserved in the lease upon delinquent installments of rent, and upon taxes, special assessments, and insurance paid by the lessor. The maximum legal rate had been reduced to 7 per cent. prior to the assignment from Smith to Adams. In July, 1899, prior to the commencement of this action, Adams procured from Smith a written release of the obligations Adams had assumed in the assignment from Smith to him. The defendants in error, Elbert W. Shirk, Milton Shirk, and Alice S. Edwards, personally and as trustees under the will of Mary Shirk, refused to recognize the assignment from Adams to Petterson; and, as citizens of Indiana, they brought this action in assumpsit to recover from Adams, a citizen of Illinois, for delinquent rent accruing in 1898 and the first quarter of 1899, and also for taxes and special assessments paid by them, together with 8 per cent. interest thereon. Adams filed pleas of the general issue, of usury, and of want of jurisdiction, on the ground that Elbert W. Shirk was a citizen of Illinois. The replication was a general denial of the special pleas. There was no conflict in the evidence. The facts hereinbefore stated were proven. Respecting Elbert W. Shirk's citizenship, he testified as a witness for defendants in error substantially as follows: "Prior to 1896 I resided in Chi-

cago. Since that year my residence has been, and now is, at Indianapolis, Indiana. I live at 439 Pennsylvania street in Indianapolis. I have an office in Chicago. I belong to two clubs in Chicago, and, although I am a non-resident member, I pay the dues of a resident member. At one of the clubs I have a room, and have had for some time. My wife is now in California with her mother. I was in Europe last summer, and always registered as being from Indianapolis." No other evidence on the subject was introduced or offered by either party.

Defendants in error had a verdict and judgment for the amount of delinquent rent, taxes, and special assessments set up in the declaration, together with 8 per cent. interest thereon. Motions for a new trial and in arrest of judgment were overruled. Under his 48 specifications of error, based on various adverse rulings to which exceptions were duly reserved, plaintiff in error presents contentions which may be grouped thus: (1) The citizenship of Elbert W. Shirk was in issue, and was not proven to be such as to give the court jurisdiction. (2) When the lease was made, Elbert W. Shirk owned only the equity of redemption. The legal title was in the mortgagee. Shirk, therefore, did not have such an estate in the land as authorized him to reserve the covenant not to assign without written consent. (3) By his conveyance to his mother, brother, and sister, Elbert W. Shirk severed the reversion and destroyed the covenant not to assign. The covenant, therefore, was not operative when Smith assigned to Adams, and Adams to Petterson. (4) The written consent to the assignment from Smith to Adams was not sufficient. The restriction was therefore waived. (5) Adams took the leasehold by privity of estate only. There never was any privity of contract between him and defendants in error. His assignment to Petterson in 1897 broke the privity of estate, and he was not liable for rents accruing thereafter. (6) Adams's covenants in the assignment from Smith to himself were for the benefit of Smith. Defendants in error were not parties to those covenants. Therefore Smith's release of Adams, made before this action was commenced, was a bar. (7) Adams's contract of assumption was usurious. (8) This action was not maintainable on the law side of the court. Defendants in error claim that all of these questions, except the first, sixth, and seventh, are res adjudicata by the decision of this court in *Adams v. Shirk*, 43 C. C. A. 407, 104 Fed. 54; same case on petition for rehearing, 44 C. C. A. 653, 105 Fed. 659,—which, it is said, was an action between these same parties to recover rent for 1897 under the lease and contract of assumption involved in this case. In their pleadings, however, defendants in error did not tender any issue of former adjudication.

William Barry, for plaintiff in error.

Frederic Ullmann, for defendants in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Inasmuch as no issue of former adjudication was made, tried, and determined in favor of defendants in error, the questions that are duly presented by the present record remain at large.

1. Prior to the act of March 3, 1875 (18 Stat. 470), if the necessary diversity of citizenship was duly pleaded in the declaration or bill of complaint, evidence to the contrary was inadmissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and a plea to the merits was a waiver of the plea in abatement. *Farmington Village Corp. v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114; *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725. By that act it was provided:

"That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or a controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

Of the effect of this act in modifying the former procedure, the supreme court, in *Hartog v. Memory*, supra, said:

"Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a cause for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceeding. The cause is not to be tried by the parties as though there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is not jurisdiction that the circuit court can dismiss the case upon the motion of either party. If in the course of a trial it appears, by evidence which is admissible under the pleadings, and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit."

Defendants in error rely on this case to show that, since plaintiff in error filed his plea in abatement with his pleas to the merits, the evidence as to jurisdiction cannot be considered. But in *Morris v. Gilmer*, 129 U. S. 315, 326, 9 Sup. Ct. 289, 32 L. Ed. 690, the doctrine of *Hartog v. Memory* on this point was denied, and it was held that:

"The act of 1875 imposes on the circuit court the duty of dismissing a suit if it appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal."

And in *Anderson v. Watt*, 138 U. S. 694, 701, 11 Sup. Ct. 449, 450, 32 L. Ed. 1078, the court said:

"Under the act of March 3, 1875, the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has in no respect been imposed upon."

It is manifest, therefore, that defendants in error are mistaken in claiming that the question of jurisdiction on the necessary diversity of citizenship is not before the court. But the question is not, as plaintiff in error contends, whether defendants in error have discharged the burden of proving that Elbert W. Shirk was a citizen of Indiana.

The proper allegation of jurisdictional facts, *prima facie*, was true. Simply to deny that Elbert W. Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, whereof plaintiff in error was a citizen. That Elbert W. Shirk was a citizen of Illinois was a material and necessary allegation. It was an affirmative averment, the burden of proving which, even under a proper plea in abatement, would have fallen on plaintiff in error. *Sheppard v. Graves*, 14 How. 505, 512, 14 L. Ed. 518; *De Sobry v. Nicholson*, 3 Wall. 420, 18 L. Ed. 263. Under the plea in the present case, the office of which was no broader than a motion or a suggestion to the court to protect itself from imposition, the burden most assuredly was upon the moving party. Plaintiff in error introduced no evidence on the subject. The evidence of defendants in error does not establish that Elbert W. Shirk was a citizen of Illinois, and that the circuit court was imposed upon.

2. The legal title of the mortgagee is recognized only for the benefit of the holder of the mortgage debt. Against all other persons the mortgagor is the legal owner of the estate. *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; *Seaman v. Bisbee*, 163 Ill. 91, 45 N. E. 208. When the lease was made to Smith, Shirk therefore had perfect authority to reserve the covenant against assignment without written consent. Furthermore, neither Smith nor Adams will be heard to deny that his landlord had good title when the lease or when the assignment was made. *Cox v. Cunningham*, 77 Ill. 545; *Hardin v. Forsythe*, 99 Ill. 312; *Sexton v. Carley*, 147 Ill. 269, 35 N. E. 471.

3. The Illinois statute (chapter 80, § 14, *Starr & C. Ann. St.*) preserves to grantees of the reversion of demised lands the same remedies for the recovery of rent that the lessor had. It is conceivable that, if Elbert W. Shirk had conveyed in severalty to various grantees different parcels of the demised land, a grantee might not enter upon his portion for breach of a covenant made with the owner of the whole. But here all the owners in common of undivided interests are seeking to recover for delinquent rents. Their right to recover is clear, if Elbert W. Shirk could have recovered, had he remained the sole owner.

4. It is said that the written consent is inefficient, because defendants in error did not execute it as trustees, but only as individuals; that defendants in error, in both capacities, accepted rent, and thereby waived the requirement of written consent to assignments; and that, the restriction being gone, Adams's assignment to Petterson was binding on defendants in error, and Adams was relieved from paying rent thereafter. The provision for written consent was for the benefit of the lessor. One can waive a safeguard for his own protection. He may thereby cut himself off from a particular defense or a particular remedy, but in other respects he creates no rights in his adversary. The claim of plaintiff in error that the acceptance of rent from him was a binding recognition of the validity of Smith's assignment to him, and of his right to assign without written consent, proves that consent by mouth or act is as effectual as consent in writing for the protection of the assignee. It is therefore immaterial whether consent, unquestionably given by act, was also duly expressed in writing. Im-

material, too, in view of the answer to be given to the next contention of plaintiff in error, is the question whether the assignment to Petter-son destroyed the privity of estate between the parties to this action. The ending of the privity of estate would not affect the privity of contract, if such a relation had been created and was existing between the parties. And this brings up the central point of the case.

5. Did Adams enter into a lawful contract with defendants in error, under which he became bound personally to pay rent, taxes, and special assessments until the end of the term? In the assignment of the lease he agreed that he "accepts and assumes all the terms, covenants, and agreements in said lease contained, and will personally comply with them and be bound by them, and will keep and perform all the covenants and agreements in said lease contained." Among the covenants and agreements in the lease was one for the payment of rent, taxes, and special assessments. Smith had agreed in the lease not to assign to any one who would not assume and discharge all the obligations of the original lessee. If the assignment had not contained Adams's assumption, or if defendants in error (or arbitrators provided for in the lease) had not found Adams to be responsible, defendants in error would not have needed to accept Adams as tenant. Their acceptance of him was a good consideration for his promise to them to keep and perform all the covenants and conditions in the lease. True, Adams's promise was expressed in writing in the assignment. But it was necessary that the assignment should contain Adams's assumption, and should be submitted to defendants in error for their approval and acceptance. Their acceptance brought them into direct contractual relations with Adams. *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Springer v. De Wolf*, 194 Ill. 218, 62 N. E. 542; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Lindsley v. Brewing Co.*, 59 Mo. App. 271.

6. For that Adams's promise was made to defendants in error, Smith's release of Adams was as ineffectual as any stranger's.

7. The rate of interest in the lease was lawful when the lease was made. The subsequent change in the statute could not make the interest provisions usurious as between the original parties. After the change, Adams assumed and agreed to carry out Smith's contract. In one's mere assumption of another's valid obligation, there can be no usury.

8. In Illinois the right of a creditor to maintain an action at law against one who has assumed the debt has been definitely decided. *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975. In *Union Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118,—a suit begun in the circuit court for the Northern district of Illinois,—the supreme court recognized that by the law of Illinois a mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt, and, respecting the right and the remedy in the national courts, held that:

"The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is to be determined by the law of the place where the suit is brought."

In the same case, however, it was said:

"By the settled law of this court, the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt."

Plaintiff in error insists that the part of the Hanford Case which rules that the creditor's remedy will be administered according to the law of the place (the state) wherein the suit is brought in the national court has been discredited by later cases (*Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; *Lindsay v. Bank*, 156 U. S. 485, 15 Sup. Ct. 472, 32 L. Ed. 505), holding that a cause of action inherently equitable must be brought on the equity side of the national court, although the particular right could have been asserted in an action at law in the courts of the state in which the national court is sitting. To affirm the judgment in the present case it is unnecessary, in our opinion, to deny the validity of this contention, because, for reasons hereinbefore stated, Adams's promise was made to defendants in error, who accepted and acted upon it, and because no relief was demanded or obtained that cannot be satisfied by an execution at law.

The judgment is affirmed.

HALL v. CHISHOLM et al.

CHISHOLM et al. v. HALL.

(Circuit Court of Appeals, Sixth Circuit. July 8, 1902.)

Nos. 983, 1,028.

1. ADMIRALTY—LIBEL OF REVIEW—POWER TO ENTERTAIN.

A court of admiralty may entertain a libel of review to correct its decree after the expiration of the term, where the petitioner is shown to be free from fraud or negligence in the matter, and the entering of the decree shows such fraud, or its equivalent, in effect, upon the rights of the petitioner, as to require the remedial action of the court upon principles of justice.

2. SAME—SETTING ASIDE DECREE INADVERTENTLY ENTERED.

Where a decree dismissing a libel was inadvertently entered by the clerk, no order having been made by the judge, although he had indicated his intention to dismiss, and the fact of the entry was not known to the judge or counsel until after the close of the term and the expiration of the time for appeal, the court properly entertained a libel of review to set such decree aside, with a view of re-entering the same as of a later date, to preserve libellant's right of appeal.

3. COLLISION—OVERTAKING STEAMER AND RAFT—NEGLIGENT NAVIGATION.

A raft of logs 2,000 feet long was being towed down the St. Clair river by three tugs, one of which was in front, to guide the forward end. An overtaking steamer was attempting to pass on the American side, when the head of the raft, reaching a bend in the river, came close to the shore, and the steamer, striking the land, sheered, and ran into it with such force as to break the boom sticks, and scatter the logs. *Held*, that

¶ 1. See Admiralty, vol. 1, Cent. Dig. §§ 677, 681.

the steamer was in fault for not being under better control, which was required in view of the manifest danger of collision; that the navigators of the raft were also in fault, it appearing that the forward tug was not making proper effort to keep the head of the raft off from the shore.

Appeals from the District Court of the United States for the Eastern District of Michigan.

T. E. Tarsney, for Hall.

Harvey D. Goulder, for the J. H. Wade.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. These cases were heard together, and originated in a cause in admiralty in the district court of the United States for the Eastern district of Michigan. In No. 1,028 an appeal was taken by Chisholm and others, in whose favor the court had decided upon the merits of the case. The libel was filed in the first case (No. 983) by E. Hall against the owners of the steamer J. H. Wade, and was dismissed upon final hearing. The case was heard in March, 1899. The district judge stated his intention to dismiss the libel, but did not make or sign any order or decree. The clerk of the court, however, supposing the order to have been finally made, entered the same upon the journal of that day. Counsel for the libelant gave notice at the time of their intention to appeal, and, the testimony being voluminous, negotiations were entered into between counsel for the purpose of reducing the expense of printing the record, and stipulations were agreed upon as to printing the testimony in the case. Pending these negotiations, the time for appeal had expired, and it was then disclosed for the first time that the clerk had entered the decree as of March 4th. Thereupon the libelant filed a petition for leave to file a bill of review containing the statements outlined above, the sixth paragraph thereof being as follows:

"Your petitioner further represents that he was absolutely without knowledge of the entering of said order dismissing said libel, as were his proctors, as he is informed and believes, and as appears from the affidavit of Timothy E. Tarsney, hereto attached, as aforesaid; and that he was not, or were his proctors, as he was informed and believes, apprised or notified by any direction of the said court to the clerk thereof to enter or cause to be entered the alleged order or decree dismissing the libel; and that the said alleged order or decree was entered without notice to, or knowledge of, the proctors for the respondents therein, as appears from the copies of correspondence attached to the affidavit of the said Tarsney, as aforesaid; that the journal of said court for the said day of March 4, A. D. 1899, was not signed by the judge thereof, as your petitioner is informed and believes, contrary to the usual custom; and your petitioner is informed and believes that said order or decree was entered upon the journal of said court by the clerk thereof inadvertently, while the said clerk was laboring under a misapprehension, to wit, that the court had pronounced a final decree in said cause, when, as a matter of fact, no such final pronouncement was made, but, as your petitioner is informed and believes, it was orally announced by said court that he, said court, would dismiss said libel, implying an intention to dismiss it at some future time, not giving expression to a judicial act to take immediate effect as of said date, with a direction to said clerk to enter the same upon the journal of said court."

These allegations were not denied in the answer. The questions presented by this appeal are whether the court of admiralty may set aside its decree after the expiration of the term at which it was entered, and whether the facts in the present case are sufficient to warrant the granting of the relief prayed for. There seems to have been some difference of opinion among the judges and text-writers upon this subject, but an examination of the authorities leads us to the conclusion that, in the absence of other remedies, a bill of review may be filed in a court of admiralty after the term, for the purpose of setting aside a decree entered through fraud or inadvertence without the fault of the party making the application. If this were not so, parties against whom a decree had been rendered in an admiralty suit by fraud or mistake would be without remedy. The cases upon this subject are reviewed in an able opinion by District Judge Lowell in the case of *Snow v. Edwards*, 2 Low. 273, Fed. Cas. No. 13,145. The learned judge states in the course of his opinion that, notwithstanding some dicta to the contrary, it has been the constant practice of courts of admiralty in England and the United States of original jurisdiction, to correct or change a decree upon a libel of review, except that in the United States summary proceedings by motion have been held to be ineffectual after the expiration of the term. This case has been followed by other and later cases, the latest of which is *The Columbia* (D. C.) 100 Fed. 890, where the cases are fully collated and cited. Judge Story in the case of *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151, states the rule to be as follows:

"But upon the most careful reflection I have been able to bestow upon it, the result to which I have brought my mind is that, if the district court has a right to entertain a libel of review in any case, it must be limited to very special cases, and either where no appeal by law lies, because the matter is less in value than is required by law to justify an appeal, or the proper time for appeal is passed, and the decree remains unexecuted, or where there is clear error in matter at law, or, if not, where the decree has been obtained by fraud, or where new facts, changing the entire merits, have been discovered since the decree was passed."

Betts' Adm., quoted by Judge Thomas in the case of *The Columbia*, supra, states the rule as follows:

"The power, however, will only be exercised by the court when no relief by appeal can be had; and the declaration of the court of last resort upon the subject imports that in this country courts of admiralty cannot, in any case, sustain such bill filed subsequent to the term in which the decision is rendered."

In the case of *The New England*, supra, Judge Story quotes with approval the language of Lord Stowell to the effect that mere negligence or oversight would not be sufficient, but a direct case of fraud, or something equivalent to it, must be made out. This view was reached by Mr. Justice Davis while upon the circuit. *Car Co. v. Hopkins*, 4 Biss. 51, Fed. Cas. No. 10,334. In the circuit court of appeals, Ninth circuit, *Munks v. Jackson*, 13 C. C. A. 641, 66 Fed. 571, relief was granted by bill of review. Although the case did not show actual fraud, yet the facts were held to warrant the relief sought by bill of review, within the sound discretion of the court, and under

such rules of decision as the sound principles of justice and policy might dictate.

We think the reasoning of these authorities establishes that a court of admiralty may entertain a libel of review to correct its decree after the expiration of the term, where the petitioner is shown to be free from fraud or negligence in the matter, and the entering of the decree shows such fraud, or its equivalent, in effect, upon the rights of the petitioner, as to require the remedial action of the court upon principles of justice. In the present case the law gives to the libelant the right to have his case reviewed by appellate proceedings, seasonably taken after the entering of the decree. It was not understood by the judge who heard the case, or by the counsel, that any final decision had been reached or that any entry would be made on March 4th. Counsel were not aware for some time that the clerk inadvertently entered the decree upon the journal. Upon discovering this fact, the libel in review was promptly filed. While there is no claim of actual fraud in this matter, to permit it to conclude the privilege of the party to appeal would have the same effect upon his rights as would the entry of a decree from improper motives. The record was voluminous, and the parties were proceeding to settle it with a view to reducing the cost of printing, when, unknown to them, the entry was made by the clerk. No laches could be charged to the libelant. Under such circumstances, we think the court, exercising a sound discretion, and in the interests of justice, may entertain a libel in review after the term, with a view to setting aside the decree inadvertently entered, and re-enter the same in the manner and at the time directed by the court.

We find no error in the action of the district court in this regard.

Case No. 983 presents the case upon its merits. The libel was filed by the owner of a certain raft of logs for damages alleged to have been sustained by the improper handling of the steamer J. H. Wade, resulting in a collision with the raft, and thereby damaging the same, and causing the loss of a large number of logs. The collision occurred about 6 o'clock in the morning of June 18, 1895, at a point in the St. Clair river where the river makes a sharp bend. The raft was a large one, being at the widest point perhaps 250 feet wide, and being some 2,000 feet long. The raft was in charge of three tugs; the Protector, the largest tug, was ahead, to tow and guide the raft, having out some 200 feet of line. The Parker, a smaller tug, was astern, to swing that end of the raft, being headed up stream, the tow being headed down stream. The Boynton, a third tug, at the time of the collision was on the American side of the river, with her bow against the raft, pushing toward the Canadian shore. The Wade, bound down, sighted the raft, and there was an interchange of signals, about which there is a conflict in the testimony. There is no dispute, however, that when the Wade attempted to pass the raft on the American shore there was ample space to justify her in coming down abreast of the raft, and the witnesses for the libelant do not seem to complain so much of the Wade for coming down, as for her failure to check her speed sufficiently to have the vessel under control before she ran into the raft. The testimony shows that when the

Wade reached the forward end of the raft she took a sudden sheer or list to port, and ran into the raft with considerable force, breaking the guy line, and scattering the logs. There is a decided conflict in the testimony as to the speed with which the Wade was running when she came down to the point of collision with the raft. The officers and crew in charge of the Wade and those having the raft in charge are in irreconcilable conflict, the former testifying that the Wade was checked more than once, until she was running very slowly; that before the collision she was losing steerageway, and more speed was put on; and that she then dropped back to a very slow rate of speed, and was so running when, by striking the land on the American side, she was caused to take a sudden sheer into the raft. Aside from the testimony of the officers and crew, counsel for the Wade produce the testimony of several persons residing in summer homes on the American side of the St. Clair river, who observed the collision; also, of the officers of a tug which came alongside the Protector, with a view to obtaining employment, shortly before the collision took place. We think it is apparent from the testimony that it cannot be concluded that the Wade did not check her speed. On the contrary, we think the testimony establishes the fact that the Wade did check up considerably while she was running alongside the raft, and near the American shore. It was a situation, however, where it is apparent it was easier to manage and control the steamer than the long and unwieldy raft which was in tow of the tugs. We think it was the duty of the master of the Wade to use her superior facilities in such a manner as care and good seamanship required to prevent injury to the raft. It is undoubtedly lawful to tow logs of rafts on the Great Lakes and connecting rivers, and while the master of the raft must exercise that degree of care that is required by the rules of navigation, this duty is also incumbent upon other navigators. *The Athabasca* (D. C.) 45 Fed. 651. Nor can we doubt that the Wade was well over on the American side. This fact is established by the testimony of disinterested witnesses. The raft, coming around the bend, owing to its great length, would naturally have its bow end nearest the American shore. The testimony develops that the Wade came down near to the bow end, and observers, not interested in the case, say that there was too narrow a space for her to get through, and that the Wade was so near to the American shore that she was stirring up the soil to a considerable extent. The raft was in plain view of the Wade for a considerable distance. Under such circumstances, it must have been apparent to the master of the Wade that a collision was imminent, and it devolved upon him to get his vessel under control, so that she might be checked,—even stopped,—if necessary to prevent the collision. When testimony is in such direct conflict, reference must be had to such physical facts as are disclosed by the proof. We regard it as established that when the Wade took the sheer into the raft, before she could be stopped she had run into the raft so far as to engage the logs in her wheel. This is the testimony of her engineer. Upon the theory of the appellee's case, the Wade was being crowded too close to the American shore,—closer than it was safe for her to go,—and it was claimed that the

forward tug was making no effort to get the raft out of the way. While the testimony shows that the Wade was somewhat checked, she must have been still running with considerable speed when she struck the raft, to break the boom sticks, and to run her length of 283 feet into the logs, so that almost immediately after the collision they were bumping her wheel. Under these circumstances, we do not think the Wade was under that control or handled with the care she should have been to avert the collision. The situation at the time was apparent to the master, and we cannot exonerate him from fault in causing the collision.

On the other hand, we are not satisfied that the navigators of the raft were free from negligence in the management of the tow. The taking of such rafts through such places as this bend in the St. Clair river requires a good deal of skill and management. In turning the bend, the raft appeared to the witness on the shore to make a wedge-like appearance from his point of view. Undoubtedly the end of the raft was very near to the American shore, and the testimony discloses that the Wade, coming down and attempting to pass, made it the duty of the master of the Protector to do all that could be done to get the head of the raft away from the American shore, so as to permit the passage of the Wade. Maines, engineer on the Kitty Haight, which had come alongside the Protector, for the purpose of obtaining employment, to assist in the handling of the tow, testified that he asked the pilot of the Protector "to go ahead, and let the Wade out," and he answered that he "guessed it was all right; he would go slow, and let the raft drift around with the current." Another witness (the master of the Kitty Haight) testified that the Protector was right ahead of the raft, and not making any particular effort to get the head of the raft around. From this view of the situation, and from other facts shown in the record, we cannot exonerate the managers of the raft from blame in failing to swing the head of the raft out of the way of the Wade, or at least in attempting so to do. We regard this negligence as directly contributing to the injury. We reach the conclusion that the collision was the result of the negligence of both parties in the manner pointed out, and that the damages should be equally divided between them.

The district judge dismissed the libel without filing an opinion, from which we are left to infer that he regarded the managers of the raft solely to blame for the collision. Reaching the conclusion that both parties were at fault, the decree below will be modified, and the damages and costs equally divided between the parties.

On Petition for Rehearing.

(October 7, 1902.)

We have carefully examined the grounds alleged for a rehearing in the petition and brief filed by the learned counsel for the appellees. The petition is based largely upon the proposition that the court found with the appellees as to the allegations of the libel concerning the steamer Wade's rate of speed at and before the collision. We reached the conclusion upon the hearing that, while the Wade was not running at a high and unchecked rate of speed to the extent averred

in the libel, still she was, just before the collision, running at a higher rate of speed than the situation warranted. There is in the record, as indicated in the original opinion, a direct conflict of testimony as to the rate of speed at which the Wade was running just prior to the collision. A number of witnesses on the tugs conducting the raft testified that she ran at a high and unchecked rate of speed. On the other hand, the crew of the Wade and some disinterested witnesses on the shore testified that she was running at a reduced rate of speed. While we are of the opinion that the speed of the Wade was checked to some extent, yet, in view of the fact that the testimony is undisputed that after the sheer she crashed into the raft with such force as to run her length into the same almost instantly, we must conclude there was still a very considerable rate of speed maintained by the Wade. In our opinion, the testimony is ample to warrant the inference that, had the Wade been under such control as was claimed by her officers and crew, she would not have struck the raft with such force and violence with the resulting injury which followed. Let it be conceded that the Wade was justified in assuming that the raft would be out of the way and coming down with a view of passing on the American side, and that the managers of the raft were in fault in not using sufficient efforts to get the head of the raft out of the way, it was, nevertheless, apparent for a considerable time before the Wade took the sheer that there was danger of a collision. In such situation, notwithstanding the fault of the navigators of the tugs towing the raft, when the collision became imminent it was the duty of the master of the Wade to use every reasonable means and precaution to avoid the collision, which, in our opinion, might have been avoided had the Wade been running slowly, and under such control as she should have been in view of the situation. There is no testimony in the case tending to show that the Wade could not have slackened, or even stopped, to avoid the collision. No matter how flagrant the fault of the navigators of the raft may have been, that would not excuse the Wade from adopting every proper precaution to avoid a collision after it became apparent that it was likely to occur. This rule is reasonable in itself, and is amply supported by the authorities. *The Maria Martin*, 12 Wall. 47, 20 L. Ed. 251; *The America*, 92 U. S. 432, 23 L. Ed. 724; *Spencer, Marine Collisions*, §§ 80, 81, and cases cited. In the *Albert Dumois*, 177 U. S. 240, 253, 20 Sup. Ct. 595, 600, 44 L. Ed. 751, Justice Brown said:

"This court has repeatedly held the fault, and even the gross fault, of one vessel does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require."

It is strenuously urged that when she took the sheer the Wade was in extremis; and, it being the fault of the tugs towing the raft that placed her in that situation, no fault can be imputed to her master for not acting differently than he did at the time. Counsel say: "The Wade, unable to withdraw, was proceeding at the lowest speed either permissible or possible. Her master, who died before the trial, was in extremis by every definition and intendment of that doctrine,"—citing authorities. The rule is well settled that a master act-

ing in extremis, placed in such situation by the fault of the other, is not responsible for error of judgment in handling his vessel under such circumstances. But the fallacy of attempting to apply the doctrine here lies in assuming that the Wade was running at the lowest speed possible. If such were the fact, the sheer would have been slight, and without serious damage to the raft. The undue speed of the Wade in a situation which demanded the slowest rate practicable contributed to the injury, as well as the wrongful act of the raft's managers in crowding the Wade over to the American shore.

It is also argued that the case was decided upon issues not made in the pleadings in the court below. We cannot assent to this view. The libel was ample to warrant the finding that the Wade was running at too high rate of speed at and before the time of the collision. Pending the trial, a motion was made to amend the libel so as to aver that the Wade should have stopped before the collision. It is true, the appellees objected to this amendment. Nevertheless it was granted, as it was within the discretionary power of the trial judge to do. But we do not put the case on the absolute necessity of stopping the Wade. What we hold is that, when it became apparent that the danger of collision was imminent, even though the situation was brought about by the negligence of the navigators of the raft, it became the duty of those in charge of the Wade to abate her speed to such a degree as would prevent the danger of collision, instead of going ahead at such a rate of speed as to send the Wade at the time of the sheer against the raft with a good deal of force. We cannot avoid the conclusion reached at the hearing that, notwithstanding the negligence of the tugs, the Wade, by the exercise of due diligence, might have avoided this injury after the risk of collision became apparent.

Finding both parties at fault, we think the decree dividing the damages equally between the two vessels was just, and the rehearing will be denied.

ZANE et al. v. CITIZENS' TRUST & SURETY CO.

(Circuit Court of Appeals, Third Circuit. September 18, 1902.)

No. 19.

1. PRINCIPAL AND SURETY—INDEMNIFYING BOND—LIABILITY—EXONERATION.

Plaintiff trust company contracted to indemnify M. against loss from the failure of Z. to erect certain houses on land sold by M. to Z. Z. gave a mortgage to M. to secure a part of the purchase price and money loaned to be used in the construction of the buildings, which money M. procured from S., assigning as security therefor the note and mortgage given by Z.; and, in order to secure the performance of the contract by Z., defendant executed a bond, sued on, for the benefit of the plaintiff surety company. *Held*, that the fact that plaintiff surety company executed its policy of indemnity to S., assignee of the mortgage, instead of to M., was no defense to the action on the bond given by defendant for loss sustained by Z.'s failure to erect the buildings, since such loss was in fact sustained in exoneration of its liability to M.

2. SAME—CONSOLIDATION OF COMPANIES—EFFECT.

Where a surety company was bound to indemnify against a contractor's failure to erect buildings, and took a bond from defendant to

secure such liability, the fact that plaintiff company thereafter transferred its assets to another company, the latter assuming its liabilities, and borrowed money from the latter with which to complete the buildings on the contractor's default, did not preclude it from enforcing defendant's liability on its bond.

8. SAME.

Where an indemnitor had taken a bond from defendant to secure its liability for the failure of a contractor to erect certain buildings, it was no defense to an action on defendant's bond for loss sustained by such indemnitor that, on the default of a subcontractor for preliminary work, he refused to acquiesce in the arrangement of the contractor for superseding such subcontractor; it not appearing that plaintiff had any right to interfere with such contractor, or that the subcontractor's default had any natural connection with the failure of the contractor to finally complete the buildings as agreed.

4. SAME—ACTIONS—INSTRUCTIONS.

Where an indemnitor for the construction of buildings by a contractor had taken a bond from defendant to secure its liability, and, on the contractor's default, plaintiff's agent went to defendant's agent, and requested defendant to proceed and complete the buildings, which was refused, and the latter stated that, if the indemnitor believed he had a claim, to go ahead and finish the building, and present the claim, in an action on the bonds it was not error for the court to charge that the indemnitor's loss was incurred in completing the operations under the directions of the obligor, through its local agent.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. For opinion below, see 113 Fed. 596.

S. Davis Page, for plaintiffs in error.

D. J. Myers, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. This was an action brought by the Citizens' Trust & Surety Company, for use of the Union Surety & Guaranty Company, against Frank S. Zane and the National Surety Company, upon their bond, dated March 31, 1898, executed by Frank S. Zane as principal, and the National Surety Company as surety, whereby the obligors bound themselves jointly and severally to pay the sum of \$6,400 to the Citizens' Trust & Surety Company. The bond contains the following recitals and condition:

"Whereas, the said Frank S. Zane has agreed to erect and build fifty-two two-story brick dwellings on the east and west sides of Wendell street (35 feet wide, extending from Clearfield street to Allegheny avenue), six two-story brick dwellings on the north side of Clearfield street, and six two-story brick dwellings on the south side of Allegheny avenue, in the Thirty-Third ward of the city of Philadelphia, according to certain plans and specifications prepared by William H. Free, architect, 1237 Arch street, Philadelphia, now lodged with the said the Citizens' Trust and Surety Company. And whereas, in and by a certain agreement, bearing date the _____ day of _____, A. D. 1898, by and between the said Frank S. Zane, the Citizens' Trust and Surety Company, John Meighan, and the Real Estate Title Insurance and Trust Company, wherein it was recited, *inter alia*, that the said John Meighan agreed to advance toward the erection and completion of said sixty-four buildings, and general expenses incident thereto, the sum of fifty-six thousand dollars; that the said sum was deposited with the Real Estate Title Insurance and Trust Company. And whereas, the said the Citizens' Trust and Surety Company have agreed to indemnify the said John Meighan against any loss

by reason of the noncompletion of the said buildings and the filing of mechanics' and municipal liens: Now, the condition of this obligation is such that if the said Frank S. Zane shall faithfully perform all the conditions and covenants in said bond, and shall fully complete said sixty-four buildings according to said plans and specifications, free of mechanics' and municipal liens, and pay the general expenses incident to said operation, then this obligation to be void, otherwise to remain in full force and effect."

At the trial of the case the evidence established the following stated facts: John Meighan sold and conveyed certain lots of ground in the city of Philadelphia to Frank S. Zane, who agreed to erect thereon 64 dwelling houses. Meighan agreed to advance to Zane, towards the erection of these houses, the sum of \$56,000. To secure the proper application of the money, it was agreed that it should be deposited in the Real Estate Title Insurance & Trust Company to the credit of the building operation, and this was done. The Citizens' Trust & Surety Company agreed to indemnify "said John Meighan, his heirs and assigns," against loss by reason of the noncompletion of said 64 buildings, or of any liens that might be filed against the same by mechanics or materialmen. These several engagements are recited in the quadrilateral agreement which the bond in suit refers to. Zane executed to Meighan a mortgage on the 64 lots of ground for \$87,300, to cover the purchase money thereof, namely, \$31,300, and the above-mentioned advance of \$56,000. Meighan borrowed from William Frederick Snyder the \$56,000 upon his note for that amount, and, as collateral security for the same, assigned to Snyder the Zane mortgage. Frank S. Zane failed to complete the 64 buildings. On March 2, 1899, while the buildings were unfinished, Zane made an assignment for the benefit of creditors to D. S. Lindsay. Mechanics' liens to a large amount were filed against the buildings. The fund, namely, \$56,000, specially deposited with the Real Estate Title Insurance & Trust Company, was all applied toward the 64 buildings, but was insufficient to defray their cost. The legal plaintiff, the Citizens' Trust & Surety Company, alleged, and claims to have given evidence at the trial to show, that by reason of the default by Frank S. Zane, and in compliance with its obligation to indemnify John Meighan, it was compelled to expend and did expend a sum of money in excess of the amount of the bond in suit to complete the said 64 buildings and free them from mechanics' liens, which money so expended it obtained from the use plaintiff, the Union Surety & Guaranty Company. There was a verdict in favor of the plaintiff for the amount of the bond and interest, and the court entered judgment for the plaintiff upon the verdict. 113 Fed. 596. To reverse this judgment, this writ of error was brought.

This record contains 33 assignments of error. We think, however, that it is not necessary for us to take them up seriatim, or to consider them separately. We prefer to follow the groupings of the assignments found in the brief of argument submitted by the counsel for the plaintiffs in error, and to treat the case with regard to the four fundamental propositions which in the brief stand at the head of the several groups of assignments, and which the counsel for the plaintiffs in error has particularly pressed upon our attention.

The first of these propositions is this:

"(1) The court below erroneously sustained the verdict on the assumption that the loss complained of was incurred in indemnifying Meighan, and not in exoneration of the plaintiff's policy of insurance to Snyder."

We are not able to accept the view here urged, nor can we give to the circumstance that the policy was issued to Snyder the effect claimed for it by the plaintiffs in error. The quadrilateral agreement mentioned in the bond in suit contains these two distinct recitals:

"And whereas, the said the Citizens' Trust and Surety Company, at the request of the said Frank S. Zane and John Meighan, hath agreed to indemnify the said John Meighan, his heirs and assigns, against all actual loss by reason of the noncompletion of said sixty-four buildings, or of any liens that might be filed against the same by the mechanics or material men furnishing labor or material in or about the construction thereof. And whereas, the said the Citizens' Trust and Surety Company hath agreed to so indemnify the said John Meighan, and issue its policy therefor, to the amount of eighty-seven thousand three hundred dollars, upon conditions, amongst other things, that the said sum of fifty-six thousand dollars should be so as aforesaid deposited, and in such manner that the same shall in no way be liable for the past, present, or future debts or engagements of the said Frank S. Zane, and shall be distributed and paid as hereinafter agreed."

From these recitals it is manifest that the Citizens' Trust & Surety Company was bound to indemnify Meighan from loss resulting from the noncompletion of the buildings, or from the filing of liens against them. The bond in suit recited this obligation thus: "And whereas, the said Citizens' Trust & Surety Company have agreed to indemnify the said John Meighan against any loss by reason of the noncompletion of the said buildings, and the filing of mechanics' and municipal liens;" and the expressed condition of the bond, upon the fulfillment of which it is to become void, is "if the said Frank S. Zane * * * shall fully complete said sixty-four buildings according to said plans and specifications, free of mechanics' and municipal liens, and pay the general expenses incident to the said operation." Now, notwithstanding the assignment to Snyder of the Zane mortgage, Meighan remained the real owner of the mortgage. The assignment was as collateral security for the loan of the \$56,000 upon the note which Meighan had given Snyder. Undoubtedly then any loss thereafter occurring by reason of the failure of Zane to complete the buildings free from liens would fall upon Meighan. The issuing of the policy to Snyder did not extinguish the liability of the Citizens' Trust & Surety Company to indemnify Meighan. The money which that company expended was in performance of its legal obligation to Meighan, and not a voluntary payment. The loss here sued for clearly is within the scope and very terms of the bond given by the defendant below, Zane, and the National Surety Company, to the legal plaintiff, the Citizens' Trust & Surety Company. Upon the most careful examination of all the assignments of error under this head, we are not able to find in any of them ground for reversal. We may add that in our consideration of this branch of the case we have proceeded as if the policy issued to Snyder was in the case and before us for every purpose. In fact, however, when offered in evidence by the plaintiff below it was rejected as immaterial upon the objection and at the instance of the defendants.

The second general proposition of the plaintiffs in error is this:

"(2) The loss complained of, whether incurred in indemnifying Meighan or in exoneration of the policy to Snyder, was sustained, not by the Citizens' Trust & Surety Company, but by the Union Surety & Guaranty Company, to whom the plaintiff in error owes no obligation under the bond in suit."

Upon an attentive examination of this record, we are satisfied that it furnishes a full answer to this proposition. The Union Surety & Guaranty Company, indeed, provided the money necessary to complete the building and discharge the liens after the exhaustion of the special deposit of \$56,000. But under the proofs, charge of the court, and the verdict, it must be taken that the money so provided was advanced by the Union Surety & Guaranty Company to the Citizens' Trust & Surety Company. These two companies were and continued to be distinct corporations, notwithstanding the transfer of the assets of the Citizens' Trust & Surety Company to the Union Surety & Guaranty Company, and the assumption by the latter of the obligations of the former. There was no substitution of an obligee, either in fact or in law. The Citizens' Trust & Surety Company did not drop out of the transaction, but acted to the end in the performance of its engagement to Meighan. At its instance and request, and to enable it to perform its obligation to Meighan, the Union Surety & Guaranty Company advanced to it the necessary money. This must be accepted as the real transaction, under the evidence, charge of the court, and finding of the jury. We cannot sustain any of the specifications of error grouped under this head.

The third proposition urged by the plaintiffs in error is as follows:

"(3) The court erred in excluding testimony tending to show that the loss complained of would not have been incurred had the Citizens' Trust & Surety Company permitted the operator, Zane, to complete the work of the first defaulting contractor, as provided for under the terms of that particular contract."

We have examined the seven specifications of error grouped under this heading in connection with the offers of evidence appearing upon the record. The offers relate to the default of one Moore, a contractor for cellar work, which occurred very early in this building operation, to some arrangement proposed by Zane which involved the superseding of Moore in the conduct of the work, the refusal of the Citizens' Trust & Surety Company to permit what Zane proposed, and, as alleged, that "this inability to carry out the arrangements proposed produced the failure in the operation." We are constrained to say that the offers strike us as too vague. Besides, it did not appear in the offers or otherwise that the Citizens' Trust & Surety Company had any right to interfere with Zane in the matter proposed by him. Moreover, there was no necessary or natural connection between Moore's early default in cellar work and the ultimate failure of Zane to complete the buildings free of liens. The supposed connection was purely conjectural, and the rejected offers involved the mere opinions of witnesses upon the subject. We are of the opinion that none of the specifications under this head should be sustained.

The fourth general proposition of the plaintiffs in error is this:

"(4) The court below erroneously charged the jury that the loss complained of was incurred in completing the operation under the directions of the obligor, through its local agent in Philadelphia."

The specifications of error grouped under this head are the twenty-eighth, twenty-ninth, thirtieth, and thirty-first. They relate to that part of the charge of the court with reference to the authorization by the defendant the National Surety Company to the legal plaintiff, the Citizens' Trust & Surety Company, to complete the buildings after Zane's failure. Thomas B. Smith was the agent of the defendant company at Philadelphia having charge of its local office there. As to what occurred between himself and Mr. Cushing, representing the plaintiff company, Smith testified thus:

"Mr. Cushing complained that the assignee had no money to go ahead and complete the work, and they wanted us to go ahead and do it. My reply was that we would have nothing to do with it at that time. He said, 'Well, if you don't do it, we are going ahead and complete it, and charge it to your office.' It was a matter of indifference to me whether they did or did not; if they chose to do that, go ahead and do it; I didn't care anything about it. If they thought they had a claim. Well, he says, 'We'll have a claim against your company.' I says, 'If you think so, when you have concluded your labors present your claim.'"

We think that this testimony fairly warranted that portion of the charge here particularly complained of. While in relating what was said the witness used the personal pronoun, yet he must be understood as having spoken for the company he represented,—the National Surety Company. Besides, even in the absence of express authorization by the defendant company, the plaintiff company, under the facts, had the right to complete the contract of Zane upon the latter's default. *Trust Co. v. Campbell*, 184 Pa. 541, 544, 39 Atl. 291.

We think that this record is free from error, and accordingly the judgment is affirmed

MAGUIRE et al. v. SHEEHAN.

(Circuit Court of Appeals, First Circuit. July 29, 1902.)

No. 430.

1. DAMAGES—PERSONAL INJURY—FACTS IN MITIGATION.

Where a plaintiff was in good health prior to a personal injury due to defendant's negligence, but the shock of such injury produced delirium tremens, by reason of which, and of his acts during delirium, his recovery from the injury was retarded and rendered less complete, the fact that his susceptibility to the disease was the result of his own voluntary acts cannot be considered in mitigation of damages, but defendant is liable for all damages resulting from the disease, as well as from the original injury.

In Error to the Circuit Court of the United States for the District of Rhode Island.

Walter B. Vincent, for plaintiffs in error.

Donald G. Perkins (J. J. Desmond, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. The alleged errors of the court below, which relate solely to the question of damages, must be considered in the light of the testimony in the case. It appeared in evidence (1) that Sheehan, the plaintiff below, prior to his injury was in good health; (2) that the delirium tremens which retarded his recovery was caused by the shock of the injury; (3) that the violent acts which delayed the healing of the wound and the knitting of the bones were committed while in a state of delirium.

This state of facts shows (1) that no question could properly arise respecting what part of the injury might be attributable to a diseased condition at the time of the accident; and (2) as the chain of causation was complete, direct, and immediate, that no question of an independent intervening cause was properly presented in the case.

The charge of the court below on the question of damages was substantially as follows: Damages mean compensation. This includes compensation for loss of time, for loss of future earning capacity, for pain, for suffering, and for all expenses incurred for nursing and in the treatment of the injury.

Upon the question of delirium tremens and the alcoholic habits of the plaintiff, the court said:

"It does appear in evidence, however, that, after the man was taken to the hospital, delirium tremens ensued, and that while he was upon his back, and should have remained in one position, in order that his leg might knit, this attack of delirium tremens rendered him practically insane, so that he moved about, tore his bandages, and even got out of bed, and that that delayed the knitting of the wound, and has prevented a recovery as complete as otherwise might have been had; in other words, that the man's previous alcoholic condition affected the injuries which resulted from the accident.

"Well, gentlemen, this is a pretty delicate matter; and I think it is the policy of the law that such damages as are the natural and probable consequences, and the actual consequence, in each case, are proper subjects for compensation. We find in our community men of various stages of indulgence in alcoholic stimulants, and it would be impracticable for the law to draw any very fine distinctions. You take the case of a cut. Suppose a man in an accident is cut. I believe it is a medical fact that the users of alcohol do not repair their wounds as rapidly as a man who has never put hot and rebellious liquors to his blood, as an old poet puts it.

"Now, suppose a case where a man of good standing in a community is injured on the highway, and is very badly cut; would it be practicable, gentlemen, for the rules of law to make fine distinctions between a man of that character, a man of perfectly reputable standing, and an alcoholic man,—between a drinker and a nondrinker? * * *

"In view of these very complicated questions which might arise, it seems to me to be the better policy that you should take the party as he stands, and say what was the injury to him which was due to this accident, as its proximate cause. Now, it is true that a person injured is obliged to use his best efforts to make the injury as little as possible. If a man suffers from a railway collision, he is not relieved from his duty to go about in the business of curing himself. He cannot allow the thing to go on, and recklessly increase his injury by not attending to it, in order to get enhanced damages. He is required to use the reasonable exertions of a prudent man, and I suppose that a patient in the condition of this man would be required to use reasonable prudence in taking care of himself; and mere nervousness, mere lack of self-restraint, would not justify conduct such as tearing off bandages or getting out of bed, any more than it would justify a man who had committed an assault upon another to say that his nervous system was so attenuated or impaired by smoking or drinking that he could not resist the taunts of his adversaries. That would be no excuse at all.

"So, in this case, had the party been a man of sound mind, the doctrine might have been applicable that he is still required to use the conduct of an ordinary and prudent man under such circumstances. The evidence in this case, however, as far as I recollect it, is that this delirium was solely caused by the accident. If that is the case, gentlemen, and the man became an insane person, then the fact that he had, by his conduct in tearing off the bandages and moving about in the bed, retarded his recovery, would be no barrier to the recovery of such damages as he had in fact suffered. * * *

"I therefore instruct you that you are not entitled to deduct anything from the ordinary damages,—from such damages as you find to have ensued from this accident."

The exception of the defendants was to the whole of this portion of the charge, and not to any particular part. For the reasons which will appear in the discussion of the substantial question involved in the case, this exception must be overruled.

The defendants further requested the court to charge "that, if the previous condition of the plaintiff was such as to prevent his recovery from the accident, such condition should be taken into account."

In relation to this request the court said:

"You may certainly take into account the man's condition, gentlemen, when you approach the question of damages as affecting his earning capacity, but I think that I have sufficiently instructed you as to its bearing upon this particular question of his conduct in the hospital."

That this request is not a correct statement of the law, and should be overruled, sufficiently appears from what follows in this opinion.

The substantial question the defendants sought to raise was presented by the second request, which was also refused. This request was as follows:

"That, if the plaintiff voluntarily put himself in a physical condition where delirium tremens might easily be developed by the shock of an accident, he would be responsible so far as such condition prevented his recovery."

The defendants admit the general rule that, where a personal injury develops a latent disease, the person whose negligence caused the injury is liable to respond in damages for the results of the disease, as well as of the original injury; but they insist that a distinction should be made between different diseases. It is not denied that the rule applies to malaria, scrofula, rheumatism, erysipelas, cancer, and lockjaw, but it is said that it does not apply to ailments which are caused by voluntary and intemperate habits.

We are not aware of any such exception to the general rule. The difficulties of establishing such an exception are apparent, as was aptly illustrated in the charge of the court below. How far a latent disease, called into activity by an injury, is the result of the habits or voluntary acts of the injured, is a matter of speculation, and necessitates the investigation of difficult and occult questions of cause and effect, which lie outside the scope of judicial inquiry. Beyond general expressions in some decisions, which at most are mere dicta, there is no authority cited by the defendants which supports their contention. As an almost universal rule, the courts have declined to recognize any such distinction, and it is only necessary to refer to the following cases:

In *Turner v. Railroad Co.* (Sup.) 58 N. Y. Supp. 490, where the

plaintiff's intestate died from delirium tremens caused by the shock of the injury, the court said:

"If the accident to the deceased had been caused while he was, and by reason of his being, intoxicated, so that his condition might be considered as contributing to the accident, a different question would have arisen; but it requires altogether too great a stretch of moral responsibility, and necessitates the investigation of cause and effect, and would carry us into metaphysical and psychological speculation, to an extent outside the possibility of judicial inquiry, to hold that the susceptibility to delirium tremens is different from any other physical condition caused by unwise or improper habits. When disease has supervened from any cause, any aggravation of that condition by the negligence of another is a cause of action for damages, provided such damages are solely set in motion and caused by the injury."

In *Sullivan v. Marin*, 175 Mass. 422, 423, 56 N. E. 600, the defendant sought to prove that the plaintiff, prior to the accident, had been addicted to the excessive use of intoxicating liquors. In ruling upon this point, the court said:

"If her previous habits had been such as to lessen the probability of her complete recovery, or to prolong or aggravate the suffering caused by her injury, that fact could not be shown in mitigation of damages."

See, also, *Railway Co. v. Ferguson* (Tex. Civ. App.) 64 S. W. 797.

The judgment of the circuit court is affirmed, with interest, and the costs of appeal are awarded to the defendant in error.

WEBB, District Judge, concurred in the conclusion of the court before he resigned.

THE NATIONAL CITY.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1902.)

1. SHIPPING—CONTRACT OF CARRIAGE BY CHARTERER—LIABILITY OF SHIP FOR BREACH.

A charter of a steamer for a term of four months, with privilege of extension for an additional four months, the owner to supply and pay the officers, but all other charges and expenses to be paid by the charterer, who is required to give a bond to protect the owner from liens, is a demise, and the vessel is bound for the contracts made on her behalf by the charterer with passengers or shippers having no knowledge or notice that the charterer was not the owner.

2. SAME—FAILURE TO MAKE RIGHT DELIVERY.

The charterer of a demised steamer contracted with libelants to transport them and certain cargo from San Francisco to points on the Yukon river, the carriage to be made by such steamer to St. Michaels, and by a connecting river steamer for the remaining distance. On arrival at St. Michaels the charterer had no river vessel there, and after some delay the master of the steamer put libelants and their goods on shore, against their protest, refusing to forward them, although transportation up the Yukon was available on other boats. *Held*, that the contracts were entire, for through transportation, for the completion of which the steamer was bound, and that she was liable in damages for failure to make right delivery by placing libelants on some river vessel for the completion of the voyage.

8. SAME—DAMAGES RECOVERABLE.

The fact that the master offered to return libelants to San Francisco free of charge on condition that they would sign a release of damages did not exonerate the steamer from liability for the cost of their return passage after they had been compelled to abandon their further journey because of their inability to pay the rates demanded for transportation up the river.

Appeal from the District Court of the United States for the Northern District of California.

The appellees filed a libel against the National City, a steamer, which had been chartered by the appellant, her managing owner, to the Alaska & Yukon Transportation Company, a corporation of San Francisco, for the voyage from San Francisco to Alaskan ports and to return to San Francisco, for a period of four months from and after February 5, 1895, with the privilege of an extension for four months. The appellant, by the terms of the charter party, was to supply and pay the wages of the captain, the chief engineer, the first assistant, and the first officer. All other charges and expenses were to be borne by the charterer. A bond was given to the appellant to hold him harmless of all liens, claims, and demands accruing under the charter party. The libelants jointly took passage and shipped cargo on the National City at San Francisco. Their tickets were for passage from San Francisco to Dawson City, and the cargo was to be delivered at Circle City. It was understood at the time of buying the tickets and shipping the goods that the National City, owing to her deep draft, could go no further than to St. Michael, and that there the libelants and their property were to be transferred to a river vessel to proceed up the Yukon to their destination. The Alaska & Yukon Transportation Company was at that time building three river steamers at San Francisco for that purpose. Two of these river boats were never sent to St. Michael. The third, the James Ever, was taken in tow by the National City on her voyage to St. Michael, and was lost at sea while on the way. The passage ticket which the libelants received had two coupons attached. The first was for transportation from San Francisco to St. Michael. Across it were stamped in red ink the words "National City." The second coupon was for transportation from St. Michael to Dawson, and contained the words, "Good only on connecting steamer to cover accommodations as specified herein and in conditions named in contract." There were no conditions, however, in the contract pertinent to the questions involved in this case, except the provision that in case of the loss or detention of the steamer during the voyage she should not be held responsible for damages either from accident, fire, or dangers of the sea, nor in such event should the "vessel, her owners or charterers, be under any obligation to forward passengers to their destination by any other conveyance or line, nor to refund the amount of passage money." Upon arriving at St. Michael, the libelants found that the Alaska & Yukon Transportation Company had no river vessel in readiness to receive them or their cargo. They were detained on the vessel 30 days, and then, against their protest, were forced to land, and their property was put ashore. During this time transportation up the Yukon river was available upon other boats, but the master of the National City refused to forward the libelants or their cargo on such vessels, or to pay their transportation. They remained ten days or two weeks on St. Michael Island, when they were ordered off the island by the military commander. They then got a small sailing vessel, and sailed to Nome. Libelant Tough thereupon returned from Nome to St. Michael, and from there took passage to San Francisco, paying \$75 for his passage. The libel was filed to recover freight and passage money, other expenses, and damages. The district court denied damages, but awarded to the libelants each the sum of \$140, the amount which they had paid for their tickets, and to Tough an additional \$75, and awarded to the libelants jointly the further sum of \$563.39, the amount which they had prepaid as freight, and allowed interest

on all said amounts at 6 per cent. per annum from the date of the commencement of the suit.

A. C. Freeman and George E. Bates, for appellants.

H. W. Hutton, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal question presented upon this appeal is whether the National City, which had been chartered by her owner to the Alaska & Yukon Transportation Company, is liable to a lien for the freight and passage money which was paid by the libelants under the circumstances above detailed. It is contended that the voyage which was to be performed by the National City, and the part which she was to take in the contract of transportation of passengers and freight, was fully performed when she arrived at St. Michael, and that neither the steamer nor her owners are responsible for the failure of the charterer to have ready at St. Michael a river vessel to complete the contract. It is not shown that the libelants had any notice that the steamer was chartered, or that any fact came to their knowledge to put them upon inquiry to ascertain whether she was chartered. We think that under the terms of the charter party the vessel was demised to the charterer, and that the latter was the owner pro hac vice, and that, so far as the present case is concerned, the vessel is to be dealt with as if the Alaska & Yukon Transportation Company had been her owner. *The Freeman v. Buckingham*, 18 How. 189, 15 L. Ed. 341; *The Phebe*, 1 Ware, 263, Fed. Cas. No. 11,064; *Arthur v. The Cassius*, 2 Story, 81, 93, Fed. Cas. No. 564. The contract which the corporation made with the libelants was an entire one. It was to carry the libelants and their freight from San Francisco to their final destination on the Yukon river. To the completion of that contract the National City was bound, so far as its part therein was concerned. This is clear from all the dealings between the parties. The bills of lading, while not signed by the master of the steamer, were all made with express reference to transportation thereon, and in one of them it was acknowledged that the goods had been received on board. The passenger tickets referred to the steamer as responsible for the contract, and expressed the conditions which should exempt the vessel from forwarding the passengers to their destination by other conveyance. The steamer was bound, not only to carry, but to rightly deliver, both the passengers and freight. There could be no right delivery by landing the passengers or the freight upon the island, or by landing them otherwise than by placing them on-board a river steamer for the voyage up the Yukon. There is no contention (and there can be none) that the National City was prevented by accident or delay or the dangers of the sea from carrying out this contract. It is true that the river steamer which it was undertaking to tow to the mouth of the Yukon river was lost at sea, but the contingency of that loss was one that had not entered into the contract. The master of the National City was not thereby ab-

solved from making a right delivery. *The Lady Pike*, 21 Wall. 1, 15, 22 L. Ed. 499; *King v. Shepherd*, 3 Story, 349, Fed. Cas. No. 7,804; *Bork v. Norton*, 2 McLean, 422, Fed. Cas. No. 1,659. If a river vessel of the Alaska & Yukon Transportation Company were not available at St. Michael, it was the master's duty to procure for the libelants and their cargo transportation upon some other river vessel.

Error is assigned to the allowance by the court of the sum of \$75 to the libelant Tough, the cost of his return passage from St. Michael to San Francisco. It is said that this sum should not have been allowed, for the reason that the master of the *National City* offered to take the libelant back to San Francisco free of charge. It does not appear in the testimony at what time this offer was made, or whether it was or was not made in connection with another offer made by the master, which was that the libelants would be permitted to sell the remainder of their tickets up the Yukon, and return on the *National City* to San Francisco, provided they would sign a release of the ship from further liability in the matter. The libelants may well have declined the offer to carry them back to San Francisco if it was made at any time before they finally abandoned their plan to go to Dawson City. It appears that the expense of passage and freight up the Yukon by the river boats then available was exorbitant, being \$125 for a passenger and \$200 a ton for freight. The libelants had not enough money to pay these rates. For aught that appears in the evidence, they may have refused the offer to carry them to San Francisco in the expectation that the ship would yet procure them the means of transportation to Dawson, or that they might otherwise reach their destination. Under the evidence which is before us we cannot say that the court erred in allowing any of the items which were decreed to the appellees.

The decree will be affirmed.

WELLMAN v. MIDLAND STEEL CO.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 774.

1. PATENTS—ANTICIPATION—CHARGING FURNACES.

The Wellman patent, No. 421,797, for an improved method of charging furnaces shows no patentable improvement over the devices described in prior patents granted to the same patentee, and is void for anticipation.

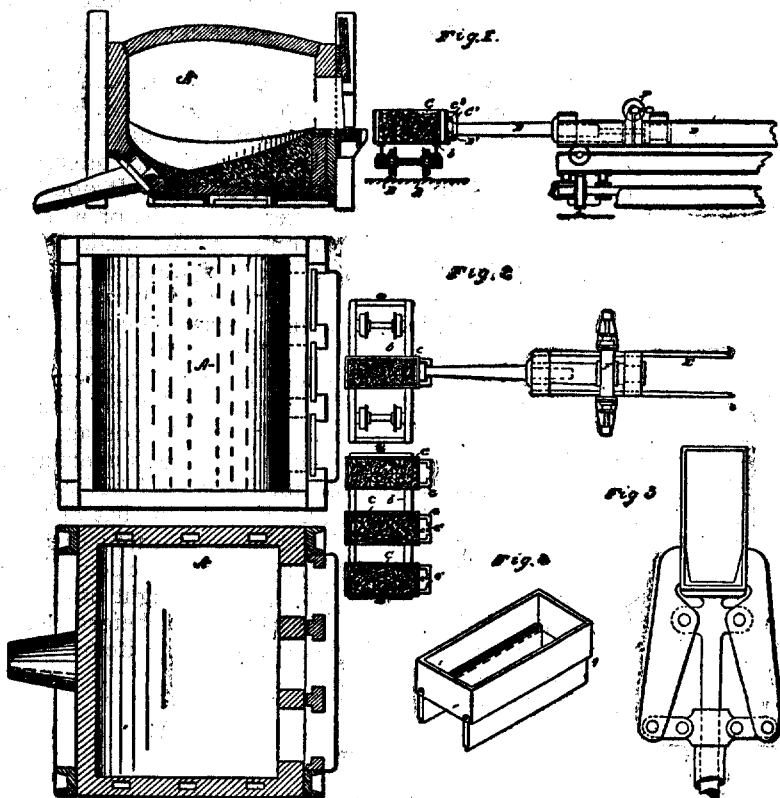
Appeal from the Circuit Court of the United States for the District of Indiana.

For opinion below, see 106 Fed. 226.

The bill was to restrain infringement of Letters Patent No. 421,797, granted February 18, 1890, to Samuel T. Wellman for a certain improved method of charging furnaces. The method is said in the letters patent to be adapted to charge open-hearth furnaces for the

manufacturing of steel, or any melting furnace that is charged through doors or openings in the side, in contradistinction to blast furnaces, or such as are charged from the top.

The drawings and specification of the patent in suit are as follows:



"My invention relates to an improved method of charging furnaces; and it consists in the steps hereinafter described and claimed. My improved method is adapted to charge, for instance, the Siemens, Martin, or open-hearth furnace for manufacturing steel, or for charging any melting-furnace that is charged through doors or openings in the side of the furnace, in contradistinction to blast-furnaces, or such as are charged from the top.

"Heretofore in charging, for instance, open-hearth steel-furnaces the practice has been to pile by hand the coarser materials—such as broken pig-iron, &c.—on the broad flat end of a long charging-bar, known as a 'peel,' such charging-bar resting on a roller located at the front of the furnace-door, this bar having a handle at the rear end thereof for the operator in manipulating the charging-bar. Other and similar charging-bars were provided having a larger spoon at the forward end thereof for receiving the finer material. By such primitive means the material in comparatively small quantities was run into the furnace and dumped. This method of charging was slow, whereby the operations of the furnace were greatly delayed, and on account of manual labor required the charging was expensive. For instance, with from three to four men, the one for operating the charging-bar and the others for placing the material on the charging-bar, a ton of material was charged usually in about from six to ten minutes, and

at such rate it required about from two and a half to three hours to charge a furnace of thirty tons capacity. With my improved method the charging-bars aforesaid and the men for operating the same are dispensed with, and in place thereof dumping-boxes are employed. The furnaces, in case there are more than one, are set in line, with track-rails extending in front of the furnaces and leading from thence to the yard or place where the material is stored or received, with cars operating on the tracks for bringing the material alongside of the furnaces. The dumping-boxes may be of any desired size, the capacity of those that I have thus far used being about one and a half tons of material each. These dumping-boxes are placed upon the cars and filled with the material, it requiring no more labor to fill the boxes thus placed than it would require to load the same amount of material directly onto the cars without the boxes. Enough dumping-boxes and cars should be provided for carrying the material necessary in charging at least one furnace, and assorting of material in the way of selecting the proportions of different ingredients is done in filling the different dumping-boxes, so that the latter contain in the aggregate a charge for a furnace, and may be dumped indiscriminately into the furnace.

"Suitable mechanism operated by power is provided for lifting successively the loaded dumping-boxes from the car, conveying the same into the furnace, dumping the load, and withdrawing the empty boxes and returning them to the cars. It requires usually but the fraction of a minute to thus handle each dumping-box, and a thirty-ton furnace may be charged in from twelve to fifteen minutes. The mechanism for thus handling the dumping-boxes in charging may be varied indefinitely, according to circumstances.

"Suitable mechanism for carrying out my method, more especially where a series of furnaces are set in line, is outlined in the accompanying drawings.

"Figure 1 is a side elevation, partly in section. Fig. 2 is a plan, partly in section. Figs. 3 and 4 are modifications showing, respectively, tongs for handling the dumping-box and a box with a dumping-bottom.

"A A are melting-furnaces of the open-hearth variety, and B B are tracks extending along in front of the furnaces and leading from thence to the yard or wherever the material for supplying the furnaces is stored or received, and b b are cars adapted to travel on the tracks in transporting the material alongside the furnaces.

"C C are the dumping-boxes shown resting on the cars, the boxes being laden with material ready for dumping. The body of each dumping-box C is in the main usually of heavy plate metal with cast-metal head or end C', the latter having flanges c of the variety shown in Fig. 2, these flanges being upright and located some little distance apart and projecting outward and along the outer edge thereof, being offset toward each other, as shown at c', the flanges partially inclosing a recess c², and the flanges near the upper ends thereof having transverse holes for receiving a pin or key c³.

"D is the lifting-bar, having a broad head D', adapted to fit in recess c² of the dumping-box. In attaching the lifting-bar to the dumping-box, pin c³ having been withdrawn, the pin is returned to its place after head D' is in position in the recess, the pin when in place extending across above head D', thus locking the parts, whereby the dumping-box is held rigid with the lifting-bar. Bar D is mounted on and journaled in suitable boxes connected with tilting frame E, with hydraulic ram or other suitable means for raising and lowering the frame and lifting-bar, in lifting the dumping-boxes from the car, and returning the boxes to the car. Frame E has a reciprocating movement endwise, whereby the lifting-bar and dumping-boxes are thrust into the furnace and withdrawn therefrom. Bar D is rotated on its axis by means, for instance, of ram F or other suitable appliance in dumping the boxes in the furnace. The mechanism for supporting and operating the lifting-bar is mounted on car G, the latter by means of suitable tracks traveling along in front of the different furnaces, and the car may be stopped whenever bar D is opposite any furnace of the series or opposite any door of the respective furnaces.

"It is not considered necessary to further describe the mechanism for operating the lifting-bar, for the reason that analogous mechanism is shown

and described in United States Letters Patent Nos. 394,419 and 394,421, granted to me December 11, 1888, and similar mechanism having a rotating lifting-bar having been made the subject of Letters Patent now pending. In place of the tongs shown in such application head D' is substituted, and the ram and mechanism for opening and closing the tongs is dispensed with. The tongs might be retained and made to grasp the dumping-boxes (see Fig. 3), but would be more expensive in construction than head D' aforesaid. It is preferable, but not essential, to reverse the boxes in dumping, as the dumping-boxes might be provided with hinged or dumping-bottoms. (See Fig. 4.) With a dumping-bottom the material would not be so well distributed in the furnace as is done by reversing the box in opposite directions with successive loads.

"I do not wish to limit myself to any particular construction of mechanism for operating the lifting-bar, as this may be varied indefinitely according to circumstances. Sometimes it might be more convenient to attach such mechanism to a traveling crane or other variety of crane; or in case, for instance, of but one furnace the mechanism could be greatly reduced or simplified."

The claims of the above mentioned patent—each of which the appellee is said to have infringed—read as follows:

"1. The means herein described for charging a furnace from the side thereof, consisting, essentially, of dumping-boxes, cars for conveying the dumping-boxes to a point opposite the charging-door, and a lifting-bar adapted to engage the dumping-boxes one at a time, convey them into the furnace, and discharge the load and return the boxes to the outside of the furnace, substantially as set forth.

"2. The means herein described of charging furnaces from the side thereof, consisting, essentially, in dumping-boxes for carrying the material, cars for transporting the loaded dumping-boxes to a position adjacent the furnace, and a lifting-bar conveying the loaded dumping-boxes into the furnace, dumping the load, and returning the dumping-boxes outside the furnace, substantially as set forth.

"3. The mechanism herein described of charging furnaces from the side thereof, consisting, essentially, in dumping-boxes for carrying the material, cars for transporting the dumping-boxes and load to positions adjacent the furnace, and a lifting-bar for conveying the loaded dumping-boxes from the cars into the furnace, dumping the load, and returning the empty dumping-boxes from thence to the cars, substantially as set forth."

Prior to the issuance of the above letters patent appellant was granted other letters patent (Nos. 394,419, 394,420, 394,421 and 408,152), relating to instrumentalities for charging or drawing furnaces. The process set forth in these patents may be described as follows:

A car, carrying thereon a square steel billet, was placed on a track opposite the door of the heating furnace to be charged or drawn. From this car the billet was transferred to the furnace by means of a tong or grappling device adapted to engage it on its side, and capable of holding it in engagement during the operation of lifting it to a level with the furnace door, thrusting it into the furnace, and then discharging by tilting. Each of these motions—lifting, thrusting and tilting—was by separate hydraulic devices. The mechanism employed to operate the tongs consisted of an overhead traveling crane, supported upon elevated parallel track, one directly above the car tracks, and the other a distance therefrom, depending upon the dimensions of the crane. Suitable mechanism was employed to support and operate the crane. On this parallel track was a bridge, supported on wheels, traveling back and forth, and upon which was a car or trolley, running longitudinally with the bridge. When the

bridge was moved, the car or trolley carrying the charging arm and its operating devices were moved along in front of the furnace; when the car or trolley was moved longitudinally upon the bridge, the charging or drawing arm could be introduced into or withdrawn from the furnace. In connection with this mechanism, and mounted within the car or trolley, was a tilting frame, being pivoted at or near its center, in order to permit the front end being raised or lowered, to raise or lower the charging arm or bar which is mounted upon and projects from it.

The Court below held that the patent in suit disclosed no substantial differences from the mechanism employed in the prior art, and was, therefore, not a pioneer invention; that in this view there was no infringement and accordingly dismissed the bill for want of equity.

Robert H. Parkinson, for appellant.

John R. Bennett, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the Court, as follows:

The patent in suit, in our opinion, adopts every feature of appellant's previous device. It substitutes for the square steel billet of the prior patents the metal or wooden box adapted to carry the segregated particles, such as bars, limestone, etc. It retains the feature of tongs to grasp the dumping boxes, but provides, as less expensive, an alternative mechanism, namely, a flanged recess in the end of the box adapted to receive the head of the lifting arm or bar, the arm or bar having a head adapted to fit the flanged recess. With this modification—which, however, is only alternative—the mechanism employed to lift the load to the level of the furnace door, to move the same into and from the furnace, and to tilt the same in the furnace, is identical with the mechanism of the prior patents.

There may be merit (though this we do not decide) in the substitution of the recess flange and suitable head for the previous device of tongs. But the question is, Can we decide, without reading something new into the patent in suit, that the claims are restricted to the flanged recess and suitable head, as interlocking means? We think not. The claims include the entire process set forth in the description, and this embodied the grasping by tongs, as well as by a flanged recess and suitable head. The patent must be sustained, as a whole, or not sustained at all; and to sustain it, as a whole, is to judge that the use of tongs in the process named had not been anticipated in the previous art. But this is clearly disproven by the patents already cited.

Nor do we think that the substitution of a box for the billet differentiates this patent from its predecessors. There is no inventiveness in this. The progress of the mechanic arts is not subject to the tribute levied by the patent laws for every departure from pre-existing methods. The departure set forth in the patent is only such as any mechanic would have adopted, had the occasion for the change arisen.

The decree of the Circuit Court will be affirmed.

SCHREIBER & CONCHAR MFG. CO. v. ADAMS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 15, 1902.)

No. 1,674.

1. PATENTS—CONSTRUCTION OF CLAIMS—LIMITATION BY LANGUAGE USED.

Where the language of the claims of a patent is clear and unambiguous, it cannot be enlarged by the courts, although it may not be broad enough to cover the actual invention of the patentee.

2. SAME—INFRINGEMENT—STOVE DAMPERS.

The Farwell patent, No. 493,548, for an adjustable stove damper, was not anticipated and is valid, but is limited, not only by the prior art, but by the specific language of its claims, to a damper with a rod having two grooves in it, one on each side thereof, extending nearly its entire length, and is not infringed by the damper of the Ohnemus & Sanner patent, No. 623,417, in which the rod is not grooved.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 111 Fed. 182.

Melville Church (Joseph B. Church, on the brief) for appellant.

M. M. Cady and L. L. Bond, for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge. The appellees (complainants below), owners of letters patent No. 493,548, issued to Fay O. Farwell March 14, 1893, for stove damper, by their bill charge the appellant (defendant below) with infringement of said patent, in the manufacture and sale by the defendant of stove dampers, and pray for an injunction, accounting of profits, and damages. The answer attacks the validity of the patent, and alleges that Farwell was not the inventor of the device described in his patent, and that before his alleged invention the same device had been known to and used by many specified persons and companies, and was described and anticipated in many designated prior patents. Infringement was also denied. Proofs were taken by both sides, including many of the earlier patents pleaded in the answer. On the hearing the charge of infringement was confined to the second claim of the Farwell patent. Decree was entered adjudging that the Farwell patent was valid, and that defendant had infringed the second claim thereof, and awarding an injunction and accounting of profits, with costs, from which decree this appeal is taken.

The evidence shows that the business of making adjustable stove dampers, to be used in repairing stoves and replacing disabled dampers, was so considerable that many devices were invented and in use, some of them being patented; the object being to provide a damper which could readily, and without the exercise of special skill, be fitted and adjusted to any ordinary cooking stove. Without following the various changes and improvements in such dampers, the state of the art at the time of Farwell's alleged invention may perhaps be sufficiently shown by considering patent No. 470,439, for stove damper, issued to Emery D. Nellis March 8, 1892. In his specifications he says:

"I construct my improved damper in two separate parts,—the damper plate, A, and the operating rod, B (see Fig. 5), with the means of securing them together. The damper plate, A, is, of course, constructed in outline of a shape corresponding to the flue space in which it is intended to operate. In one edge of the plate, A, are formed the oppositely projecting curved lips, C and D, which are adapted to embrace the body of the rod, B; the intermediate space between them corresponding to the size and shape of the body of the rod, B. To prevent the plate, A, from turning on the rod, B, about the axis of the same, when the damper is assembled, as shown in Fig. 4, I form a longitudinal tongue, E (see Figs. 5 and 7), in the concave surface of the lips, C, and a longitudinal groove, F, in one side of the rod, B, adapted to engage with each other and rotate the plate, A, when the rod, B, is rotated by the handle, G, on the end of the rod, B, about the axis of the rod as the center of rotation. The aforesaid construction * * * enables the damper rod or journal rod to be readily inserted endwise through the framing plates and damper, which facilitates the insertion of the damper when the stove is set up or in case of repairs. * * * The damper plate, A, is placed in the flue space, through which passes the current it is intended to regulate by the same; then the rod, B, is thrust through the groove formed in the edge of the plate, A, by the lips, C and D, passing it through the perforations formed therefor in the framing plates, L, of the stove, letting the groove, F, engage the tongue, E, until the perforation, H, coincides with the perforation, I, when the pin, K, is inserted therein, locking the parts, A and B, together."

In this Nellis device, the perforation, H, just mentioned, is through the rod, and the perforation, I, through one of the lips of the plates; and the split key, K, is passed through both when opposite each other, to prevent the plate from slipping longitudinally on the rod. This is criticised as requiring the rod to be perforated after the location of the damper plate is ascertained, or the making of the rod with many perforations, and with liability then to vary from the exact place desired. But the substitution of a set screw or simple wedge would occur to any mechanic as a complete remedy for any such difficulty. So the longitudinal tongue, E, in the concave surface of the lips on one side to engage the single longitudinal groove in the rod is criticised as permitting the rod to be inserted from only one side of the stove. But if this was found objectionable the obvious remedy would occur to any mechanic to make that tongue in the central part of the cavity between the lugs or lips, and just opposite the edge of the plate, when the rod could be inserted equally well from either side of the stove. Neither of these slight changes would involve any invention.

In the Farwell patent the device is described in the specifications as follows:

"A is the blade of the damper, provided on its opposite lower edge with three or more lugs, B, B, which curve partly around the upper portion of the rod, C, and engage with the flutes or corrugations, D and E, in said handle, C, as shown more fully in Fig. 2. This rod, C, has one end of the same bent at an obtuse angle, to form a convenient handle for operating the same. The rod, C, is of peculiar form, resembling an acute triangle slightly rounded at the angles, as shown in Fig. 2, with two flutes or corrugations, D and E, upon the sides opposite to each other, extending nearly the entire length of the rod, C, with which the lugs, B, B, engage, in such a manner that when the rod is inserted in the blade, A, and the lugs, B, B, are in the flutes, D and E, the width of the rod with the lugs will still be narrow,—slightly narrower than the base of the rod,—and will not prevent the damper from lying flat on the oven when turned down, and will also allow the

rod to rest on the oven when the blade is turned and in use; thus preventing any air from passing under the rod, as is the case with those dampers where the lugs, B, B, clasp the whole of the rod. Through the blade, A, I pass the bolt, F, which prevents the blade from sliding on the rod when it is in position, and allows the blade to be set in any position on the rod. As these flutes or corrugations, D and E, run nearly the entire length of the rod, C, I am enabled to set the blade at any position along the handle to suit stoves requiring handles of varied lengths."

Peculiar advantages are asserted from the ovate form of the rod, the smaller part of which above the grooves or flutes is grasped by the lugs loosely, so that the plate, when fastened by the bolt, may be made to stand inward from the center of the rod, and come flat on the oven plate when turned down, while the larger lower part of the rod will, when the plate is raised, close the space below the plate.

Claim 2 of the Farwell patent, which the defendant is charged with infringing, claims:

"A stove damper comprising a rod having two grooves in it, one on each side thereof extending nearly its entire length, and a blade formed with lugs on its opposite sides, said lugs being fitted loosely in the grooves or flutes, and adjustable with the blade in said grooves to any point desired so as to adapt the dampers to stoves requiring different lengths of handles, and a screw for confining the blade to its adjusted position, substantially as described."

This Farwell patent, like that to Nellis, is granted for its peculiar combination of the constituent parts of the device; such parts, separately considered, being regarded as old, or at least as unpatented. The devices described in these two patents are in many respects similar. In each a rod or stem is used which passes through the side of the frame of the stove, and through the opening fitted for it by the shape of the lugs or lips of the plate or blade of the damper. In both the plate may be adjusted on the rod and brought opposite the flue intended to be closed, and there secured from slipping longitudinally on the rod by being there fastened, whether by the key named by Nellis, or the screw named by Farwell, or by a wedge, or in any other equivalent manner. So far, at least, the devices are substantially alike, and the Farwell combination anticipated by that of Nellis. The difference in the two combinations arises entirely from the differences in the form and in the grooving or fluting of the rods, and the incidental variances in the plate lugs, in matching the rods. These have been already described. The advantages claimed for the Farwell combination, resulting from the shape of its rod, are that the rod may be inserted from either side of the stove and damper, and that its formation closes more entirely the space between the damper blade and the oven than did the surrounding lugs of the earlier device. The improvement over previous combinations is doubtless sufficient to sustain the validity of the Farwell patent.

The next and most serious question is, does the defendant's device infringe this Farwell patent? Defendant's damper is made under a patent, No. 623,417, issued to Anton Ohnemus and Henry Sanner April 18, 1899, and its construction is described in the specifications of that patent:

"The main portion of the stem is of oval shape in transverse section, and has a broad back, 3, sloping sides, 4, and a narrow front, 5, extending the

greater portion of its length. One end of the stem is turned to form a handle, 6. The back of the blade fits against the back of the stem, and is held thereto by ears or lugs, 7, on the blade, and by ears or lugs, 8, on a plate, 9, that fits in a recess, 10, that is formed in the central part of the blade. The plate is held to the blade by means of a bolt, 11, and its inner edge is notched at 12 to receive one of the ears, 7, on the blade. The upper and the end walls of the recess, 10, slope inwardly from the outer surface of the blade, so that when the bolt, 11, is tightened to cause the ears, 7 and 8, to engage the stem, the inner edge of the plate will be pressed against the back of the stem, and a tight, close fit will be effected between the walls of the recess and the plate; the result being a practically airtight connection between the blade and the stem. The ears are formed to fit the sloping sides of the stem, and the blade is thus movably held to the stem, and can be adjusted thereon by loosening the bolt, as will be readily understood. By forming the stem without grooves, and by clamping the blade firmly thereto throughout the entire length of the latter, the stem is not liable to become warped by excessive heat."

That defendant's device performs the same functions as does the Farwell device, and in substantially the same way, is apparent; and if the Farwell patent was for a pioneer invention, which for the first time assembled the parts so as to permit the blade of the damper to be moved, adjusted, and fastened to any place along the rod, the patent might be entitled to a broad and liberal application of the doctrine of equivalents, and a persuasive argument presented that defendant had appropriated the idea of the patent, with a mere change in the form of the parts. But this device was an old one at the time of Farwell's alleged invention, which only changed the previous devices by substituting his peculiar and carefully described form of rod for rods previously used, and by providing that such rod should be fitted loosely in the engagement of its grooves by the lugs of the blade. The meaning of the word "groove" or the word "flute" is unmistakable and perfectly clear. Either of these words conveys to the mind the idea of a noticeable depression of some length in a surface. It is absurd to imagine a groove, flute, or furrow in a perfectly smooth, even surface. The defendant does not use Farwell's invention. Its rod has no groove, and it is not fitted loosely in the lugs, so that the blade can be rolled over slightly, and then held in the desired place by the impact or pressure of a screw, but, when adjusted to its place on the rod, the lugs on their inner surface embrace and clasp the rod tightly.

It may be that Farwell's invention would have entitled him to have made a broader claim, which would have covered any form of rod which could be passed through the lugs of the damper plate equally well from either side of the stove, but his patent makes no such broad claim. It is in this respect like the patent under consideration in *Key-stone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344, where the claim was for:

"First, the construction of the lower chords of truss bridges of series of wide and thin drilled eye-bars, C, C, applied on edge between the ribs, S, S, on the bottoms of the posts, and connected by pins, P, P, supported in the diagonal tension braces, D and E, all substantially as herein described."

It was held that the use of round or cylindrical bars flattened and drilled at the eye, in the lower chords of truss bridges, was not an infringement of this patent, although the round bars performed the

same functions as the wide and thin bars, and in the same way. The court said:

"Words cannot show more plainly that the claim of the inventor does not extend to any other eye-bars or chords than such as are wide and thin, and applied on edge. As those constructed by the defendant are cylindrical in form, only flattened at the eye for insertion between the ribs or projections, it is plain that no infringement of this claim of the patent has been committed. * * * When a claim is so explicit, courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of, inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a re-issue. They cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. Since the act of 1836, the patent laws require that an applicant for a patent shall not only, by a specification in writing, fully explain his invention, but he 'shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery.' * * * As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim."

In *McClain v. Ortmyer*, 141 U. S. 419, 423, 12 Sup. Ct. 76, 77, 35 L. Ed. 800, the court says:

"While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court, to construe such claims to include more than their language fairly imports. Nothing is better settled in the law of patents than that the patentee may claim the whole or only a part of his invention, and that, if he only describe and claim a part, he is presumed to have abandoned the residue to the public." Citing *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235; *Burns v. Meyer*, 100 U. S. 671, 25 L. Ed. 738; *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. 376, 30 L. Ed. 492.

In *Seabury v. Johnson* (C. C.) 76 Fed. 456, the claim was:

"(1) A sulphur candle, provided with a surrounding band of metal, projecting slightly above the upper side or end of the main portion or body of the said candle, substantially as described."

The defendant's device was similar, except that, instead of a metal band, he used a band made of paper chemically treated so as to be rendered incombustible. Complainant claimed that the paper band so prepared became an equivalent for the metal band, and was an infringement. But the court held that, while the invention might have warranted the patentee in claiming a band of incombustible material, he had not done so, but had limited his claim to a metal band. The court said:

"His act in so doing was nothing more nor less than a declaration that he abandoned to the public the right to use bands which were nonmetallic. The law of patents requires that the patentee shall particularly specify and point out the part, the improvement, or the combination which he claims as his invention or discovery. Courts are bound by the language chosen by the inventor, and they have neither the right nor the power to enlarge a patent beyond the scope of its claim, as allowed by the commissioner of patents. 'When the terms of a claim in a patent are clear and distinct, the patentee, in a suit for infringement, is bound by it.' He is absolutely barred from attempting to show that his invention or discovery is larger and broader than the terms of the claim. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639;

White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed 303; Stirling Co. v. Pierpoint Boller Co. (C. C.) 72 Fed. 780."

The language employed in the Farwell patent, as well in the specifications as in each of the claims, makes the rod of the peculiar form described, with two grooves,—one on each of its opposite sides and extending nearly its entire length,—an important and essential part or element of his combination. The defendant does not use a rod with grooves, and therefore does not infringe the Farwell patent.

The decree appealed from is therefore reversed, with costs, and with directions to dismiss complainants' bill.

CASTLE v. PERSONS.

(Circuit Court of Appeals, Eighth Circuit. September 15, 1902.)

No. 1,729.

1. GIFT CAUSA MORTIS—DELIVERY.

A verbal direction by a creditor to his debtor to pay the debt, which is not evidenced by any note or other writing, to another, where the debtor at the time accepts the order and promises the donee to make payment to him, constitutes a good delivery to validate a gift of the chose in action causa mortis. Per Carland, District Judge.

2. SAME—REVOCATION—PARTIAL RECOVERY OF DONOR.

A donor 84 years old, when seriously ill and in expectation of death, made a gift to his wife causa mortis. The evidence showed that he partially recovered, and lived for nearly a year thereafter, being able to walk during a part of the time for a distance of half a mile, but did not disclose the nature of his illness. *Held*, that it was error to charge as matter of law upon such evidence that the donor's partial recovery operated as a revocation of the gift. Per Carland, District Judge.

3. PLEADING—VARIANCE—DEFENSE NOT PLEADED.

The due process of law, without which parties may not be deprived of their property, requires that notice be given of the issue to be determined before it is tried. A defendant may not deny in his answer the plaintiff's averments of a good cause of action, and then defeat him by a confession of the truth of those averments and an avoidance of their effect by the proof of new matter, no notice of which was given by the pleadings or by the course of the trial until plaintiff had introduced substantially all his evidence. Per Sanborn, Circuit Judge.

4. DIRECTION OF VERDICT—DEPARTURE FROM ISSUES.

In an action to recover on a chose in action which plaintiff alleged had been verbally assigned to her by her husband, which assignment had been accepted by defendant, who promised to pay the debt to her, the court is not warranted in directing a verdict and entering judgment for defendant on the ground that the assignment to plaintiff was intended as a gift causa mortis, which became ineffectual by reason of the subsequent recovery of the donor, where defendant did not plead such defense, having himself received a gift from the donor at the same time and under the same circumstances, which he still retained, but denied his indebtedness and the assignment, such issues being the only ones litigated by the parties. Per Sanborn, Circuit Judge.

5. NOVATION—VERBAL ASSIGNMENT OF CHOSE IN ACTION—ASSENT OF DEBTOR.

A verbal assignment of a chose in action, not evidenced by any note or other writing, assented to by the debtor, who promises to pay the debt to the assignee, constitutes a complete novation, and effectually substitutes the assignee as the creditor. Per Sanborn, Circuit Judge.

Thayer, Circuit Judge, dissenting.

¶ 2. See Gifts, vol. 24, Cent. Dig. § 116.

In Error to the Circuit Court of the United States for the District of Minnesota.

J. N. Castle, for plaintiff in error.

Rome G. Brown, Charles S. Albert, Herman Winterer, and Edward Winterer, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This action was originally commenced in the district court of Washington county, Minn., and subsequently removed by the defendant in error to the circuit court of the United States for the district of Minnesota, on the ground of diversity of citizenship. Maria Persons was the original plaintiff, but, she having died pendente lite, the action is now prosecuted by her executor. The object of the action was to recover from defendant in error the sum of \$5,000 and interest. The complainant alleged for a cause of action that prior to the 23d day of January, 1897, the defendant in error became and was indebted to one Thomas Persons in the sum of \$5,000; that on said date defendant in error admitted said indebtedness, and, at the request of said Thomas Persons, promised to pay the same to Maria Persons, with interest. The answer of defendant in error denies any indebtedness to Thomas Persons, or that said Thomas ever directed or requested him to pay said indebtedness, if any existed, to Maria Persons, or that defendant in error ever promised or agreed to pay said indebtedness to Maria Persons. At the close of the testimony for plaintiff in error, counsel for defendant in error made the following motion:

"I move to direct a verdict on the ground that there is not sufficient evidence to enable the jury to find the issue in favor of the plaintiff in this action, and particularly that there is not sufficient evidence to show an accounting by which any sum was agreed upon between the father and defendant, and no sufficient evidence to show that there was an assignment of that claim by the father to the mother, and it appears so far as any evidence appears, as a question of law, that if anything was due that money is still due to the estate of Thomas Persons, and not to the mother."

The trial court granted the motion upon two grounds, and those grounds can hardly be said to have been embraced in the above motion. They were that the evidence showed that plaintiff in error's title to the chose in action was derived through an attempted donatio causa mortis, which failed (1) because there was no delivery of the chose in action by Thomas Persons to Maria Persons; and (2) because there was a recovery of Thomas Persons from the sickness which caused him (Thomas Persons) to make the gift, which by operation of law revoked the same. The case was not tried on any such theory, and not till the court ruled had this theory been mentioned in the pleadings or by counsel. Counsel for plaintiff in error excepted to the ruling of the court, and such ruling is the only error assigned here. Conceding, for the purpose of this writ of error, that the theory on which the trial court ruled was the correct one, let us examine plaintiff's testimony, and ascertain if there were not issues that ought to have gone to the

jury. There was abundant testimony from which the jury might have found the following facts:

On January 23, 1897, at Alma, state of Washington, Thomas Persons, father of defendant in error, was a man 84 years of age. He was a very sick man. He expected to die; others expected him to die. He desired to dispose of his property in order to save administration. In contemplation of death he gave to defendant in error certain property in the state of Washington, and to another son certain property in the state of Minnesota. On this same date he was asked by defendant in error this same question: "What are you going to do with what money I owe you?" Thomas Persons answered: "That is mother's. I want mother to have that." Defendant in error, turning to his mother, Maria Persons, who was present, said: "Mother, that is all right, but I have not got the money with me, but I will pay you when I get back." That defendant in error repeatedly acknowledged to Maria Persons and others subsequent to this time and prior to the death of Thomas Persons that the amount owing by him to the latter was \$5,000. That defendant in error subsequently, many times prior to the death of Thomas Persons, promised to pay this sum to Maria Persons, and did pay her \$100 thereof. Thomas Persons died on December 27, 1897.

The following is all the testimony bearing upon the question of revocation of this transaction by operation of law, resulting from the recovery of Thomas Persons from the illness from which he apprehended death, and under which apprehension he made, or attempted to make, this disposition of the chose in action to Maria Persons. He never did anything himself to revoke the gift.

Simon E. Persons, examined in chief by counsel for plaintiff in error:

"Q. Well, what eventually happened? Did he recover or recover temporarily? A. He did partly. He partially recovered, and we took him back to Minnesota."

Cross-examination:

"Q. Your father, up to the time he died, from the time he first came back from Alma, was in feeble health? A. He was quite feeble at first, but he got so he could walk half a mile and further,—sometimes three-quarters of a mile. Q. But during the last few weeks of his life he was very feeble, was he not? A. The last two months he was continually in bed, or six weeks. Q. Was your father able to transact business on his own account and keep his accounts and do his business for himself, or did somebody have to assist him? A. He was perfectly able to do it himself; at least, I thought so. He always did. Q. Did he do correspondence of his own? A. Mother, I think, did the writing for him. Q. Up to the time of his death? A. I think so."

Maria Persons, examined in chief by counsel for plaintiff in error, testified as follows:

"Q. After that did your husband die or did he recover? A. He recovered partially. Q. Where did you go then? A. We came, or rather was brought back here, to Afton; neither one of us could walk."

Out of 67 pages of printed testimony, the foregoing is all that counsel on either side put into the case upon a question which turned the plaintiff out of court. The court, at the close of the case, elicited the following testimony from the witness Marion E. Persons:

"The Court: After your father made this disposition of his property did he get well, so he was able to travel? A. Yes, sir. Do you mean at Alma or at any time? The Court: At any time. Ans. Yes, sir. Q. Where did he drive? A. He traveled around about the yard and up and down the roads at my place at Afton. The Court: How far was he able to go? A. Half a mile or a mile. He did walk that, and might have walked more. He was out and walked every morning before breakfast about half a mile. The Court: Was he as well as he had been for several years before this sickness in Washington that you spoke of, at the time that he disposed of this property? A. He was until the last two months. The Court: Have possession of his mind and faculties, so he could think as well about his affairs as he had been accustomed to before that sickness in Washington? A. Yes, sir."

On the theory that the evidence showed a *donatio causa mortis*, these questions by the court were dangerous in the extreme to plaintiff in error's case, and the most dangerous could not have been asked by counsel for defendant in error in the form in which they were put. The witness simply affirmed the testimony of the court. On this evidence was the court justified in deciding as a matter of law that there was no delivery of the chose in action? The evidence in regard to the order or request which Thomas Persons made to the defendant in error, to pay the indebtedness owing by defendant in error to Thomas Persons to Maria Persons, when considered with the evidence in regard to the acceptance of said order and the promise to pay said indebtedness to Maria Persons by defendant in error, was sufficient, to say the least, to go to the jury upon the question of delivery, under proper instructions.

We understand that a mere request on a bailee, depository, or debtor to pay money to the donee is not a sufficient delivery of a chose in action so as to validate a gift *causa mortis*. Yet where the request or order is accepted by the person upon whom it is made during the lifetime of the donor this is a good delivery. A check upon a bank is in itself, though delivered to the donee, no delivery, but if accepted by the bank during the lifetime of the donor the delivery is good. *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, and cases cited.

We see no difference between a verbal order or request and a written order or request, there being no law requiring either to be in writing. Neither need the acceptance be in writing. If the defendant in error owed Thomas Persons, and Thomas Persons requested him to pay the debt to Maria Persons, and he, upon such request, promised to pay it to Maria Persons, thereby extinguishing his debt to Thomas Persons, Maria Persons could sue and recover upon the promise, and, if this could be done, then all control over the chose in action would be in Maria Persons. She had complete power to reduce it to possession. In other words, all the delivery of which the chose in action was capable had been made.

We also think the court erred in deciding as a matter of law that if the evidence showed a *donatio causa mortis* it was revoked by operation of law by the recovery of Thomas Persons from the illness which caused him to apprehend death, and under which apprehension he made the gift *causa mortis*. In the first place, the record may be searched in vain for any evidence as to the cause of the illness of Thomas Persons. Had he been injured in an accident? Had he consumption? Had he a contagious disease? Had he a cancer, Bright's

disease, or one or more of many other diseases which lead as straight to death as the projectile from the gun? If we do not know the cause of the sickness of Thomas Persons on January 23, 1897, how can we say as a matter of law that he recovered from it before he died, especially in view of the evidence in the record as to his partial recovery? He had the possession of his faculties. So he did at Alma when he disposed of his property and was expected to die every hour. He was brought from the state of Washington to Minnesota, but he could not walk. If we are permitted to draw any inference from the evidence as to the cause of his illness, we might infer that the weight of 84 years was so heavy upon him as to cause him to believe that his life might end any day. Who can say as a matter of law that Thomas Persons did not each day from January 23, 1897, to December 27, 1897, when he died, apprehend death from the same cause that made him sick at Alma, state of Washington? *Grymes v. Hone*, 49 N. Y. 21, 10 Am. Rep. 313, is a case where Federal Vanderburgh made what was held to be a *donatio causa mortis*. It was made August 19, 1867, and he died January 23, 1868. He was from 78 to 80 years of age and in failing health. Peckham, J., in delivering the opinion of the court, used the following language:

"True, he did not, and of course could not, know when death would occur, when he executed the assignment, but he was in apprehension of it. His age and his 'failing' told him death was near, but when it might occur he had no clear conviction. An allment at such an age is extremely admonitory. From these facts can this court say, as a matter of law, that this testator was not so seriously ill when he executed this assignment as to be apprehensive of death; that he was not legally acting in view of death; that he was not so ill as to be permitted to make this sort of gift? True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness."

We have no doubt that the issue of gift or no gift *causa mortis*, and the issue as to whether, if there was a gift *causa mortis*, it had been revoked by the recovery of Thomas Persons, ought to have gone to the jury under proper instructions. The question whether there has been a gift in a particular case is for the consideration of the jury, and the evidence on the subject should therefore be submitted to it. *Flanigan v. Waters*, 57 Kan. 18, 45 Pac. 56; *Jones v. Jones* (Ky.) 43 S. W. 412; *Nye v. Chace*, 139 Mass. 379, 31 N. E. 736; *Peirce v. Burroughs*, 58 N. H. 302; *Betts v. Francis*, 30 N. J. Law, 152; *Trow v. Shannon*, 78 N. Y. 446; *Hess v. Brown*, 111 Pa. 124, 2 Atl. 416; *Osthaus v. McAndrew* (Pa.) 8 Atl. 437; *Horn v. Buck*, Id. 609; *Swab v. Miller* (Pa.) 9 Atl. 667; *Jacques v. Fourthman*, 137 Pa. 428, 20 Atl. 802; *Sourwine v. Claypool*, 138 Pa. 126, 20 Atl. 840; *In re Osterhaut's Estate*, 148 Pa. 223, 23 Atl. 1069; *McKane's Ex'rs v. Bonner*, 1 Bailey, 113; *McLure v. Lancaster* (S. C.) 58 Am. Rep. 259. Whether or not there has been a delivery is a question for the jury. *Thomas v. Degraffenreid*, 17 Ala. 602; *Hunt v. Hunt*, 119 Mass. 474; *Kelly v. Maness*, 123 N. C. 236, 31 S. E. 490. A gift *causa mortis*, like a gift *inter vivos*, is a question of fact for the jury. *Dunn v. Bank*, 109 Mo. 90, 18 S. W. 1139; *Scollard v. Brooks*, 170 Mass. 445, 49 N. E. 741.

The judgment of the court below should be reversed, and a new trial granted; and it is so ordered.

THAYER, Circuit Judge (dissenting). I am satisfied that this case was correctly decided by the circuit court, and I accordingly dissent from the order made by my associates reversing the judgment of the lower court.

The amended complaint, on which the case was tried, after reciting various facts showing that Phineas P. Persons, the defendant below, who is commonly called Page Persons, was, on January 23, 1897, indebted to his father, Thomas Persons, since deceased, in a sum exceeding \$5,000, thereupon alleged "that on the 23d day of January, 1897, for a valuable consideration, the said Thomas Persons duly transferred, sold, and assigned \$5,000, constituting part of the said indebtedness, to this plaintiff (Maria Persons), who now owns and holds the same, and then and there directed the defendant to pay the same to the plaintiff, which the defendant then and there agreed to do, and on the last-mentioned day specially agreed by and with this plaintiff to pay said sum of five thousand dollars to this plaintiff on demand, with five per cent. interest per annum." It is clear, therefore, that the original plaintiff, Maria Persons, the mother of the defendant Page Persons, who is now represented by her executor, Luke B. Castle, sued as the assignee, for a valuable consideration, of a part of an indebtedness claimed to be due from Page Persons to his father, Thomas Persons, which indebtedness was not evidenced or represented by any bond, bill, note, or other instrument in writing, but was a chose in action pure and simple. The defendant below denied the existence of any such indebtedness, and also denied the assignment thereof to his mother, and on these issues the case was tried.

The evidence which was offered by the plaintiff to sustain her complaint was to the following effect: That in the month of January, 1897, the father, Thomas Persons, was residing at Alma, Wash.; that he was taken very sick about the 18th of January, 1897, and that another son, Simon E. Persons, who resided near Hudson, Wis., was summoned by telegram to his father's bedside; that he arrived at a railroad station near where his father was living on the evening of January 22, 1897, and was met there by his brother, Edgar Persons, and was told that his father was very sick and perhaps would not live until the two brothers reached the house; that he did live during the night; that on the succeeding morning, January 23, 1897, a notary was summoned to the house, and on his arrival was told by Thomas Persons that he wished to make some disposition of his property to save the expenses of administration; that he gave instructions to the notary to make out a deed conveying certain property situated in St. Paul, Minn., to his son Simon E. Persons; that he gave directions to make over certain notes and mortgages to his son Page Persons; that he was thereupon asked by his son Page, "What are you going to do with what money I owe you?" and that he replied, "That is mother's; I want mother to have that;" and that the defendant, Page Persons, thereupon turned to his mother, who was present, and said, "That's all right, but I haven't got the money with me, but will pay you when I get back,"—meaning that he would pay it when the family returned to Minnesota, where they expected to go. The witness from whom the foregoing testimony was elicited, Simon E. Persons, one of the brothers, testified that when this occurred Thomas Persons, the father,

was a very sick man, and "didn't expect to live but a very few hours"; that these transfers of property to his sons, Simon E. and Page Persons, were made "because of what [his] father supposed to be then his immediately approaching death"; that in point of fact he recovered from his illness, and returned to Minnesota with his wife, Maria, and after his return lived with his son Simon for nearly a year, or until December 27, 1897, when he died; that after his return to Minnesota, and while he was living with his son Simon, Thomas Persons recovered his health to such an extent that he was able to walk at times as much as a mile, and until the last two months before his death was as well as he had been for several years before he was taken sick at Alma, in the month of January, 1897. The testimony showed that while Maria Persons, the mother, was living in the family of her son Simon, and in March, 1898, she made a will by which she gave all that she possessed to her son Simon, save small legacies amounting to about \$100, which she gave to her other sons, Edgar, Curtis, and Page Persons. It also appeared on the trial that, about three weeks before the death of Thomas Persons, Page Persons visited him at his home in Wisconsin, on which occasion he handed to his mother \$100, which sum she said she wanted at the time to pay doctor's bills and some other little expenses.

It is suggested in the opinion of the majority that the evidence showing that the gift by Thomas Persons to his wife, Maria, was made in expectation of his immediately approaching death, was elicited somewhat irregularly by the court, at the close of the case. But this suggestion is due, I think, to an oversight, since the fact in question was clearly developed by counsel for the defendant below on the cross-examination of Simon Persons, the principal witness for the plaintiff, who testified, on cross-examination in the manner above stated, that the gift to Maria Persons was made because his father supposed himself to be in extremis.

The foregoing testimony, which was elicited principally from Simon E. Persons, the sole beneficiary under his mother's will, comprehends substantially all the testimony which was produced at the trial for the purpose of proving an assignment for value to Maria Persons of a part of the indebtedness due from Page Persons to his father, which was alleged in the complaint. It is manifest, I think, that it has no tendency to prove such an assignment as was alleged, but, at most, only tends to show a gift *causa mortis* or a gift *inter vivos*. And admitting, for the purposes of this case, that a recovery under the complaint might have been allowed if the evidence had shown a completed gift of either kind, yet, as I view the case, no such gift was proven or evidence offered from which the existence of a gift could have been found. To perfect a gift *inter vivos* or *causa mortis*, it is absolutely essential that the property or thing given should be delivered to the donee in the lifetime of the donor. Where the property given is bulky, a constructive delivery of the possession thereof may suffice; and where the thing given is a chose in action, and represented by a note, bond, or bill made by a third party, all the authorities agree that a delivery of the note, bond, or bill, unindorsed by the donor, will suffice. *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Grover v. Grover*, 24

Pick. 261, 35 Am. Dec. 319; *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157; *Lacey v. Lacey*, 7 Pa. 251, 47 Am. Dec. 513; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898. But it is equally well settled that when a chose in action is not thus represented by a note, bond, bill, or other instrument in writing, which can be delivered, but is merely a claim against a third party, which must be established by parol, a written assignment of the demand, by the donor to the donee, is essential to complete the delivery, whether the gift be one *inter vivos* or *causa mortis*. 2 Kent, Comm. (11th Ed.) 567; *Hooper v. Goodwin*, 1 Swanst. 485; *Picot v. Sanderson*, 12 N. C. 309. See, also, *Sanborn v. Goodhue*, 28 N. H. 48, 56, 59 Am. Dec. 398; *Bond v. Bunting*, 78 Pa. 210.

The evidence in this case discloses beyond peradventure that no written assignment of the chose was made or attempted; hence there was no such delivery as vested the donee, Maria Persons, with the title to the chose. Furthermore, it is evident, I think, that the alleged gift to Maria Persons was made in view of the approaching death of the donor, which event was supposed to be only a few hours distant, and as the donor recovered and lived for nearly a year, and in the meantime enjoyed as good health as he had for some years previously, the gift, treating it as one *causa mortis*, was revoked by such recovery, even if there had been a sufficient delivery. It is well settled that a gift *causa mortis* passes to the donee only a defeasible title, which becomes absolute only on the death of the testator, and is usually regarded as revoked if the testator recovers from the particular illness which occasioned the gift. *Staniland v. Willott*, 3 Macn. & G. 664; *Weston v. Hight*, 17 Me. 287, 35 Am. Dec. 250; *Smith v. Downey*, 38 N. C. 268; *Martin v. Smith*, 25 W. Va. 579; *Roberts v. Draper*, 18 Ill. App. 167.

Viewing the case from another standpoint, I also conclude that it would be wise to leave the judgment below undisturbed. The case originates in a bitter family quarrel over the property of a deceased parent. Simon E. Persons, who is the principal witness in the case, in view of his mother's will, which was made while she was a member of his family, and while the other sons of Thomas Persons were not present, claims whatever may have been due from Page Persons to his father, at the date of the latter's death, to the exclusion of the other sons. If anything was in fact due to the father's estate from Page Persons, it can be recovered readily by an administrator of the father, duly appointed, and if so recovered it will be apportioned among the sons as the law directs. For the reasons above stated, I am satisfied that the alleged gift to Maria Persons never took effect, and that the lower court was right in so holding.

SANBORN, Circuit Judge. I concur in the judgment of reversal for these reasons:

1. In my opinion no question of *donatio mortis causa* was presented in this case, and no judgment against the plaintiff ought to be sustained on the ground that the novation which Maria Persons pleaded was void because it was made in contemplation of the death of her husband, Thomas Persons, for the reason that no such defense was

pleaded and no such issue was presented for trial when the case came on for hearing, or was ever fairly tried. The averment of the complaint was that Thomas Persons assigned his claim for \$5,000 against Phineas P. Persons to Maria Persons, that he directed Phineas to pay this debt to Maria, and that Phineas agreed to do so. The answer was a flat denial of these averments, and nothing more. The defense, which was interposed by the court near the close of the plaintiff's evidence and which was sustained at the trial, was a confession and avoidance which had not been pleaded, and of which the plaintiff had received no notice until after the issues made by the pleadings had been practically tried. This defense was an admission that Thomas did direct the defendant to pay the \$5,000 to Maria, and that the defendant did agree to do so, coupled with an averment, not found in the pleadings, that this contract was void because it was made in contemplation of the immediate death of Thomas Persons, who lived for some months thereafter. This defense was inconsistent with the denial in the answer, was not made by the defendant in the action, and it formed no substantial basis for a judgment.

That due process of law without which parties may not be deprived of their property gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit upon one cause of action and recover upon another, nor may he go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action, and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings or by the course of the trial until the plaintiff had introduced substantially all his evidence. Proofs without averments and averments without proofs are equally unavailing. *Gentry v. U. S.*, 41 C. C. A. 185, 101 Fed. 51; *Burton v. Platter*, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; *Taussig's Ex'rs v. Glenn*, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; *Merrill v. Rokes*, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452; *Live Stock Co. v. Blackburn*, 30 U. S. App. 571, 579, 17 C. C. A. 532, 536, 70 Fed. 949, 954; *Wood v. Collins*, 23 U. S. App. 224, 230, 8 C. C. A. 522, 525, 60 Fed. 139, 142.

2. The reason why the defendant did not plead nor at the trial insist upon the defense that the novation which the plaintiff alleged was void because it was a *donatio mortis causa* is apparent upon the face of the record. And if the defendant did not choose to make this defense he had a right to waive it, and no duty was imposed upon the court to compel him to avail himself of it. At the same time that Thomas Persons directed the defendant, and he agreed, to pay to Maria Persons the \$5,000 which he owed to Thomas, the latter assigned and conveyed to him notes, mortgages, and land of the value of several thousand dollars. If the assignment and novation alleged by the plaintiff were void because they constituted a *donatio mortis causa*, all the assignments and conveyances made by Thomas to the defendant were also void for the same reason, and until he returns to the estate

of his father the property he received through these assignments and conveyances, or the value of it, he may well hesitate to aver, and the courts to hold, that any of these transactions were void for that reason. It will be time enough to consider whether or not this assignment and novation are void because they constituted a gift in contemplation of the immediate death of Thomas Persons when the defendant has returned to the estate of his father what he received from him on the day that this transaction took place, and has clearly pleaded the invalidity of this assignment and novation because they were gifts in contemplation of immediate death.

3. There was ample evidence to sustain the cause of action which the plaintiff pleaded and the defendant denied. There was testimony that the defendant was indebted to Thomas Persons in the sum of \$5,000, and that this indebtedness was not evidenced by any bond, bill, or writing. There was evidence that on the day in question Thomas Persons assigned and conveyed a large amount of property to the defendant, that he directed the defendant to pay this \$5,000 to Maria Persons, and that the defendant agreed to do so. This testimony, if true, constituted a valid assignment of this chose in action and a complete novation,—an effectual substitution of Maria Persons for Thomas Persons as the creditor of the defendant. It released the defendant from his obligation to pay this debt to Thomas Persons, and bound him to pay it to Maria Persons, and the release of his indebtedness to Thomas was a valid and sufficient consideration for his agreement to pay it to Maria. The contract between these parties was complete and perfect in itself. It contained no condition that this assignment, this novation, this substitution of one creditor for the other, should be in any way affected by the death or the continued life of Thomas Persons, and there was nothing in his subsequent partial recovery to release the defendant from his agreement to pay this \$5,000 to his mother, especially as long as he retained the property which he obtained from his father on that day, his release from his obligation to pay the \$5,000 to his father, and failed to place this money in the hands of the administrator of the estate of the latter to be distributed among his heirs. The transaction related in this evidence was a valid assignment of this claim of \$5,000 and a complete and effectual novation. A chose in action not evidenced by writing may be assigned without writing, and if the debtor is aware of the assignment and promises to pay the assignee the latter may maintain an action at law to recover the debt. *Rollison v. Hope*, 18 Tex. 446, 452.

If a creditor orally directs his debtor to pay his debt to a third party, and the debtor verbally agrees with the third party to do so, the latter is substituted for the first party as his creditor, the first party is estopped from collecting the debt, the debtor is released from paying to him, and is legally bound to pay it to the third party. A complete novation and assignment have been effected. The third party stands in the shoes of the first party as the creditor, and the chose in action has been lawfully assigned to him. *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Tatlock v. Harris*, 3 Term R. 174; *Wilson v. Coup-land*, 5 Barn. & Ald. 228; 1 Pars. Cont. (7th Ed.) 244; 1 Poth. Obl. (3d Am. Ed.) 434.

HANIFEN et al. v. ARMITAGE et al.

(Circuit Court, E. D. Pennsylvania. September 15, 1902.)

No. 38.

1. DIVIDED COURT—PRECEDENT—CONFLICTING CIRCUIT DECISIONS.

An affirmation by a divided court establishes no precedent or principle. Where, therefore, a patent has been held valid by the court of appeals of one circuit and invalid by the court of appeals of another, which on appeal is affirmed in the supreme court by an even division of the judges, this will not overcome the effect of the first-mentioned decision, which must be regarded as controlling in that circuit.

2. PATENTS—MECHANICAL SKILL AND ADAPTATION—INVENTION.

No doubt it is not every slight advance in the art, such as is constantly being made by mere mechanical skill and adaptation, that is to be considered invention. It is at the same time recognized that the impalpable something which is said to distinguish invention from simple mechanical skill is not easy to discriminate or define, and in the attempt to judge of it after long lapse of years the courts are in danger of being misled by the increased intermediate knowledge.

3. SAME—INVENTION.

One criterion of invention is that others have sought and failed, even where the process is so simple, when discovered, that many believe they could have produced it, if required.

4. SAME—ANTICIPATION—CONSTRUCTION OF FOREIGN PATENTS.

The construction of a foreign patent as an anticipation is not governed by what might have been made out of it, but by what is inherent, and substantially displayed in it.

5. SAME—INFRINGEMENT—KNITTED ASTRAKHAN.

The Bywater patent, No. 374,888, for a knitted fabric having a smooth back and a face of looped yarn, matted and curly, to resemble Astrakhan cloth, was not anticipated, and is valid. Claim 2 also construed, and held infringed.

In Equity. Suit for infringement of letters patent No. 374,888 for a knitted fabric, issued to Levi Bywater December 13, 1887. On final hearing.

W. P. Preble, Jr., for plaintiffs.

Augustus B. Stoughton, for defendants.

ARCHBALD, District Judge.¹ This patent has been the subject of marked vicissitude. It was at first sustained by Judge Dallas in this court in *Hanifen v. E. H. Godshalk Co.* (C. C.) 78 Fed. 811, but upon a rehearing, on account of certain expert evidence, by which he felt himself controlled, he decided against it. On appeal, however, he was reversed, and the patent upheld, although the court of appeals was not unanimous, Judge Butler dissenting from the views of Judge Shiras and Judge Acheson, who constituted the majority. 28 C. C. A. 507, 84 Fed. 649. It came up again before Judge Gray in *Hanifen v. Lupton* (C. C.) 95 Fed. 465, where the validity of the patent was conceded, the suit being defended on other grounds. It next appeared in the Second circuit, and was sustained by Judge Townsend in a well-considered opinion (*Hanifen v. Price* [C. C.] 96 Fed. 435); but he in turn was reversed by the court of appeals

¹ 1. See Courts, vol. 13, Cent. Dig. § 316.

² Specially assigned.

of that circuit in an opinion by Judge Shipman, and the patent declared invalid (42 C. C. A. 484, 102 Fed. 509). On account of these conflicting decisions in the two circuits, the supreme court allowed a certiorari in the latter case, and it was supposed that the matter would be thus put at rest. But again there was a serious difference of views, which resulted in an affirmance by an equally divided court. Such an affirmation establishes no precedent or principle (7 Am. & Eng. Enc. Prac. p. 44), and, so far as this court is concerned, the decision of the court of appeals of this circuit sustaining the patent therefore remains. With no new considerations advanced, the question of its validity cannot be regarded here as an open one. At the same time I have re-examined it as though it were, and, with the benefit of all that has occurred since it was rendered, I see no occasion to vary from the conclusion so reached.

The patent was issued in 1887 to Levi Bywater, and, according to the second claim which is the one in controversy, the invention is declared to be "a knitted fabric, composed of face and back yarns of different materials, the face yarn being looped at regular intervals and on alternate stitches of adjacent rows of the back yarn, and being matted and curly, and having a smooth back, whereby the said fabric has the appearance of looped or Astrakhan cloth as described."

In the specifications which precede, the invention is said to consist of "a new and improved textile fabric having the face yarn thereof looped on the stitches of the back yarn; * * * the said face, which is formed of mohair, worsted, or other yarn, being beat up so as to present a wavy or curly surface, and the back, which is formed of woolen or other yarn, brushed so as to present a smooth surface, the fabric having the appearance of looped or Astrakhan cloth." In carrying out his invention the patentee declares that he employs a circular knitting machine, a partial description of which he gives, and in the operation of knitting the fabric he says that the thread by which the rough face or Astrakhan effect is produced is so placed upon the needles by the backing wheels as to be alternately in front of and behind two needles, the backing wheels being so set in a four-feeder machine that for successive rows of the fabric they alternately press back different needles, thus forming the loops on alternate stitches of adjacent rows. It will be thus seen that the patent is distinctly for a textile fabric of specific character and designated structure. It is not for the process by which it is made, nor the machine for making it, each of which is referred to merely to aid in describing it. The question, therefore, on which the validity of the patent depends is whether the fabric is new, or has been previously, in whole or in part, anticipated. On this question it is brought into comparison with the prior British patent of James Booth in 1881. There are other references, but, without stopping to discuss them, the case seems to turn on this one. Unquestionably imitation Astrakhan existed before either of these inventors; but it was the woven, and not the knitted, article, which Bywater was the first to actually produce. As said by Judge Dallas in his first opinion: "Knitted Astrakhan was created by Bywater, and this he accomplished not by merely applying the skill of the knitter to effect a change in either

of their [i. e., prior] products, but by the exercise of his own inventive faculty." That is the whole case in a nutshell, and it is abundantly sustained by a proper consideration of the matters involved. Booth did not aim to knit Astrakhan, and his patent, unaided, was not calculated to do so. What he claims to have invented was simply a novel description of looped fabric of ornamental appearance, whatever that might mean. Looking to the process by which it was made, we find that he employed for the back or body the ordinary wool yarn, capable of being afterwards felted, and for the face a worsted or long-fibered yarn that would not felt. This face yarn, which ultimately constitutes the loops, is laid in between the needles in any desired order, and tied to the body by the tie thread used in fleecy-backed hosiery, known as "stockinet." The fabric so produced is then subjected to the process of fulling or felting, by which the back or knitted portion is shrunk or felted together, and the face yarn, "being laid in straight and tied," is thereby caused to project from the body of the fabric in loops, producing, as he says, a very ornamental appearance. Did this disclose knitted Astrakhan? It is not so claimed by the inventor, by whom we must assume that the invention would be given its widest possible scope; and the suggestion of Judge Shipman in *Hanifen v. Price*, 42 C. C. A. 484, 102 Fed. 509-512, that he had in mind to make a knitted fabric which resembled the woven article (unless there was something in that record of which I am not aware), would seem to be an entire misconception. The ornamental effect is all that he indicates, produced by the loops running in longitudinal or diagonal stripes, or with mixed irregularity in longer or shorter floats. Unless knitted Astrakhan is necessarily embraced by and involved in the fabric so described, it cannot be said to be disclosed by the patent. It is no answer that it has been produced by other knitters following the patent. We have no evidence of that kind in this case, however it may have been shown in others; Turtle merely testifying that he produced knitted Astrakhan in 1885 from a piece of the manufactured fabric which Booth had previously made. But even so, the additional skill by which this was able to be brought about, if it was, is an element of which we have no means of judging at this time. It is to be remembered also that, as a foreign patent it is not so much what could have been made out of it as what was inherent in it,—not its possibilities, but what it substantially displayed,—that is to govern. *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Hanifen v. E. H. Godshalk Co.*, 28 C. C. A. 507, 84 Fed. 649. Neither will it do to say, as in the case referred to in the Second circuit, that the loops of Booth, being made of long fibered worsted, would necessarily twist and curl. That is not claimed for them in the patent, and we cannot assume that it was desired or intended; and, even if it was, to meet the Bywater patent, as well as to imitate Astrakhan fur, the loops must both mat and curl so as to present the shaggy appearance of the animal. This is an imposed effect, due not only to the yarn used and the way it is laid in, but to the subsequent treatment of the fabric, and there is nothing suggested by Booth calculated to bring it about.

What is there, then, to stand in the way of the invention of Bywater? It is said that, even if Booth did not anticipate Bywater, still Bywater's fabric is merely an advance or improvement, the result of a choice of yarns, which would suggest itself to any skilled knitter seeking to produce this special effect, and therefore not involving the exercise of inventive faculty. "It is doubtless true," says Judge Shipman in *Hanifen v. Price*, *supra*, "that a distinction can be traced in the two patents as to the purpose that was in the mind of each patentee; the earlier patentee having in mind to make a knitted fabric which resembled Astrakhan in having a looped face varied according to the fancy of the knitter, and the latter patentee having in mind to closely imitate woven Astrakhan. But, in our opinion, that fact gives to the Bywater improvement nothing of a patentable character."

It is also admitted by Judge Shipman at another place in his opinion that not all long-fibered yarn will curl, so that whether it would or not in any given case would be problematical. It consists simply "in the selection of yarns to produce a particular effect or particular style of goods, and, after Booth had told the public (if, indeed, he told them anything of novelty) how to produce a knitted loop fabric, there was nothing of an inventive character in the selection of yarns to make a looped curly fabric more curly and matted. The validity of the Bywater patent should not rest upon the fact that the Booth patent said nothing about curly wool, but its validity depends upon the question whether, after Booth's improvement had been described, there was anything of an inventive character left. Bywater, by a wise choice of yarns and continued mechanical improvement, succeeded in presenting to the public an attractive fabric, and had the great merit of being patient in the work of mechanical development, but the inventive idea was absent." And again: "We do not regard the question of the Booth anticipation as the controlling one in the case. Indeed, the importance of the Booth patent consists in its bearing upon the question of patentable invention, and we coincide in the view of Judge Butler that upon the admitted facts in the case the work of Bywater was the mechanical work of an intelligent spinner, and was destitute of the element of invention."

In this arraignment of the patent there are concessions large enough, as it seems to me, to produce a very different result. The fact that there are distinctions between the work of Booth and that of Bywater, and that Bywater, by a wise choice of yarn and patient work in mechanical development, produced the fabric which he did, goes a long way to meet the charge of the want of invention which is made. What is there that makes up the inventive faculty beyond this? The error into which I can but feel that the learned court fell consists in the assumption that Booth not only had it in mind to make, but actually produced, a fabric which resembled knitted Astrakhan, and that Bywater merely improved upon it. The difference between the work of the two inventors is of no such incidental character. It may be that by adaptive manipulation an Astrakhan effect can be worked out with the Booth loops, but, taking the patent as it reads, it is clear that it will not be produced naturally. The only provision for creating loops is by the felting of the back or body by

which the face yarn between the tie points is loosened and protrudes. That these may curl is possible if a curly or crinkly yarn happens to be used; but that they will both mat and curl, which is the essential feature of the Bywater fabric, is not suggested. It will not do, therefore, to characterize what Bywater did as built upon the work of Booth; or to say that Booth made loops which were a little curly, and Bywater only made them more so. Neither can the result achieved by Bywater be said to depend simply on the selection of yarns calculated to produce a special effect. We must look at what he did as a whole, and so judge of it, analyzing, rather than dividing and dissecting, it. As already said, what he invented was a textile fabric of designated structure, produced by a specified method, and having an intended imitative Astrakhan effect. Generically, this may be of the same class as the style of fabric designed by Booth, both providing for looping the face yarn on the back or body regularly or irregularly according to a prearranged design. But the means employed by each is different; nor can either be said to suggest the other. Booth uses a long-fibered yarn or worsted, so that it will not felt; Bywater, mohair or luster, which will mat and curl. In Booth the face yarn is laid in straight, and the loops are produced by the felting process to which the fabric is subsequently subjected. Bywater makes his loops in the process of knitting, and controls their character from the start. In the Booth the face yarn is fastened down by the tie thread at each end of the proposed loop, which stands in the way of its curling. In the Bywater it is simply tied to the back as a part of the stitch, leaving it free to mat and curl as desired. You cannot make Astrakhan by the Booth patent unaided, or (as I am almost prepared to say) except as you in fact depart from it. By the Bywater it was effectually and designedly and for the first time produced.

No doubt it is not every slight advance in the art, such as is constantly being made by mere mechanical skill and adaptation, that is to be considered as invention. The design of the patent laws, as it is said in *Atlantic Works v. Brady*, 107 U. S. 199, 2 Sup. Ct. 231, 27 L. Ed. 438, "is to reward those who make some substantial discovery or invention which adds to our knowledge, and makes a step in advance in the useful arts." It is at the same time recognized that the impalpable something which is said to distinguish invention from simple mechanical skill is at times not easy to discriminate or to define (*McClain v. Ortmayer*, 141 U. S. 419-427, 12 Sup. Ct. 76, 35 L. Ed. 800); and in the attempt to judge of it after the long lapse of years we are likely to be misled by the increased knowledge immediately attained. That is the danger here. No knitter had produced Astrakhan cloth before Bywater, and how, then, can it be affirmed that any skilled knitter could? He could if he had the inventive genius to conceive it as Bywater did, but he could not without it. One criterion of invention is that others have sought and failed, even when the process is so simple, when discovered, that many believe they could have produced it if required. Walk. Pat. § 26. And why may that not be applied here? If, as it is stated, a gold medal was awarded Bywater by the Crystal Palace Wool Exhibition in

1881 for his curled stockinet, which was nothing more or less than Astrakhan, such a recognition by those most competent to judge, occurring at the time, ought to afford speaking proof of his real achievement. Conscious, therefore, as I am of my own inexperience in such matters, and having the highest regard for the opinion of the court from whose views I am compelled to differ, I am nevertheless unable to see why so material an advance in the textile art can be regarded as devoid of invention. To characterize it as amounting to no more than a selection of yarns, or a matter of mere mechanical skill, is a want of appreciation, as it seems to me, of what it really was,—a new textile fabric of great merit, which others had sought to produce in vain.

With the question of infringement—to which, by the way, the evidence of the defendants is mainly directed—I have no serious difficulty. The structure of the fabrics manufactured by them is displayed in the exhibits which have been produced, where the stitching of each is given in exaggerated form. These have been of the greatest assistance to me in the disposition of this part of the case. But notwithstanding the opinion of the experts which accompanies them, I am convinced that the great majority of these fabrics, if not in fact all, fall within the terms of the patent, and offend against it. As already seen, the inventor specifies with regard to his fabric that the face yarn is to be “looped at regular intervals, and on alternate stitches of adjacent rows of the back yarn, and, being matted and curly, and having a smooth back,” has the appearance of looped or Astrakhan cloth as described. That the greater portion of the defendants’ goods in outward appearance infringe upon the patent can hardly be denied. Some one or two in which the face yarn is of different colored threads, by which the diagonal lines of the looping is brought out, may not seem so much to do so. But it is the structure, rather than the appearance, which determines the infringement; or, rather, the appearance and the structure combined, the latter being the controlling feature. Turning, then, to the patent again, and analyzing its terms, we find that the looping of the face yarn must be “at regular intervals, and on alternate stitches of adjacent rows of the back yarn.” Admittedly these terms are not technical, and are to be construed according to their ordinary meaning, in which the opinions of experts are of little aid. By “regular intervals” we are to understand intervals that conform to a prescribed rule. This does not apply to the loops, be it noted, but to the intervals between; and by no means does each interval have to be a single stitch. Hence the loops may be of any desired irregularity, and pass over any number of stitches. Neither do I see why a regularity of intervals is not preserved where one set of loops of a certain fashion follows on after another, even though the interval between two immediately successive loops may not be the same. The intervals are not required to be equal, but regular, and this is satisfied by any repeated group or pattern. It further appears as an essential that the looping of the face yarn shall occur “on alternate stitches of adjacent rows of the back yarn.” This does not mean “every other stitch of successive rows,” as the defendants contend; but, looking to the process of knitting and the course of the

back thread which necessarily controls, the face thread is to be looped or tied to stitches which alternate with each other, as the successive rows of the back yarn come around after a complete revolution. This fabric is machine-made, as is specified, and the possible employment of a four-feeder is recognized,—a circumstance which has got to be taken into consideration in construing the directions given. Where, therefore, a single thread machine is not used, the words “adjacent rows” mean what they would mean to the knitter,—the next row formed by the back thread after it has gone once around. Without departing in any respect from the terms used, this part of the claim may be rearranged and paraphrased thus: “The face yarn being looped at regular intervals in one row of the back yarn and to an alternate stitch of said back yarn in the adjacent row.” Here row is compared with row, as is manifestly intended, the back thread in one revolution forming one row and in the next another, and each being the adjacent row to the other for that particular thread. The word “adjacent,” even in its strictest sense, means no more than “lying near, close, or contiguous, but not actually touching.” *Webst. Dict.* There are degrees of nearness, and when you want to express the idea that a thing is immediately adjacent you have to say so, and that is not what is said here. If this, then, is the construction to be given to the second claim of the patent, the defendants’ fabrics clearly infringe upon it in the main. It would be interesting to go over each of them, and point out wherein that is the case, but I do not think it would serve any useful purpose to do so. The matter will have to be taken up in detail by the master, and to a certain extent it is better to leave it open to him. It may be that some of the fabrics on further examination can be distinguished and saved, but, the charge of infringement having been made out with regard to any of them, the extent to which it goes in others is not at present material.

Let a decree be drawn upholding the validity of the patent, and referring the case to a master to take an account.

WHITLEY et al. v. WINSOR & JERAULD MFG. CO.

(Circuit Court, D. Rhode Island. September 13. 1902.)

No. 2,598.

1. PATENTS—INFRINGEMENT—CLOTH-STRETCHING MACHINES.

The Whitley patent, No. 503,301, for improvement in chain clips for cloth-stretching machines, claims 1, 2, and 3, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 503,301 for a chain clip for cloth-stretching machines, issued to Alfred A. Whitley August 15, 1893. On final hearing.

Wilmarth H. Thurston and William R. Tillinghast, for complainants.

Richardson, Herrick & Neave, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 503,301, granted August 15, 1893, to Alfred A. Whitley,

for improvements in chain clips for cloth-stretching machines. The first, second, and third claims are involved. The defense is non-infringement. Each claim specifies as a feature of the combination a lever, which, so long as it rests upon the fabric, supports or maintains out of action a movable jaw. Each claim specifies as a feature of the combination that the movable jaw shall bear on the lever to "counterbalance" the weight of the lever, or the weight of the free end of the lever on the fabric. In the defendant's clip, the movable jaw bears upon the lever, but in such manner as to increase the pressure of the free end of the lever upon the fabric; and the full weight of the lever, or of the free end of the lever, considering the lever as an independent part bearing by force of its own weight upon the fabric, exerts its pressure upon the fabric. The pressure of the defendant's lever, when it is considered as an independent part resting with its own weight upon the fabric, is not "counterbalanced," or supported, or diminished by the bearing of the movable jaw upon the lever. In the complainants' clip, as shown in the patent and illustrated by the models, the weight, or a portion of the weight, of the lever itself, is lifted from the fabric, so that the direct pressure of the lever part upon the fabric is less than the weight of the lever part. This is accomplished by placing the bearing point of the movable jaw upon that side of the pivot of the lever which is opposite to the free end of the lever. The weight of the movable jaw thus tends to rotate the lever upon the pivot, and to raise the free end, or that end which rests upon the fabric, thus relieving the fabric of weight. If it is true, as the defendant contends, that the claims have specified as an essential feature such a bearing of the movable jaw upon the lever as diminishes or tends to diminish the specific weight of the lever, or the pressure of the weight of the free end of the lever upon the fabric, then there is clearly no infringement. If the claims specify as an essential feature a "counterbalancing" of the weight of the free end of the lever part, there is no infringement. The defendant does not employ such a counterbalance, or any equivalent therefor. The complainant contends that it is not an essential feature of the patent that the specific weight of the lever part itself should be counterbalanced or diminished by use of the weight of the movable jaw. It is shown that in the prior art, as represented by the Smith clip, described in the patent to Smith, No. 404,314, May 28, 1889, a controller was attached to the movable jaw, so that the weight of both jaw and controller bore with excessive pressure upon the fabric; that the thing to be remedied was the excessive pressure on the fabric due to the weight of the jaw; that Whitley accomplished this by separating the controller from the movable jaw, substituting an independently pivoted controller or lever for the attached controller, and so disposing his lever and movable jaw that the lever supported the jaw at a point near its pivot, whereby the fabric was relieved in part from the weight of the jaw. It is urged that the keynote of Whitley's invention was the interposition of leverage, and such a support of the weight of the jaw by the independent pivot of the controller or lever as permits the controller to rest with light pressure upon the fabric; that what he did was to prevent the weight of the movable

jaw from producing undue pressure on the fabric. If the patent were to be construed as for the combination of a slotted stationary jaw, a movable jaw, a lever to rest upon the edge of the fabric above the slot in the stationary jaw, and support the movable jaw to hold it out of action as long as the lever rests on the fabric, the parts so arranged that the said movable jaw bears on said lever near its pivot so that the fabric is relieved of or prevented from receiving undue pressure or strain from the weight of the jaw, the defendant's device would, in my opinion, infringe. The defendant's movable jaw bears upon the lever in such manner that its weight is not wholly transmitted to the free end of the lever, and the fabric is thus, to some extent, relieved of pressure. The question, however, is whether the lever has such a bearing as is specified in the claims, or substantially such a bearing.

It is apparent from the patent and from the models that in relieving the cloth of pressure the complainant Whitley did two things: He supported a portion of the weight of the jaw upon the independent pivot of the lever. The weight put upon this pivot is not transmitted to the lever, and thus cannot be considered a part of the weight or of the burden of the lever end. He also did a second thing,—he adopted such a bearing of his jaw on the lever as enabled him to use a portion of the weight of his jaw to offset the weight of the lever on the cloth. Such portion of the weight of the jaw as is not sustained by the pivot is described as tending to lift the lever, and thus to diminish the weight of the lever upon the cloth. This second thing is entirely absent from the defendant's clip. The defendant contends that the second thing is the important and controlling characteristic of the Whitley patent; a feature inserted by amendment to avoid a rejection; and that it is distinctly specified in the claims by the words, "the said movable jaw bearing on said lever to counterbalance the weight of the lever on the fabric." The complainants contend that those words mean "to lessen the pressure of the lever on the fabric." Does the patent permit such an interpretation of language? It is quite true that the word "counterbalance" is not used by the patentee to signify opposing one weight by an equal weight. But it seems apparent that the patentee used the word to signify the opposition of the weight of one part to weight of another part. Thus he says in the specification:

"The pressure of the arm, G, on the bail, h², of the lever, H, counterbalances the weight of the free end, h, of the said lever. * * * For stretching heavy fabrics the counterbalancing of the lever, H, is not essential, the fabric being sufficiently strong to support the weight of the lever."

Also, in describing Figs. 5, 6, and 7, he says:

"The weight of the jaw serving to counterbalance the lever, H, as in the arrangement illustrated by Figs. 1, 2, 3, and 4."

In a claim which was rejected by the patent office the patentee specifies "a pivoted lever, or equivalent device, to counterbalance or partially counterbalance the weight of the jaw"; and, had this claim been allowed, it would have been fair to interpret the word "counterbalance" to mean "support," since the pivoted lever does not oppose its weight to the weight of the jaw. But upon rejection of his claims

the patentee amends by specifying that the lever supports the movable jaw, and that the movable jaw counterbalances the weight of the lever. That before amending he had in mind the distinction between supporting the jaw by a lever, and the use of the weight of the jaw to oppose the weight of the lever part, thus counterbalancing it, is very clear from the following communication to the patent office:

"It will be found that the claims now presented set forth an important feature not found in the references; that is, the counterbalancing of the weight of the lever. It is desirable to take as much weight as possible off the part of the clip which drops through the slot when the fabric passes it, and to put as much weight as possible onto the part of the grip which bears on the fabric after it leaves the part which drops through the slot, so as to firmly hold the fabric. These parts I shall call parts one and two, respectively. Looking at Smith's clip, it will be seen that he uses an arrangement in which a counterweight is used, which takes weight off both parts one and two,—a distinct disadvantage as regards part two. I have an arrangement in which the parts one and two are so arranged separately that the weight which is used to take off weight from part one is utilized to put weight onto part two to give it extra grip, instead of taking off, as in Smith's."

If we adopt the defendant's construction, then the claims specify and cover this particular feature which was urged upon the patent office, and to which a very considerable portion of the specification and drawings is devoted. If we adopt the complainants' construction, we encounter numerous difficulties. If the language means broadly to lessen the pressure on the fabric, this makes the opposition of weight to weight, and the lifting of the free end of the lever, immaterial; and we must ignore the reasons urged upon the patent office for allowing the amended claim. The question whether the patentee is entitled to a broad patent for all arrangements of lever and jaw which result in relieving the cloth from pressure is one that was not passed upon by the patent office. Nowhere in the specification does the patentee himself point out that the substantial feature of his invention is the use of the pivot to sustain the weight of the arm; and, while this is apparently a feature of the special structure shown, it is exceedingly doubtful whether it is sufficiently described or claimed to meet the requirements of the patent law. But the language proposed by the complainants does not remove the difficulties in the case. Suppose we have, instead of the language of the claim, the substituted language, "said movable jaw bearing on the said lever to lessen the pressure of the lever on the fabric," what new feature is brought out by naming the pressure of the lever instead of the weight of the lever? Complainants' brief says that:

"The pressure on the fabric due to the weight of the jaw is transmitted to the fabric through the lever, because it is the lever which bears on the fabric. It is proper, therefore, to speak of lessening the pressure of the lever on the fabric, even when such pressure is due to the movable jaw, and this is what the claim means."

It is necessary, then, to the complainants' argument, and to make it appear that pressure of the lever means anything different from the weight of the lever part, to assume that the lever referred to by the patentee receives the burden of the jaw in such a way as to transmit it to the fabric. The patentee is describing a mechanical combination,

and not only enumerates the parts used, but tells how they are put together. If he means by the weight of the lever its own specific weight plus a weight imposed upon it by the movable jaw, he must also necessarily mean that the jaw bears on the arm so as to transmit weight to the free end. Upon such a construction, we must find that the patentee means to indicate two bearings,—one which puts pressure on the free end of the lever, and one which takes it off. It would then be necessary to amend the complainants' language to read: "Said movable jaw bearing on the lever so as to add weight to the weight of the lever, and to lessen the combined weight of lever and jaw upon the cloth." Such a reading is obviously out of the question. It is certain that the patentee does not intend to describe an adjustment which transmits the weight of the movable jaw to the lever end. He means, then, by the "weight of the lever," exactly what those words imply,—the weight of the lever part, or the pressure of the specific weight of the lever part, upon the cloth. The communication to the patent office shows this clearly. The only bearing of the movable jaw which will counterbalance or lessen that weight is the one that he indicates in his patent, and which the defendant does not have. We cannot consider the claims to be descriptive of parts, and of the manner of combining those parts, if we adopt the complainants' contention that the weight of the lever includes also the weight of the arm. A bearing on the pivot so that the pivot prevents the weight of the arm from being transmitted to the lever end does not affect the weight of the lever, and does not lessen it.

Upon a reading of the patent, the claims themselves, and the communication to the patent office, it is clear beyond question that the patentee recognized the difference between supporting the jaw and using the weight of the jaw to counterbalance the tendency of the free end of the lever to depress the cloth. The language used in the claims expresses this clearly. The complainants' construction requires us to substitute for the word "counterbalance" the word "lessen," and for the words "weight of the lever" the words "pressure of the lever." It requires us also to assume that the lever referred to by the patentee is one that bears the burden of the movable jaw; that the weight of the lever part itself is immaterial, and that it is the weight of the movable jaw that the patentee has in mind; that the claim shall then read, in substance, "the movable jaw bearing on the lever to lessen the weight of the movable jaw on the cloth"; and that this signifies that substantially all the weight of the jaw shall bear upon the pivot of the lever. By adopting this construction, there would be effected a substitution of the weight of the jaw for the weight of the lever, a support of the weight of the jaw upon the pivot for a bearing of the jaw, which would tend to rotate the lever and lift its free end, and elimination of the entire feature of counterbalancing weight by weight. This is not an interpretation of language, but a complete substitution of new claims for those drawn by the patentee. I am of the opinion that the patentee has clearly claimed as an element in his combination such a bearing of his movable jaw upon the lever as tends to lift the free end of the lever, that he is estopped by his action in the patent office from now contending that such ele-

ment is nonessential, that this feature is entirely absent in the defendant's clamp, and that there is no infringement.

The bill will be dismissed.

H. W. BUTTERWORTH & SONS CO. v. WINSOR & JERAULD MFG. CO.

(Circuit Court, D. Rhode Island. September 13, 1902.)

No. 2,600.

1. PATENTS—INFRINGEMENT—CLAMP FOR TEXTILE MACHINERY.

The Butterworth patent, No. 571,508, for an automatic clamp for textile machinery, is limited by the prior art to the specific mechanism described in the specification. As so limited, claim 6 *held* not infringed.

In Equity. Suit for infringement of letters patent No. 571,508, for an automatic clamp for textile machinery, granted to Harry W. Butterworth November 17, 1896. On final hearing.

Ernest Howard Hunter, for complainant.

Richardson, Herrick & Neave, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 571,508, granted November 17, 1896, to Harry W. Butterworth, for an improvement in automatic clamps for tentering machinery. Claim 6 is in issue:

"In a clamp for textile machinery, the combination of a frame having a clamping-jaw, a movable frame carried by said main frame, a gripping-jaw pivoted to the movable frame, means independent of the jaws to limit the movable frame in one direction, a locking device to limit the movement of the movable frame in the other direction, and a gravity-actuated and cloth-controlled finger for controlling the gripping action of the movable jaw."

The complainant contends that the essence of the invention consists in the combination of an automatic controlling finger with the swinging frame of the clamp. The defendant contends that it does not infringe, for the reason that its clamp does not contain the particular "locking device" which is an element of the combination claimed. The element in the defendant's clamp which the complainant's expert regards as an equivalent for the locking device of the patent in suit is a stiff coil spring. Whether this spring is an equivalent for the locking device of the complainant depends, in my opinion, upon an examination of the substantial character of the complainant's invention. Were it true, as the complainant contends, that the essence of Butterworth's invention consists in the combination of an automatic controlling finger with a swinging frame clamp, then it might be held that the coil spring of the defendant's clamp is an equivalent of the locking device of the complainant. The fact that the spring yields under excessive strain, while it might be an improvement, would not be a sufficient difference to avoid infringement. If the complainant properly could be regarded as the first to bring together in a true combination all the elements enumerated in the claim, and if the locking device were to be regarded merely as a subordinate feature, we would be obliged to say that the spring of

the defendant was an equivalent means for performing a function of the complainant's locking device, though it possessed other advantageous features novel with the defendant. Butterworth, however, was not the first to produce a clamp containing both a swinging frame and an automatic controlling finger; and he discloses nothing novel in the means of controlling the action of a pivoted gripping-jaw by an automatic controlling finger. The substance of what he did was merely to adapt a completely organized automatic clamp to use upon a vertical, as distinguished from a horizontal, machine, by pivoting its upper arm so that it could be retracted, and providing this upper arm with a lock to hold it rigidly during the clamping action. The prior art discloses completely organized automatic clamps, in which the action of a pivoted gripping-jaw is governed by a controlling finger; as in the patents to Smith, No. 404,314, dated May 28, 1889, and to Walker, No. 501,855, dated July 18, 1893. Butterworth employs a similar organization. Because the operative parts of such clamps are usually mounted upon rigid jaws, the clamps, while adapted for use on horizontal machines, are not adapted for use on vertical machines, since in the latter the rigid upper jaw, arising from below, is opposed in its upward movement by the cloth. In his specification Butterworth says:

"The clamps, as heretofore made, have been impractical to permit the fabric to be inserted automatically within the grasp of the clamp, because the upper jaw of the clamp cannot secure a position above the fabric in passing about the end cylinders of the machine. By my improvements I support the gripping or upper jaw of the clamps upon a movable frame carried with the lower jaw, and combine therewith automatic locking devices which lock or unlock the lower jaw and movable frame relatively in position at or about the time the clamping operation takes place."

Butterworth's problem was the narrow mechanical problem of an adapter or improver. The automatic clamp had been used upon a horizontal chain, and he desired to use a similar automatic clamp upon a vertical chain. The prior art discloses a number of non-automatic clamps, in which the problem of bringing the clamp to the cloth from below had been successfully solved. It was well known in the art that, to enable a cloth clamp to be used on a vertical machine, the upper jaw of the clamp should be swung back while the clamp is rising into operative position. It was old to provide a swinging arm, to retract this arm by a cam so that the upper jaw of the clamp was held out of the way of the cloth until the lower jaw was in contact with the cloth, and then to let the upper jaw fall upon the cloth, and clamp it firmly between the upper and lower jaws. In other words, the problem of bringing a clamp up from below, instead of from the side, had been solved by the use of a pivoted or movable arm, instead of a rigid arm. This is shown in the British patent to Stewart, No. 192, of 1874, and in the United States patent to Scheider, No. 366,431, dated July 12, 1887. It being old to bring a nonautomatic clamp to the cloth upon a vertical chain by the use of a swinging frame, it constitutes, in my opinion, neither invention nor a new combination to employ the same means for bringing an automatic clamp to the cloth on the vertical

machine, unless the difference between an automatic clamp and a nonautomatic clamp makes the mechanical problem different. Nothing appears in this record to warrant the finding that the presence of the automatic controlling finger changed the mechanical problem of retracting the arm. Moreover, the English patent to Farmer, No. 4,215 of 1894, claims a swivel jaw pivoted on a movable frame for use in a clamp with or without controlling or checking fingers; i. e., whether automatic or nonautomatic. As was said by the circuit court of appeals of this circuit in *Osgood Dredge Co. v. Metropolitan Dredging Co.*, 21 C. C. A. 491, 75 Fed. 670, 672:

"It is a commonly accepted rule of the law of patents that the inventive idea is not ordinarily present in the conception of a combination which merely brings together two or more functions, to be availed of independently of each other. The mechanism which accomplishes such a result, and no more, is ordinarily spoken of as a mere aggregation," etc.

See, also, *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.* (C. C. A.) 116 Fed. 363.

The patentee expressly states that he not only supports the upper jaw of the clamp upon a movable frame, but that he combines therewith an automatic locking device, which locks or unlocks the lower jaw and movable frame. His automatic locking devices are governed directly or indirectly by the controlling finger. Mr. Livermore, the expert for the defendant, has testified that, in his opinion, "there is nothing whatever, broadly considered, of substantial novelty in the clamp shown and described in the Butterworth patent; and that the only matters of substantial novelty, even in details of construction and arrangement, reside in the specific construction of locking device for positively holding the overhanging frame in working position, and in the operative connection between said locking device and the automatic controlling device for the movable jaw, by which said locking device is brought into action when the margin of the cloth pulls out from under the controlling device so that the locking of the overhanging frame and the beginning of the clamping action are consecutive parts of a single continued operation." This view I believe to be substantially correct, and upon this view there is clearly no infringement.

The view of the complainant that the essence of the invention is in a combination of swinging frame and controlling finger, I believe to be essentially incorrect. There is no mechanical co-operation between them. Even if it were true that Butterworth was the first to adapt the automatic clamp to use upon a vertical machine, he would not be entitled to monopolize all means for doing this, but only such as are substantially similar to his. The use of a swinging frame cannot be regarded as a novel or peculiar feature with Butterworth, but merely as an employment by him, for its ordinary purpose, of a device common in mechanical arts, as well as in this particular art. Nor do we find it broadly new with Butterworth that a swinging arm is locked during the action of the clamps. The Scheider patent, No. 366,431, dated July 12, 1887, is admitted by the complainant's brief to disclose "a pivoted gripping-jaw, * * * carried by a swing-

ing frame or arm pivoted to the lower fixed jaw, and intended to be locked rigidly to the fixed jaw when the clamp is closed. This locking device consists of a small catch on the swinging frame, adapted to engage lugs on the fixed jaw, and controlled by a cam-operated finger." The complainant's problem being, then, the narrow one of adapting the old automatic clamp to use on a vertical machine, and his use of a swinging frame for this purpose being the use of means well known in the prior art for the same purpose, the substantial difference between the complainant's device and the devices of the prior art is not broadly in the provision of a swinging arm locked during the operation, but narrowly in the specific kind of locking mechanism.

There are further reasons which require us to limit this claim to the specific construction described in the specification. The English patent to Farmer, No. 4,215 of 1894, describes a clamp containing in operative combination all the elements of Butterworth's claim 6. Farmer employs a swinging frame, the upper part of which can be pushed back by suitable guides out of the way of the fabric at the point required, and which is locked during the gripping operation. He also employs controlling fingers to regulate the action of the gripping-jaw. The difference between Farmer and Butterworth is merely a mechanical difference in the manner of combining the parts, and not in elements or functions. While Farmer attaches his controlling fingers to a short check-chain, so that he uses a smaller number of controlling fingers than of gripping-jaws, and while the controllers are not an integral and permanent part of the clamp, yet at the time of action the controllers form substantially a part of the clamp, and the operation of the parts is substantially the same as in Butterworth's clamp. Butterworth has his controlling finger carried either by the movable frame or by one of the gripping-jaws. It is not obvious, however, that this mechanical difference is important, or constituted a practical improvement on Farmer. Butterworth says in his specification that it is customary in practice to form the clamps upon the links of a chain. We are unable to say, upon a reading of the patent, that a number of swinging frame clamps, each provided with a controller, is a better construction than a number of swinging frame clamps with a smaller number of controllers, or substantially different. There is no evidence that the Butterworth clamp has ever been in practical use, and there is evidence that the construction is an impractical one. There is no evidence that the Butterworth clamp is a practical advance upon Farmer. As Butterworth's claim, broadly construed, covers the Farmer combination, the claim is invalid, unless restricted. We cannot restrict it merely by so limiting it as to require the controllers to be pivoted to the frame. It is not apparent that this is a difference of any practical consequence, or which would enable Butterworth to avoid a charge of infringement of the Farmer patent. Farmer says, of his controlling mechanism:

"We do not limit ourselves to the use of chains, as any known mechanical equivalents having the same or similar functions and operating as a checking apparatus or appliance * * * may be employed," etc.

The complainant's expert testifies that a controlling finger like that of the Smith patent could be substituted for Farmer's controlling devices without requiring any change in any other part of the apparatus. To avoid the Farmer patent, then, we must limit the claim by other difference than the manner of attaching the controllers. I am of the opinion that we must find this difference to be what is pointed out by Mr. Livermore,—a difference in the specific construction of locking device, and in the operative connection of locking device and automatic controlling finger. The defendant's coil spring is not, in my opinion, substantially similar to the complainant's locking device. There is no operative connection between defendant's controlling finger and its coil spring. The locking action of the spring is not a positive locking action, but a yielding action, which produces a change of function. While Butterworth is a mere adapter of an old toggle-grip clamp to use in a new position, the defendant has done more than this. By using a spring instead of a rigid lock, he combines in a single clamp the advantageous features of the old spring clamp, to wit, the use of a yielding pressure and of the automatic grip, namely, quick action. What the defendant's clamp has in common with the complainant's, the defendant had, it seems to me, an equal right to take from the prior art. The differences are original and advantageous, and have made the defendant's clamp practical and commercially successful. Upon the whole, I am of the opinion that the defendant does not infringe the complainant's patent, and does not use the substance of anything original with Butterworth in this art.

The bill will be dismissed.

WARREN FEATHERBONE CO. v. DODGE.

(Circuit Court, D. Massachusetts. August 7, 1902.)

No. 1,558.

1 PATENTS—INFRINGEMENT—METHOD OF ATTACHING STIFFENINGS TO DRESS WAISTS.

The Warren patent, No. 327,626, for a method of attaching stiffenings to dress waists, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 327,626, for a method of attaching stiffening to dress waists, issued to Edward K. Warren October 6, 1885. On final hearing.

Fred L. Chappell, Seabury C. Mastick, and Frederick L. Emery, for complainant.

J. Stuart Rusk, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 327,626, granted to Edward K. Warren October 6, 1885, for improvements in methods of attaching stiffenings to dress waists. The defenses are invalidity and noninfringement. The patent has a single claim:

"The method of attaching the stiffening material to seams by placing it in the open seam after the main seam is sewed, and attaching it to the fabric by stitching its sides to the inside portion of the open seam without connecting it with the main seam, substantially as described."

It appears that Warren was the originator of an article known as "Featherbone," which is used in dressmaking as a substitute for whalebone. The complainant's presentation of its case calls for the remark that this patent is not for "Featherbone," and cannot be supported by evidence as to the characteristics, utility and commercial success of "Featherbone." It also appears that the complainant uses, or teaches others to use, in connection with "Featherbone," what is termed the "Warren mode of springing," which is described as follows:

"The operator takes hold of the material already stitched and the material of the garment at the seam which is about to be stitched to the stay, and sharply turns the former portion vertically, and creates a drag or tension upon the latter portion by grasping the same between the fingers. The direct result of this operation is that the material of the garment at the seam, including the flap portions thereof, is stretched relatively to the stay or bone. * * * The direct effect of this is to constantly keep the body of the material under tension, and remove all wrinkles, and produce absolute smoothness along the length of the seam."

The portions of the record relating to springing are entirely irrelevant to the patent, and may be eliminated from the case: First, because the Warren mode of springing is a special mode of manipulating the stay and material, not disclosed by the patent; and, secondly, because it has not been shown that this method of manipulation is practical or possible when the stay is attached to the material in the manner shown in the patent. So far as it has relevancy, the evidence tends to show a substantial difference between the defendant's method and that described in the patent. The first question is whether the defendant uses the method claimed in the patent; and the conclusion upon this point renders it unnecessary to consider the authorities cited upon the question whether what is shown is patentable as a method. The method consists of two steps: First, placing the stiffening material in the open seam, i. e., within the flaps which project beyond the main seam. The location of stiffening material within the flaps of the main seam is proven to be old in the art, and not new with Warren. The second step is attaching it to the fabric by "stitching its sides to the inside portion of the open seam without connecting it with the main seam." The drawings and specification show the stiffening material attached to both flaps of the open seam. The drawings show a zigzag line of stitching, passing across the central line of the stay or stiffening material, "alternating on each side of the main or outer seam, so that the stiffening material is firmly connected to the inward projecting parts of the same without in any manner affecting the principal seam of the fabric, and yet supporting the fabric as firmly as though it were directly connected therewith." In this way, the "sides" of the stiffening material, i. e., those parts on either side of its central line and on either side of the main seam, are attached to the inside portion of the main seam. The specification states: "It is not essential that the stitching should be zigzag, as it may be in two straight lines, without crossing the

middle strand of the stiffening material." It seems clear that this specification instructs the reader to attach the stiffening material, at opposite sides of the main seam, to both flaps of the inner seam, by stitches through the stiffening material upon each side of its central line. It is very clear that the defendant does not do what the patent describes. His stiffening material is attached by a single line of stitching passing along the central line of the stay. The sides of the stay are left unattached and unconfined. The words of the claim, "by stitching its sides to the inside portion of the open seam," are not applicable to the defendant's method of attachment. Furthermore, the defendant attaches his stay to only one flap of the inner seam. His stay, therefore, is not "firmly connected to the inward projecting parts" or flaps. The words of the claim, "attaching * * * to the inside portion of the open seam," when fairly construed in connection with the reference to the specification, are, in my opinion, limited to attachment to both sides of the inner seam. Furthermore, the claim calls for attachment of the sides of the stiffening material to the inside portion, and would not be infringed by a method of attaching through the central line, leaving the sides of the stay unconfined. I am of the opinion that the defendant's method cannot be brought within the language of the claim of the patent, and therefore that there is no infringement.

The complainant's counsel contend that by the word "sides" is meant the front and back sides, "or, in other words, that the stay is to be stitched flatwise to the inside portion of the open seam,—the only practical way it can be stitched." It is hardly conceivable, however, that the patentee could have thought that any one would endeavor to apply the stiffening material otherwise than flat; and it is so obvious that the word "sides" means portions of the stay at opposite sides of its central line after it is laid flat upon the main seam, that the complainant's expert testifies that "the word 'sides' refers to those portions of the stiffening material or stay which lie outside of a central line drawn from end to end of the stay." This is clearly the only possible interpretation, and there is no room for the application of the rule that, where a claim is fairly capable of two constructions, that one will be adopted which preserves to the patentee his actual invention. The defendant's method cannot be brought within the claim, save by rejecting the words "its sides," which the patentee has made a substantial part of the claim. But, even should we ignore these words, the complainant, in my opinion, still fails to show infringement of any invention disclosed by the patent.

In view of the fact that it is proven that whalebone in a cloth casing had been applied to the open seam by stitching the sides of the casing to opposite sides of the inner seam, I am of the opinion that there was no invention in stitching directly through the stay, instead of through the casing alone, after a stiffening material was made in which, as Warren testifies, "the bone and casing were one," and which could be perforated by a needle. But, assuming invention in what is disclosed in the patent, I am of the opinion that the complainant entirely fails in proving a substantial similarity between what is dis-

closed by the patent, and what is done by the defendant. The following is proposed by the complainant as the essential test of similarity:

"The essentials of the method being that the line or lines of stitching shall run very close to, and yet not encroach upon, the line of stitching making the main seam of the garment, and that the stitching shall be continuous from end to end of the stay."

There is absolutely nothing in the patent to show that the patentee had learned that it was essential to attach the stay as closely as possible to the main seam. On the contrary, he directs that the sides of his stay be attached. It is amply proved in this record that the method of attaching a stay by a single line of stitching through its center and through but one flap, and close to the main seam, is of so much greater practical value than the patented method of attaching it to both flaps by two lines of stitching, that the complainant has abandoned the method of the patent, and teaches through demonstrators only the method which is used by the defendant. That there is a very substantial and practical difference between what the patent describes and what is done in actual practice is established by the complainant's testimony. The complainant's argument merely assumes, and does not prove, the substantial similarity of the practical with the patented method. Miss Doty, witness for complainant, testifies that the continued confinement of the central portion of the bone, and the fact that both sides are free, does away with fulling or wrinkling; and that stitching the stiffening material to the waist by the machine is far superior, principally because the bone is fastened in the center. Mr. Chapman, the complainant's expert, testifies that an essential of the method of the patent is that the line or lines of stitching shall run very close to, and yet not encroach upon, the line of stitching making the main seam of the garment; but this is the method in use, and not that described in the patent. Evidence has been offered to show that the commercial importance of "Featherbone" is to some extent dependent upon the teaching of the method of the patent; but it shows rather the value of a method not disclosed or suggested by the patent. Warren testifies that he has no desire to attach the stay in the manner described in the patent; and it is evident that this is because of the superiority of the method of attachment by sewing with a sewing machine a single line of stitching through the central line of the stiffening material, and through one flap of the inner seam close to the main seam. The advantages of this method of attachment, with whomsoever it originated, are facility in attachment by the use of a sewing machine, superiority in operation from the fact that the sides are not confined, and that the patent directions are not followed in this respect. The defendant cannot, with his stiffening material, use either of the methods of attachment illustrated and described in the patent in suit. His material confines him to the central stitch. In order to sew through the sides, or to run seams at the sides of the central line, he would be obliged to sew through whalebone. Nor can it in strictness be said that the defendant has any line of stitching through his stiffening material. His stiffening material is whalebone. It is in evidence that one of the difficulties in stitching whalebone directly to the inner

seam was that the whalebone had to be soaked in water and softened before the needle could penetrate it. The complainant adopted a substitute for whalebone, which could be attached by sewing through it. The defendant obviates the difficulty in the use of whalebone in an entirely independent and novel manner. He divides his whalebone into two strips, which are confined in a case which separates them and leaves a central line of fabric, which can be penetrated by the needle. His novel stay cannot be suppressed as a competitor of "Featherbone" by preventing him from sewing through the central line and attaching it to one flap of the inner seam, through a patent which does not disclose or suggest this manner of attachment.

In view of the practical dissimilarity of this method and that disclosed by the patent, and of the entire absence of any evidence to show that the patentee himself originated the particular method actually in use, the complainant's case must be regarded as outside the patent, and as an attempt to include in and cover by a patent for one thing, several distinct and unrelated things.

The bill will be dismissed.

SHARP v. BEHR et al.

(Circuit Court, E. D. Pennsylvania. August 12, 1902.)

No. 22.

1. EQUITY—EVIDENCE TO OVERCOME ANSWER—TESTIMONY OF WIFE.

Under the law of Pennsylvania, the testimony of a wife, supporting that of her husband, to a fact denied by the answer, is entitled at least to the weight of a corroborating circumstance, which is sufficient to satisfy the equitable requirement.

2. REFORMATION OF CONTRACT—MISTAKE—LACHES.

One who seeks to reform a contract on the ground of mistake should act promptly, and, if there is any great delay, he is called upon to explain and excuse it. Lapse of time is a serious obstacle to the attainment of truth, and parties are entitled to its quieting effect on possible litigation.

3. SAME—CONSTRUCTION.

Plaintiff was superintendent of a garnet mine belonging to the defendants, and was himself the owner of another mine adjoining, which he was induced to convey to them. As part of the consideration, he claimed that he was to be retained in his position as superintendent, for 20 years, at a salary of \$20 a week, which he was then receiving. This was not expressed in the written agreement between the parties, and, according to the preceding parol understanding set up, he was merely to be retained, at the salary he was then receiving, for a term of years to be afterwards agreed upon. *Held*, that this was too indefinite and incomplete to warrant a reformation of the contract; nor was it helped out by a provision in the contract that the royalties on ore mined there stipulated for should continue for the term of 20 years, unless the plaintiff should voluntarily leave his employment; nor by the further provision that they should be paid to his wife at a reduced rate—one-half—in case of his death during that period.

4. CONTRACT TO PAY ROYALTY ON ORE MINED—CONSTRUCTION.

By a written contract plaintiff agreed to convey to defendants a farm on which was a garnet mine, and which adjoined property on which defendants were also working mines. In part consideration for the conveyance defendants stipulated to pay plaintiff for a term of years a royalty "upon

all ore shipped by them" from their mines in the township, including not only the mines then operated by them, but also from the mines on the property conveyed, "if possession thereof be obtained" by them. The mines on the property conveyed were then leased, the lessee having an option to renew, which he exercised, and defendants did not obtain possession, but received only the royalty from the lessee. *Held* that, under the terms of the contract, the obligation of defendants to pay royalty on ore from the farm purchased was conditioned on their obtaining possession of the mines thereon, and that under the facts stated they were not liable for such royalty.

5. CONTRACTS—CONSTRUCTION BY PARTIES.

The construction of a contract which is plain and unambiguous cannot be affected by voluntary payments made by one party thereunder through mistake, and which were clearly not required by its terms, and were not demanded by the other party, although, had they been required by the contract, they would have been in arrears for over three years.

6. MINING—CONTRACTS FOR ROYALTY—IMPLIED CONDITION TO OPERATE MINES.

Plaintiff conveyed certain property to defendants, in consideration of which they contracted to pay him a royalty on all the ore shipped from their mines in the vicinity during a term of 20 years, the right to which, however, plaintiff should forfeit if he voluntarily quit defendants' employment during such term. *Held*, that it was an implied condition of such contract that defendants should continue to operate their mines with reasonable diligence during the term, and that their ceasing to operate the same was a breach of such condition, for which plaintiff was entitled to recover damages.

7. SAME—FORFEITURE FOR NONPAYMENT—COST OF PROPERTY TO BE REPAID ON RECONVEYANCE.

In case of failure by the defendants to pay royalties for 90 days after written demand, the plaintiff had the right to call for a reconveyance of the mine, which he had conveyed to them, upon repaying the cost price. The money consideration named in the agreement was \$1, but the real cost to the defendants was \$3,500, made up of incumbrances on the property and obligations of the plaintiff, which they took care of for him at the time. *Held*, that the tender of \$1 was insufficient, and that the plaintiff must repay the \$3,500.

8. SAME—ROYALTY PER TON—DOCKAGE OR DEDUCTION FOR INFERIOR QUALITY.

The defendants, having stipulated to pay a royalty of \$1 per ton on ore mined and shipped, had no authority to reduce this amount on account of the inferior quality of the ore, the royalty being measured by the quantity, and not by the quality; nor, although the royalty was, no doubt, to be calculated on refined or cleaned ore, had they the right to make a deduction or dockage on the quantity, provided the ore shipped had been treated to the usual process of cleaning.

In Equity. Hearing on bill, answer, and proofs.

A. B. Geary and W. B. Broomall, for complainant.

R. C. Dale, for defendant Robert Behr.

ARCHBALD, District Judge.¹ In September, 1891, the defendants were the owners of a garnet mine on what was known as the "Lancaster Farm," in Delaware county, Pa., and the plaintiff, who was their superintendent, had acquired a similar mine on the Fulton farm adjoining. Both mines were in operation, the one by the defendants themselves, and the other by a tenant, who was in possession under the plaintiff, paying royalty. In order to control both mines and have the plaintiff's undivided interest and services, Mr. Herman Behr, one of the defendants, approached him with a proposition to buy the

¹ Specially assigned.

Fulton farm, which resulted, September 26, 1891, in a written agreement as follows:

"Memorandum of agreement made this twenty-sixth day of September, 1891, between George W. Sharp, of the one part, and Herman Behr, Robert Behr, and Gustav Heubach, trading as Herman Behr & Co., of the other part.

"First. George W. Sharp agrees to convey to Herman Behr & Co., for the consideration of one dollar, the premises described in a deed bearing date June 17, 1891, and recorded in the office for recording deeds for Delaware county, in Deed Book 11, No. 7, page 238, made by James Fulton to George W. Sharp.

"Second. In consideration of said conveyance, Herman Behr & Co. agree to pay to George W. Sharp a royalty of one dollar per ton of 2,240 pounds upon all ore shipped by them from their garnet mines in Bethel township, Delaware county, Pennsylvania, including not only the mines now owned or operated by Herman Behr & Co., but also the mines situated upon the property above mentioned, if possession thereof be obtained by Herman Behr & Co. The amount of shipments to be determined by the railroad shipping receipts.

"Third. The payment of royalties as above to continue for the term of twenty years, unless George W. Sharp shall voluntarily leave the employment of Herman Behr & Co. In case the said George W. Sharp shall die during the said period of twenty years, the royalty shall be reduced to fifty cents per ton, and shall be paid to the wife, Martha Sharp, so long as she may live, and no longer.

"Fourth. In case Herman Behr & Co. should at any time fail to pay the royalty for a period of ninety days after written demand for the payment of the same has been duly made of Herman Behr & Co., then Geo. W. Sharp shall have the right to demand a reconveyance of the premises mentioned in the first article of this agreement upon his paying to Herman Behr & Co. the cost price thereof."

The plaintiff contends that this does not express all that was agreed to upon that occasion; that according to the preliminary parol understanding, which the written agreement was supposed to represent, he was to be continued by the defendants in the same capacity, as superintendent, for 20 years, at a salary of \$20 per week, the wages he was then receiving; and, having been discharged by them in May, 1899, after they had stopped mining, he asks to have the written agreement reformed and enforced accordingly. The defendants deny that there was any such oral agreement, and maintain that the writing expresses the full understanding between them. This raises the first question to be disposed of.

According to the plaintiff's testimony, the proposition made to him by Mr. Behr was in these terms:

"He said: 'If you will transfer that property to us, we will then pay you a royalty of one dollar a ton for all ores shipped from our mines in Bethel township, not only the mine that is now operated by Herman Behr & Co., but also from the Fulton farm,' together with my salary,—my present salary,—'for a term of years to be agreed upon. And,' he says, 'if you die during that term, I will pay to Mrs. Sharp fifty cents a ton so long as she lives; but,' he says, 'if you leave our employ during that term, that contract is null so far as you are concerned.'"

This, at the suggestion of Mr. Behr, was repeated to Mrs. Sharp, who testifies that the proposition was thus stated to her by him:

"Mrs. Sharp, we propose to pay Mr. Sharp a royalty of one dollar per ton for all ores shipped from our mines in Bethel township, not only the mines

now owned and operated by Herman Behr & Co., but also on the Fulton farm, when you and Mr. Sharp deed that property to us, along with his present salary for a term to be agreed upon."

Mr. Behr admits the interview with Mr. Sharp, but gives a considerably different version of it, in which no allusion is made to the matter of continuing his salary. As to Mrs. Sharp, he says he does not recall seeing her at all, and is sure he never said anything to her about the arrangement made with her husband, although he admits that he told the latter to talk it over with his wife.

No objection seems to be made to the quality of this proof,—that, being the testimony of husband and wife, it is equivalent to but one witness. It was formerly so held (*Sower v. Weaver*, 78 Pa. 443); but, according to the present more enlightened view of the law, it is now considered otherwise (*Brenneman v. Rudy*, 8 Pa. Dist. R. 68; *Guernsey v. Froude*, 13 Pa. Super. Ct. 405). The testimony of a wife, supporting that of her husband, should at least be accorded the weight of a corroborating circumstance, which is sufficient to satisfy the equitable requirement. The difficulty is, not with the quality of the proof, but with the fact that it does not go far enough. The parol understanding, which is now set up, was that the plaintiff's salary should go on for a term to be subsequently agreed upon, and it was left in this incomplete and indefinite shape. There was no meeting of minds with regard to the term of the plaintiff's employment, not only at the time, but afterwards; for, when the written agreement came to be drawn, nothing was said on the subject. The parties were to fix the time, but never did so, and there it rests. We cannot say that the 20 years that the royalty was to run is to be taken; for the question of employment was not discussed when that period was fixed. When the parties came together at Mr. Dale's office to have the agreement drawn, they did not altogether agree as to the term to be put in,—the defendants wanting 20 years, and the plaintiff but 10 years; and it might have made a considerable difference if the matter of the plaintiff's employment had been drawn into the decision. The plaintiff may have thought, as he now says, that it was involved in what was agreed to; but we must have something more than that assumption to warrant us in going on and inserting in the contract a provision not found there. To authorize the reformation of a written instrument on the basis of a preceding parol agreement, a part of which has been omitted by mistake, it is essential that the agreement should be definite and complete, well understood, and agreed to by both parties. Without this we have nothing on which to proceed.

Nor can it be said that a continued employment is implied in the provision that royalties should be paid for the term designated, unless the plaintiff should voluntarily leave within that period. The evident purpose of this was to secure his continued services, if the defendants desired it; but it does not necessarily bind them to retain him, if they did not. It is a provision for their benefit, and not for his, except to the extent—which is no doubt implied—that the royalty should go on in case he was discharged. Nor is this affected by the fact that, in case of his death during the period named, the

royalty was to be paid to his wife at a reduced rate,—one-half. This may, indeed, show that the plaintiff's services were a material consideration to the defendant in the bargain which they made; but I cannot see that it goes further. If the plaintiff, upon his side, regarded his retention of equal importance, he should have expressly stipulated for it, as well as for the salary which he was to receive (of which, be it noted, there is not the remotest mention), instead of leaving both to doubtful implication.

There is another reason, which it seems to me may be urged for denying the relief asked, although I advance it with some hesitation because it was not discussed at the argument, and that is the delay with which the plaintiff is chargeable. The agreement was executed in September, 1891, and this bill was not filed until February, 1900, some eight years and five months afterwards, and in the meantime it had been accepted by him without question, and lived up to on the other side, and it is pretty late to now say that it does not express the entire agreement between the two. One who seeks to reform a contract on the ground of mistake should act promptly, and, if there is any great delay, he is called upon to explain and excuse it. Lapse of time is a serious obstacle to the attainment of the truth, and parties are entitled to its quieting effect on possible litigation. In the present instance the only explanation for the delay is that the plaintiff supposed he was protected by the contract as it was written, and was not disabused of that idea until his services were dispensed with in May, 1899, and that previous to that, even if he had known of the defect, as an employé of the defendants, it might not have been wise to litigate with them; but this can hardly be said to excuse his want of action. He was bound to know the purport of the writing within a reasonable time after it was executed, even if he did not; and if the present question had been brought up promptly, when the subject was fresh in the minds of both parties, and before any controversy had arisen, it is more than likely that it would have been adjusted amicably according to the facts as they were, or a satisfactory settlement agreed upon. But these observations are only advanced tentatively. As I have already said, I will not undertake to rest my disposition of the matter upon them, although I think they are worthy of serious consideration.

The next question is as to the proper construction to be given to the provisions of the contract with regard to the payment of royalty. According to its terms, the defendants, in consideration of the conveyance of the Fulton farm, were to pay the plaintiff a royalty of \$1 per gross ton upon all ore shipped by them from their garnet mines in Bethel township, Delaware county, Pa., including not only the mines which they then owned and operated, but also those upon the property about to be conveyed, if possession thereof were obtained by them. It appears that the mines on the Fulton farm had been leased in August, 1884, for a term of 10 years, with the privilege of a renewal for 10 years more, on a royalty of 75 cents per ton, so that at the time the agreement was executed, in September, 1891, this lease was outstanding, and the lessees were in possession under it. Some sort of a notice to quit had been served, but it does not seem to have been

effective; for they continued in possession, and subsequently exercised, without question, the option to renew, and have worked the property from that time to this, simply paying to the defendants the stipulated royalty. Notwithstanding that this is all the dominion which the latter have been able to exercise over these mines, the plaintiff contends that he is entitled to \$1 a ton for each ton of ore which has been shipped by the lessees off of it. It is a sufficient answer to say that this is not according to the agreement. The right to receive a royalty from the defendants on the product of the Fulton farm was dependent upon their getting possession of it. It was to be on all ore shipped by them from their garnet mines in that township, including the mines on the property conveyed to them by the plaintiff, "if possession thereof be obtained by Herman Behr & Co." The word "if," here, is plainly equivalent to "when," or "provided," and expresses a condition; and the possession stipulated for is of the mines on the property, and not simply the farm part of it, or the reception of the royalty paid by the tenants; nor, while others were working and shipping ore from the property, could it be claimed that the defendants were so doing, which was also necessary in order to obligate them. These terms are too plain to permit us to speculate how they came to be brought about as the basis of some other construction; but it would not be difficult to find a reason why the defendants would not be likely to enter into any other. The plaintiff may have figured out an advantage to himself somewhat different, but that he mentioned it to Mr. Behr in discussing the bargain is sharply denied by that gentleman, and I am not called upon to decide between them.

It is argued, however, that the defendants have given a contemporary construction to the contract such as is now contended for; but the facts do not seem to me to bear this out. For three years and over no royalty was paid to the plaintiff on the ore mined from the Fulton farm, nor did he make the slightest request for it. Some time, however, in January, 1895, a bookkeeper of the defendant's firm called the attention of Mr. Heubach, one of the members of it (but not the one who had conducted the negotiations with the plaintiff), to the fact that no royalty appeared by the books to have been paid to Mr. Sharp on this farm. By the direction of Mr. Heubach, a letter was thereupon addressed to Mr. Sharp with regard to the subject, and an inquiry made as to whether he had received anything on account of such royalty, to which he replied that he had not. A statement was accordingly made out from the shipments reported by the tenants for the three years preceding, by which it was acknowledged that the defendants were indebted to the plaintiff, January 18, 1895, for 1,095½ tons, at \$1 a ton, \$1,095.50, on which \$71.41 was allowed as interest on that which was mined in 1892 and 1893. The response of Mr. Sharp was that he had seen the error, but, knowing that he was dealing with reliable parties, he thought it would be made satisfactory to him when it was discovered. This was followed at the close of 1895 by a similar statement, by which he was again credited with \$480.80 for ore mined up to the close of October of that year; and a second statement, January 4, 1896, by which he was further credited with 65.9 tons mined in December,

1895. Similar credits were given him through the years 1896, 1897, and 1898, until some time in the spring of the latter year, when, the attention of Mr. Herman Behr having been accidentally called to the subject, he pronounced the payments a mistake, and, the written contract being referred to, it was found that they were. Here the matter rested until January, 1899, when the defendants, in making out a statement for the royalty for 1898, after giving the plaintiff credit for that which had been mined from the Lancaster farm at \$1 a ton, allowed a further credit for 570 tons and a fraction, from the Fulton farm, at 75 cents a ton, making \$427.76. This was forwarded, with a letter stating that Mr. Behr had informed them that he had never made any arrangement for paying royalties on the Fulton farm, but that, as the plaintiff had been credited from time to time on account of them, at \$1 a ton, which was 25 cents in advance of what they were receiving, they had concluded not to change it materially at that time, and so had credited him with but 75 cents, the actual amount paid them. If the terms of the agreement were doubtful, the defendants would be unquestionably concluded by this recognition of liability; but, as they are not, I do not see that any such result follows. In the light of what was written, these payments were a gratuity. The explanation of Mr. Heubach and Mr. Behr as to how the mistake occurred is reasonable and satisfactory; and the fact that no demand was ever made by the plaintiff, and that the subject was brought up by the defendants themselves voluntarily, confirms what they say. The silence of the plaintiff for over three years is certainly fully as significant as the subsequent acknowledgment by the defendants of a supposed obligation which did not really exist. Nor can I see that the crediting of the 75 cents royalty after the mistake had been discovered carries the matter any further than the rest of it. In the face of the agreement itself, it is plain, it was a donation, which they might make, if they chose, without the risk of having it establish a liability against them. My conclusion, therefore, is, on this part of the case, that the writing must be taken as it reads, and that there is no royalty due the plaintiff under it, excepting for a small balance unpaid on ore from the Lancaster farm.

By the fourth paragraph of the agreement, in case the defendants should at any time fail to pay the royalty, for a period of 90 days after written demand for the payment of the same had been duly made, the plaintiff was to have the right to call for a reconveyance of the property he had turned over to them upon repaying them the cost price. A demand has been made in pursuance of this provision, but it is resisted on two grounds: First, because there is nothing due; and, second, because the plaintiff has merely tendered a dollar, the consideration named in the agreement. The evidence establishes to my satisfaction, however, that there are arrears of royalty, and the only question is, how much? By the statement rendered January 5, 1899, the defendants acknowledged to have received from the Lancaster property 540 tons and a fraction, on which they credited the plaintiff with \$540.60; also 28 tons and a fraction, on which they credited him with \$14.40, which is at the rate of but 50 cents a ton. There seems to be no authority for the

latter reduction. If we assume that it is based on the inferior quality of the ore, which is designated as "Brown Ruby," the royalty was to be measured by quantity, and not quality, about which nothing is said in the agreement. It is true that in a letter, January 12, 1898, the previous year, the necessity for arranging the royalty on "Brown Ruby" is advanced, and 50 cents is suggested; but the defendants could not modify the contract at their will, and it nowhere appears that the plaintiff assented to it. On the contrary, in the receipt given March 18, 1899, for this ore, he is very particular to accept the \$14.40 as a payment on account only, so that the balance—\$14.40—is unquestionably due. This may seem a small sum for which to forfeit the defendants' estate in the property; but they have chosen to abide by it, and I cannot say that it would be unconscionable to hold them to their agreement. Besides that, I am persuaded that considerably more than this has been withheld. According to the plaintiff's testimony, which is not contradicted, there were 802 tons of ore shipped in 1898, of which he has been credited with only 540 tons and a fraction, leaving 260 tons unaccounted for. These figures may need further verification before they are accepted in their entirety, but there is enough in the record to substantiate a part of them. In a statement furnished June 20, 1898, there is a deduction or dockage on different shipments running from 10 per cent. up to 25 per cent., and amounting in the aggregate to 82,474 pounds, or about 37 gross tons. This dockage is claimed on account of dirt, and yet with regard to the shipment of April 25th, which forms a part of it, in a letter of that date, as well as one of the day following, we find the character of the ore actually commended. To that extent, at least, the dockage is discredited, and the burden is on the defendants to maintain the rest of it. No doubt they are only liable for royalty on refined or cleaned ore, but the plaintiff testifies that all of it was treated to the usual process for cleaning it, and there is no evidence to the contrary. The fact is—as is manifest from the letters which passed at the time—that it is the quality of the ore with which the defendants were dissatisfied, and for this the plaintiff was not responsible. It may be that the plaintiff is not able to avail himself of these particular arrears as a ground of forfeiture, no demand for them having been made in the request for a reconveyance; but that does not prevent us from considering them in weighing the equities, and (to prevent a misconception) the plaintiff will, of course, be entitled to bring them forward in the accounting before the master. It cannot be said, therefore, to be aside from the case to have discussed them here.

But, to secure a reconveyance, the plaintiff must undoubtedly pay the defendants what the property originally cost them, which was not \$1, but \$3,500. Not only is this the consideration named in the conveyance, but the same thing is established by the plaintiff's own testimony. The amount was made up of a legacy of \$700, charged on the land in favor of Mrs. Sharp, a judgment note of \$1,200, \$500 borrowed by the plaintiff from his brother-in-law, Howell, and \$1,100 borrowed from Mr. Behr. All these matters were taken care of by the defendants in the transaction, and they must be reimbursed for them before they can be compelled to give up the property. The tender of \$1 was

altogether insufficient, and might as well not have been made; but this can be adjusted in the decree. It does not bar the plaintiff from the reconveyance to which he has shown himself otherwise entitled.

It remains to consider the question of damages for breach of the contract by reason of the failure of the defendants to continue mining. Ordinarily this would have to be made the subject of an action at law, and could not be recovered by bill (Appeal of Pittsburgh & C. R. Co., 99 Pa. 177); but, having acquired jurisdiction upon other grounds, it is proper to go on and do complete justice in the premises. As a material part of the compensation for the transfer of the Fulton farm, the plaintiff, as we have seen, was to receive a royalty of so much per ton for 20 years on the ore mined and shipped by the defendants from their mines in that vicinity, and this was to be forfeited if he voluntarily left their employ within that period. Having obtained his property in this way, and tied up his services, they certainly owed him some reciprocal obligation. While no minimum annual quantity was stipulated for, the law will imply an undertaking to operate the mine with reasonable diligence. This is the rule where lands are conveyed for mining purposes, reserving a royalty based on the extent of the product (Watson v. O'Hern, 6 Watts, 362; Lyon v. Miller, 24 Pa. 392; Koch's Appeal, 93 Pa. 434; Ray v. Gas Co., 138 Pa. 571, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; Aye v. Philadelphia Co., 193 Pa. 452, 44 Atl. 555, 74 Am. St. Rep. 696; Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320); but the principle is one of general application (Appeal of Pittsburgh & C. R. Co., 99 Pa. 177), and is properly invoked in the present instance, although there is nothing more than a contractual relation between the parties. Without it the plaintiff is at the mercy of the defendants, who can hold the property conveyed to them, and yet do nothing, depriving him of all benefit from the transaction; and while he can not quit their service, at the peril of losing the whole bargain, they, at the same time, are at liberty to discharge him when they will. By all that is just and reasonable, it must be assumed under the circumstances that it was in the contemplation of the parties that the mining operations should go on and be prosecuted with proper diligence, and, as they have not, the plaintiff is entitled to such damages as he has sustained.

Let a decree be drawn directing a reconveyance of the Fulton farm to the plaintiff on payment to the defendants of the sum of \$3,500, without interest, the plaintiff to be entitled as a credit thereon, to the sum of \$2,000 moneys in their hands which he has loaned to them, with such interest as may be due thereon, and that he be given a further credit for any royalties due from the defendants for ore mined and shipped from the Lancaster, but not from the Fulton farm; and let the case be referred to a master to determine the amount of such royalties, and to settle and adjust the accounts between the parties, and to further assess the damages sustained by the plaintiff by reason of the breach by the defendants of the implied undertaking to prosecute their mining operations on the Lancaster farm with reasonable diligence, such damages to be allowed as a further credit to plaintiff in the said account; and let the defendants pay the costs of suit.

MACKAY v. GABEL et al.

(Circuit Court, S. D. California, S. D. July 10, 1902.)

1. VENDOR AND PURCHASER—BONA FIDE PURCHASER—VALUABLE CONSIDERATION.

To constitute one a bona fide purchaser of real estate, entitled to protection in his legal title as against the equitable owner, the payment of a valuable consideration is essential; and a consideration which, although monetary, is merely nominal, when compared with the known value of the property, is not a valuable one, such as to give the grantee standing in a court of equity as a bona fide purchaser, but, on the contrary, raises an irresistible inference of bad faith.

2. PARTIES—SUIT TO CANCEL DEED—NECESSITY OF JOINING GRANTOR.

The grantor in a deed is not an indispensable party to a suit by a third person, claiming to be the equitable owner, to set the deed aside, and to establish complainant's title to the property, where it is admitted in the pleadings of both parties that such deed conveyed to the defendant all of the grantor's right, title, and interest.

3. SAME—EQUITY—DISPENSING WITH PARTIES.

A federal court of equity will not refuse to grant relief because of the nonjoinder as a defendant of a person who is out of the jurisdiction, where it appears that, while a proper party, he has no interest in the subject-matter of the controversy which will be affected by a decree between the parties.

In Equity. On exceptions to pleas.

Lloyd & Wood and Hunsaker & Britt, for complainant.

H. C. Dillon and George A. Corbin, for defendants.

ROSS, Circuit Judge. By his amended bill in this suit the complainant charges that he is, and for more than five years last past has been, the owner and engaged in the development and working of a certain mining claim called the "Grand Reef Mine," situated in Graham county, in the territory of Arizona, and in such work has already expended more than \$300,000; that up to the 23d day of April, 1900, one J. W. Payne was employed by the complainant as superintendent of the said work, to whom the complainant intrusted the entire management of the property, having reposed full confidence and reliance in and upon his honesty, faithfulness, and integrity; that while Payne was so employed it was deemed expedient by the complainant to acquire a certain described tract of land for the purpose of sinking a well thereon from which to develop water to be conducted to the mine, to be there used in and about the work of prospecting and developing the property, and of extracting and reducing the ores therefrom; that, acting solely for the complainant, and in pursuance of his aforesaid employment, and at the request of the complainant, and for his use and benefit, and with money supplied to him by the complainant for that purpose, Payne acquired the piece of land mentioned, taking the title thereto in his own name, but with the distinct understanding between him and the complainant that he was acting therein for the complainant, and as his agent, and that he would convey to the complainant the title so acquired, and that in the meanwhile he would hold such title in trust for the complainant; that after the purchase by Payne of the tract of land

mentioned the complainant took possession thereof, and began the sinking of a well thereon, and, having found a supply of water therein, complainant purchased and placed at the well upon the land a pumping plant consisting of engine, boiler, and pump, and other machinery required for and about the work, and connected the same by pipe line with the machinery at the mine, and did thereupon put the same in operation, and commence to and did pump the water from the well by the machinery mentioned, and did conduct it therefrom by means of the pipe line so constructed to the mine, where the same was exclusively used in and about its operation; that all of the acts of the complainant in and about the sinking of the well, the purchase, erection, and putting in place of the pumping plant and pipe line, and in the use of the same for the pumping of the water and the conducting of the same to the mine for the purposes stated, were done with the full knowledge and consent of Payne, and under his direction as the superintendent and managing agent of the complainant, and with his money; that the complainant has, ever since entering upon the possession of the said piece of land, retained its open and notorious possession, and has at all times used the said land and water plant for the purposes aforesaid openly, notoriously, and exclusively; that, notwithstanding the facts stated, and notwithstanding the trust and confidence reposed in him by the complainant, the said Payne, in violation of his duties as such trustee, and in disregard of the rights of the complainant, and against his will, did, on or about the 5th day of April, 1901, wrongfully and fraudulently, by deed absolute in form, grant and convey to the defendants to this suit the said piece of land, together with the said pumping plant and pipe line and appurtenances thereunto belonging, which deed the defendants thereafter caused to be recorded in the office of the county recorder of the county in which the property is situated, and have notified the complainant that they now claim the said land, pumping plant, and pipe line, and threaten to take forcible possession thereof. It is alleged in the bill that at the time the defendants took from Payne the deed they well knew and had notice of all of the facts stated, and that the complainant was in possession of all of the said property, and that he had caused the well to be sunk, and the pumping plant to be erected, and the pipe line to be laid for the purpose of obtaining a supply of water for use at his Grand Reef mine, and that all the money expended in and about the matter had been furnished and supplied by the complainant, and that Payne acquired and held the legal title to the land in trust for the complainant, and not otherwise. The defendants, by their answer, admit the acquiring by Payne of the title to the piece of land mentioned, and while denying, among other things, the alleged possession of the complainant thereof, and any and all notice on their part of any right on the part of the complainant therein, expressly allege the conveyance of the property in question by Payne to them by the deed referred to, and, in addition to the denials contained in the answer, they set up two affirmative defenses, one of which is:

"That the complainant ought not to have his action aforesaid, because they aver that, previously to and on the 5th day of April, 1901, said J. W.

Payne was, or pretended to be, seised in fee simple, and was in, or pretended to be in, actual possession, of the property concerning which this suit is brought and sought to be recovered by the complainant herein, to wit [describing the land], together with the appurtenances, as in the said amended bill are particularly mentioned and described, free from all incumbrances, equities, claims, demands, or trusts whatsoever; and these defendants, believing the said Payne was so seised and entitled, and that the said premises and property were in fact free from all incumbrances, equities, claims, demands, and trusts in favor of any person whomsoever, on or about the 1st day of January, 1901, agreed with the said Payne for the absolute purchase of the fee simple and inheritance thereof for and in consideration of certain services thereafter to be performed by said defendants for said Payne and whatever moneys might be paid out or expenses incurred by them therein or thereabout; whereupon, and on said 5th day of April, 1901, for the considerations aforesaid, at the county of Los Angeles, in the state of California, the said Payne did make, execute, and deliver to defendants his certain deed to said premises mentioned and described in paragraph 6 of plaintiff's said amended bill, and by the said deed the said Payne, in consideration of the sum of ten (\$10) dollars, granted, bargained, sold, and confirmed unto these defendants the premises and property last above mentioned, to hold unto and to the use of said defendants, their heirs and assigns, forever; and these defendants aver that the said sum of ten (\$10) dollars, the consideration money in the said deed mentioned, was actually laid out and expended for and on behalf of said Payne, and said services had been performed by said defendants for said Payne, at and before the execution of the deed aforesaid; and these defendants also aver that at or before the time of the execution of said deed by said Payne to these defendants, and the payment of the said purchase money and the performance of said services, these defendants had no notice whatsoever that the said land and appurtenances were held in trust by the said Payne for the use and benefit of complainant, or that the same were in any manner affected by any equity, claim, or trust in favor of any person whomsoever; and these defendants insist that they are bona fide purchasers of the said hereditaments and premises for a good and valuable consideration, and that they have not at any time before or at the time of purchasing said hereditaments and premises or since, until the said complainant's bill was filed, any notice whatsoever, either expressed or implied, of the said trust and equity now claimed by the complainant, or that the same in any wise affected the said hereditaments and premises so purchased by defendants, or any part thereof; and these allegations the defendants make in bar of the complainant's bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same."

The second affirmative defense set up by the defendants is the nonjoinder of Payne as party defendant, who, it appears from an amendment to the amended bill, was, at the time of the commencement of the suit, and ever since has been, a resident of the territory of Arizona, and therefore without the jurisdiction of this court.

Exceptions to the two affirmative defenses thus set up were filed by the complainant, and are now for disposition. These exceptions, I think, must be sustained. It is nowhere alleged in the first plea to which an exception is filed that the complainant was not in the actual possession of the property in question at the time of the defendants' alleged purchase and the making of the deed by Payne to them, and, although it is alleged therein that the defendants agreed, in consideration of such conveyance, to perform services, there is no statement as to the character or nature or value of the services which were to be performed as the consideration for the conveyance of the property, nor is there any averment as to the character or value of

any services actually performed by the defendants in consideration of such conveyance. It is averred in the plea that the defendants paid \$10 for the property, which is the only definite consideration pleaded. Such a sum, if it be the true consideration, for 160 acres of water-bearing land in an arid region, upon which was admittedly constructed and in operation a pumping plant consisting of an engine, boiler, and pump, together with a line of pipe extending therefrom to a large mine, through which pipe the water so developed and pumped was being conducted for the operation of the mine, is enough to raise an irresistible inference of fraud in the conveyance. In considering a similar question, the court of appeals for the Eighth circuit said, in the case of *Dunn v. Barnum*, 2 C. C. A. 265, 269, 51 Fed. 355, 359:

"But, independently of French's testimony, the bad faith of the transaction is apparent upon the face of the deed when the value of the property is considered. The consideration expressed in the deed is \$100, and at the time the deed was executed the land was worth \$30,000, with a prospect of a rapid increase in value, and it is now worth \$1,000,000, or more. However it may have been in past ages, it is certain that in this age, when capital is so abundant, and dealers in land so numerous, and eager to purchase wherever the investment gives promise of a profit, no man can openly acquire in the market, at private sale, a good and unimpeachable title to \$30,000 worth of land for \$100 without exciting the gravest suspicions as to his good faith and the honesty of the transaction. It would seem that one could not purchase land worth \$30,000 for \$100 without a well-grounded suspicion either that the seller was insane or that his title was bad. In the judgment of all mankind—and there is no surer guide to the right than the universal consensus of opinion among men—such a transaction, unexplained, implies a bad title or bad faith. The instant such a conveyance is set up as evidence of a purchase in good faith and for value of a sound title, the inference is irresistible that it was procured by fraud, or for a fraudulent purpose. Such a conveyance passes the legal title, and may be good between the parties as a gift, or as a conveyance to remove a cloud from the title, or as a sale of a confessedly doubtful and disputed title, and for such like purposes; but when it is set up and relied on under the registration laws of the state as a means of taking lands from the real owner because, and only because, his deed was not recorded, it will not be accepted as sufficient evidence that the vendee paid a valuable consideration, and purchased without notice, either actual or constructive, or a well-grounded suspicion, that his vendor had no title. A valuable consideration, actually paid, is an essential requisite. In the sense of this rule, as applied to this class of cases, the consideration expressed in the deed to Furber is not a valuable one. The same sum of money is not equally a valuable consideration in all cases. Whether it is so or not depends on the relation it bears to the value of the property claimed to have been purchased with it. When the consideration is infinitesimal, merely nominal, compared to the value of the property, it will not be accepted as a valuable consideration by a court of equity, as against one claiming under a prior unrecorded deed. The enormous discrepancy between the consideration expressed in this deed and the value of the land compels the conclusion that the grantee knew, or, what is the same thing in legal effect, had good reason to believe, there was a fatal infirmity in the title he was acquiring, and so was not a purchaser in good faith. At that time numerous satisfactory sources of information were open to any one desirous of learning the facts about the title to this land. One put upon inquiry and seeking the truth could not have failed to learn the facts. An offer to sell land worth \$30,000 for \$100 was enough to arouse suspicion and excite inquiry in the most lethargic mind; and if inquiry was not made, and the facts not learned, it was because the purchaser deliberately and purposely abstained from doing so, to avoid the actual knowledge of facts he with good reason believed to

exist; and this is the legal equivalent of actual notice. *Hume v. Franzen* (Iowa, 1887) 34 N. W. 490; *Knapp v. Bailey* (Me., 1887) 9 Atl. 122, 1 Am. St. Rep. 295; *Gaines v. Saunders* (Ark., 1888) 7 S. W. 301; *Hoppin v. Doty*, 25 Wis. 573."

"Purchasers," said the Virginia court of appeals in *Burwell's Adm'r's v. Fauber*, 21 Grat. 446, 463, "are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to the purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive, notice, which is the same in its effect as actual notice."

See, also, *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Henderson v. Wanamaker*, 25 C. C. A. 181, 79 Fed. 736.

Is Payne an indispensable party to the suit? The bill alleges that the deed from him vested the legal title to the property in question in the defendants, and their answer not only admits the averment, but affirmatively alleges the execution of the deed, and, further, that it was made in good faith, and for value, and passed all of Payne's interest to them. Payne having, according to the pleadings of the parties, parted with all of the interest he ever had in the property, prior to the commencement of the suit, obviously retained no interest therein to be affected by any judgment that may be rendered in the suit. If he were dead, it would hardly be contended that his legal representatives would have an interest in the property so conveyed by him during his lifetime, rendering them indispensable parties to such a suit. No more, in my opinion, is he an indispensable party during his life. No judgment that can be rendered in the suit can affect any property right of his, not only because the pleadings of the parties to the suit show that he parted with all of his interest in the property, of every character, prior to its commencement, but also for the reason that no judgment of any character is sought against him. In *Barney v. City of Baltimore*, 73 U. S. 280, 284, 18 L. Ed. 825, the court said:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction. This class cannot be better described than in the language of this court in *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting this interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.'"

"The general rule as to parties in chancery," said the same court in *Williams v. Bankhead*, 86 U. S. 563, 571, 22 L. Ed. 184, "is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party, if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be made a party or not, at the option of the complainant."

See, also, *Cameron v. McRoberts*, 3 Wheat. 591, 4 L. Ed. 467; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. Ed. 204; *Harding v. Handy*, 11 Wheat. 132, 6 L. Ed. 429.

The rule thus established by the supreme court was affirmed by statute as well as by the equity rules. By section 1 of the act of congress of February 28, 1839, it is provided that:

"When there are several defendants in any suit at law or in equity and one or more of them are neither inhabitants of, nor found within, the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice the parties not regularly served with process, nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."

And equity rule No. 47 declares that:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the case, without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

See, also, *Mining Co. v. Dangberg* (C. C.) 81 Fed. 73; *Columbia Finance & Trust Co. v. Kentucky Union R. Co.*, 9 C. C. A. 264, 60 Fed. 794.

It is obvious that cases in which an interest in the property in controversy remains in a person not made a party, and who it is claimed should be, are not in point, for the simple reason that in this case, according to the pleadings of the parties, no interest of any character in the property in controversy remained in Payne after his conveyance to the defendants, and no judgment of any character is sought against him by the complainant.

An order will be entered sustaining the exceptions to the affirmative defenses mentioned, being exceptions numbered 3 and 4. Exceptions numbered 1 and 2 having been withdrawn at the argument, no order in respect to them is necessary.

In re HAYS, FOSTER & WARD CO.

(District Court, W. D. Kentucky. October 13, 1902.)

1. **BANKRUPTCY—LIABILITY ON LEASE—SUBSEQUENT RENT.**

Where a tenant is adjudged a bankrupt, such adjudication terminates the existing relation of landlord and tenant, and the landlord is not entitled to prove, as against the bankrupt's estate, a claim for rent accruing after the adjudication, though the tenant had executed notes therefor.

2. **SAME.**

Semble, that the rule might be different where the landlord becomes bankrupt.

J. D. Moquot, for petitioner.

EVANS, District Judge. Max B. Nahm filed a claim in this proceeding for a balance of rent alleged to be due him upon a lease of certain premises. The referee having disallowed the claim, a petition has been filed for a review of that action. The material facts appear to be as follows: (1) On the petition of certain creditors, filed May 28, 1900, alleging that on May 1, 1900, the bankrupt had made a general assignment for the benefit of all his creditors, the corporation was adjudged bankrupt on June 22, 1900. (2) On the 14th day of July, 1900, J. W. Campbell was chosen trustee. (3) The bankrupt corporation was tenant for a term of five years, beginning May 10, 1898, of certain premises in Paducah, Ky., belonging to the claimant, Max B. Nahm. The rent was payable monthly, and a separate note for \$137.50 was given for each month's rent. (4) A. W. Foster had been named as assignee in the deed of assignment referred to in the petition. While in possession, as such, of the leased premises, and of the stock of merchandise belonging to the bankrupt, on May 10, 1900, upon the alleged consideration that Nahm should refrain from suing out an attachment for his rent, he consented to deposit and did deposit in the American German National Bank, as security therefor, the sum of \$3,000. Subsequently this sum of money was turned over to the trustee in bankruptcy. (5) Before the petition was filed, and, of course, before the adjudication in bankruptcy, namely, on May 10, 1900, and possibly notwithstanding the deposit of the \$3,000, the landlord, Nahm, exercised a power reserved under the lease, and declared a termination of the tenancy as of May 10, 1901. (6) Foster, the assignee under the general assignment, converted all the property into cash, and he or his subtenants occupied the premises from May 1, to August 10, 1900, and paid the rent accruing to the landlord for that period. (7) The trustee in bankruptcy never used or occupied the premises in any way, but refused to do so, or to accept the keys to the buildings thereon. (8) Immediately after the election of Campbell as the trustee in bankruptcy, the landlord demanded of him the balance of the year's rent, namely, \$1,237.50, though no part of it was then due. (9) On the 22d day of October, 1900, the landlord, leaving outstanding the other notes maturing in subsequent months, rented the premises to another satisfactory tenant, but now claims from the trustee \$330, the rent alleged to have accrued

between August 10 and October 22, 1900,—all, of course, after the adjudication on June 22, 1900, and for all of which the landlord held the promissory notes of the bankrupt. Whether that particular rent shall be paid out of the bankrupt's assets, and as a preferred claim, is the only question to be decided.

The question thus raised is the same as that involved in the case of *In re Jefferson* (D. C.) 93 Fed. 948, 2 Am. Bankr. R. 206, where, after very careful consideration of it, both upon principle and the authorities, the court reached the conclusion that, where the tenant is adjudged to be bankrupt, the relation of landlord and tenant, ipso facto, comes to an end, and consequently that there cannot, under section 63, be a "provable debt" against the bankrupt's estate for rent alleged to have accrued after the date of the adjudication. From that time on there is no tenant, and no one to perform the duties or discharge the obligations of a tenant; the bankruptcy act, in prescribing the duties and authority of a trustee, not making it one of them, and reason and the principles of law not of themselves impressing that duty upon the office of trustee in bankruptcy. The reasoning upon which the court reached its conclusion is quite fully stated in the opinion in that case, and need not now be repeated at much length. The views then expressed do not seem to have met the approval of Judge Lowell, as shown in his opinion in the case of *In re Ells* (D. C.) 98 Fed. 967, though the accuracy of his deductions seems to have been doubted by the circuit court of appeals of the Fifth circuit when it considered the case of *Atkins v. Wilcox*, 44 C. C. A. 626, 105 Fed. 598, 53 L. R. A. 118. But not only is the conclusion reached in the *Jefferson* Case supportable upon just principles and the cases cited in the opinion then delivered, but the precise question was ruled the same way by Judge Purnell in *Bray v. Cobb* (D. C.) 100 Fed. 270. The authorities referred to in the *Jefferson* Case as maintaining the proposition therein announced were the cases of *Bailey v. Loeb*, 2 Fed. Cas. 376, decided in 1875 by Mr. Justice Woods; *In re Webb*, 29 Fed. Cas. 494, decided by Judge Ballard of this court; and *In re Breck*, 4 Fed. Cas. 43. Other judges have probably expressed opinions upon the subject one way or another since the present law was passed. This conflict has led me to re-examine the question with much industry.

The rule announced in the *Jefferson* Case is, I think, upon the whole, beneficial to the landlord, inasmuch as, although in some instances he might find on the premises property sufficient to meet the demand for rent, in most others this would probably not be the case; but in every instance, if that rule be sound, he would have the right promptly to find a new tenant, and could do so more advantageously than any one else, being more interested. Section 64b, cl. 5, of the bankruptcy act, gives priority of payment to any person who by the laws of the United States or of the state is entitled to priority. Probably the word "person," in this connection, should also be construed to mean "claim," but the laws of Kentucky (Ky. St. c. 75) do not give a landlord's demand for rent any absolute right to priority of payment. What the Kentucky law does is to create a "lien" upon certain property found upon the leased premises, which the bank-

ruptcy act preserves and effectuates. If there is no such property, there is no lien to enforce; and, if the claim for rent is a "debt," it must stand in the position of other debts, even though evidenced by notes, and must take its chances of pro rata payment upon the same basis as ordinary claims. This result is not changed by a general assignment. Ky. St. § 74. A demand for rent not being entitled to any priority of payment except through a lien given by the statute upon property, if there is no property for it to operate upon such a demand must range with other simple-contract debts; and, though the trustee in bankruptcy owned the leasehold, the landlord then could only prove the debt evidenced by the notes for rent, and could only obtain thereon payment pro rata with other unsecured creditors, thus imposing upon the trustee possession of premises he neither wanted nor needed, and upon the landlord the loss of most of the rent which might accrue subsequent to the adjudication. These illustrative suggestions point out how much better for all parties is the general rule acted on in the Jefferson Case, which enforces the payment of rent up to the adjudication, and leaves the premises free to the owner thereafter. Of course, if the trustee uses them, he makes the trust estate liable for the value of such use; but this is because he was in possession and actually used the property, and not because of the previous tenancy of the bankrupt. These considerations of advantage or convenience should not, however, modify or control the operation of those logical principles which should govern the court in determining the question. As I conceive it, the true grounds upon which the decision must rest are that after the adjudication the landlord has no tenant; that the bankrupt thereafter is legally impotent to be such; that the trustee, not having by law any power to continue to conduct the business, has ordinarily no use for the leased premises, and has no authority under the statute to be the tenant in substitution for the bankrupt, though, if necessary to carry on his business of selling the trust assets, as distinguished from that which had been carried on by the bankrupt, he may rent the old premises or new, at his option, and pay the cost thereof as part of the expenses of administration. Under these circumstances there is no "fixed liability" for a demand "absolutely owing" to the landlord at the time of the adjudication, except for the rent which had accrued or been earned up to that date; and certainly, in the nature of the case, no such debt can accrue against the bankrupt after the adjudication, and, if not, it cannot be proved against his estate as one of his debts. Section 63. There is no just reason why the bankrupt's estate should bear any such burden. The landlord cannot have every advantage while other creditors are probably losing most of their demands. Other creditors irremediably lose their debts. The landlord loses only his tenant, and may recoup that loss by reletting the premises.

The trustee succeeds to the legal title in the assets and property of the bankrupt, but does not succeed to the duty of performing any of his obligations. They are discharged by the proceeding in bankruptcy, leaving no one bound to perform them further than the distribution of the assets under the orders of the referee will do it.

A leasehold or term bought and paid for in advance would be an asset, but a mere right to use real estate upon the condition of paying full current rent for it, if property or an asset at all (unless in cases too rare to change the result), is so in a sense so attenuated as not to be worth considering in practical affairs, and so unimportant as not to affect the common-sense rule followed in the Jefferson Case.

As pointed out in the opinion in the Jefferson Case, rent and use or occupation, or the right or opportunity to occupy, are dependent and correlative terms. Rent cannot accrue without a tenant. The bankrupt himself manifestly ceases to be such at the adjudication, and the trustee is not authorized by law to become such in his stead. He cannot continue the "business," and, though he may sell the "property" of the bankrupt, he is under no legal obligation while doing so to use the real estate of which the bankrupt had been tenant. He may, under the control of the court, and if necessary, procure and use any other, if thought better. Whatever, therefore, may be the law of Kentucky as to the lien of the landlord, is not now very material. Such lien will, of course, be enforced for what is due up to the adjudication, but, as the tenancy is thereby ended, no further debt against the bankrupt can thereafter accrue. Without a debt there can be no lien, and the idea of a lien without a demand to support it is an abstraction.

Section 2317 of the Kentucky Statutes, which gives the landlord a lien for the rent of his premises, must necessarily go upon the idea that the tenancy will continue, for it cannot be that if that ceases the rent will nevertheless go on. This must be so, because the state cannot by legislation release or impair the obligation of contracts; and an assignment for the benefit of creditors, while it may secure an equal distribution of assets, in no way discharges the debtor's liability to pay any balance of his indebtedness not satisfied by the distribution of his property among his creditors. Hence the contract with the tenant stands notwithstanding the assignment. The bankruptcy act, however, dissolves and discharges the liability of a tenant to his landlord, as well as every other, and makes it legally impossible for him, after the adjudication, to continue the liability to pay rent, unless there is a new contract. This destruction of the liability of persons under contract finds no exception in the case of a landlord. The indebtedness to him is no more sacred in character than are the obligations to other creditors. It is, indeed, the purpose and essential object of the bankruptcy act to discharge obligations and dissolve contracts which the bankrupt is unable to perform, and the contract of a landlord with a tenant is subject to the same vicissitudes.

Cases have been cited in opposition to the views I have expressed, but it will be found, I think, that few of them have any real application. In re Appold, 1 Fed. Cas. 1075, *Austin v. O'Reilly*, 2 Fed. Cas. 234, In re McConnell, 15 Fed. Cas. 1297, and In re Hoover (D. C.) 113 Fed. 136, are among such cases, but in not one of them was the question involved or discussed. The only two of the old cases of which the same thing may not be fairly stated appear to be In re Wynne, 30 Fed. Cas. 752, decided in 1868 by Chief Justice Chase,

and *In re Trim*, 24 Fed. Cas. 197, decided by Judge Bryan in 1871. They arose under state statutes different from that of Kentucky, and, while claims for rent accrued after the adjudication were allowed in both, the precise point now involved was not discussed or decided. However, it may be conceded that they hold a different doctrine, and yet I think the weight of the old cases and of reason is the other way. And it is quite significant that when Mr. Justice Woods decided the case of *Bailey v. Loeb*, *supra*, he had before him the opinion of the Chief Justice in the *Wynne Case*, and also the opinion of Judge Bryan in the *Trim Case*, but did not follow them. Obviously this was because the Chief Justice and Judge Bryan, who followed him, had overlooked the plain provisions of section 19 of the act of 1867. Manifestly, therefore, those cases were both erroneously decided, and for that reason they can hardly be the best guides for us to follow. Yet they appear to constitute the basis of the opinions in the *Ells Case* and in the *Mitchell Case*, now to be mentioned.

Since the preparation of this opinion was begun there has appeared in the advance sheets of volume 8 of the *American Bankruptcy Reports*, at page 324, 116 Fed. 87, the opinion of Judge Bradford in the case of *In re Mitchell*, wherein that learned judge also impugned the accuracy of the decision in the *Jefferson Case*. The case before Judge Bradford arose under a statute of Delaware, which he says is different from that of Kentucky; and it must be observed, in reading the opinion, that it was not at all necessary to decide the point in passing on the claim for rent against Mitchell. Nearly all of that claim was for rent which accrued before the adjudication, and during the residue of the time for which rent was claimed the trustee used the premises for the purposes of the trust, so that in every event the entire claim ought to have been paid. The result, therefore, was inevitable, but the reasoning was supererogatory, and, I think, unsound.

While there is conflict of opinion as to whether rent accruing after the adjudication, of premises not used by the trustee in bankruptcy, should be paid as a debt of the bankrupt, there seems to be entire agreement upon two propositions, namely: (1) That the lien for rent accrued up to the adjudication must be enforced; and (2) that the trustee must pay the rent after the adjudication for any time during which he occupies the premises. It may be added that the nineteenth section of the act of 1867 (section 5071, Rev. St. U. S.) provided that "where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods"; and section 5072 provided that no other debts than those mentioned in that and the other four preceding sections should be proved at all. This was clearly a statutory recognition of the rule of law followed in the *Jefferson Case*,—a rule founded upon just and logical principles, and which exists, although no provision corresponding to section 5071 is repeated in the act of 1898.

If the views I have expressed be sound, the notes for rent filed with the claim of Nahm failed for want of consideration when the

adjudication was made, and are therefore not sufficient evidence of provable debts against the bankrupt.

It is, furthermore, a not unimportant phase of this case that the assignee, Foster, or his subtenants, occupied the premises until August 10, 1900, and paid the rent for that period, but the trustee in bankruptcy never used or occupied them at all, nor was possession of them ever delivered to him by the assignee. These facts may have a most important bearing on the case, in view of the opinions of the circuit court of appeals and of the supreme court in the cases of *Ex parte Comingor*, 47 C. C. A. 51, 107 Fed. 898, and *Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, wherein it seems to be considered that the assignee under a general assignment holds the estate in his hands adversely to the trustee in bankruptcy. If so, the leasehold of Nahm's premises was held adversely by the assignee along with the other property. He in fact paid the rent while so holding it up to August 10th, and it never was used, nor were the premises ever occupied or possessed, by the trustee. These considerations afford additional, and possibly of themselves sufficient, grounds for the disallowance of the landlord's claim for rent alleged to have accrued after the adjudication.

The arrangement by which the sum of \$3,000 was deposited in bank by the assignee as security for the rent, if carefully looked into, might assume an appearance of collusion, but it is not necessary to decide the point.

To avoid any misconception, it may be advisable to add that it is entirely possible that different reasons would require a different result in case a landlord should become bankrupt. In that case, where the legal title to the real estate would devolve upon the trustee in bankruptcy, and who would then be the substituted but temporary landlord by operation of law, the land itself might be regarded as performing such duties to the tenant as his needs required. He would doubtless have rights to the use of the land, which could not and need not be taken from him because of a mere change of ownership of the naked legal title to the premises. Change of ownership of real estate never affects the rights of the tenant. It is a matter with which, in normal cases, he has no concern. The act clearly authorizes the trustee to sell the remainder interest of the bankrupt in the land. But this does not require the destruction of the tenant's rights therein. His interest in the premises depends upon his obligation and ability to pay rent for the use. So long as this obligation and ability continue, his rights continue. When they cease, his rights end. With his bankruptcy both obligation and ability to pay rent terminate. But when the landlord becomes bankrupt the land still remains to serve all the purposes of the tenant. It may be sold quite as well with as without a paying tenant, though, if there be a tenant in possession, he thereafter becomes the tenant of the purchaser. In short, when the tenant is adjudged bankrupt the landlord no longer has one, inasmuch as section 47 does not authorize the trustee to become such, and the relations of the landlord with the tenant cease by virtue of the adjudication; but when a landlord is adjudged bankrupt the tenant by opera-

tion of law still has a landlord in the trustee, who, under section 70, holds the legal title to the premises, and in such case the relation of landlord and tenant may continue. This may clearly mark the distinction between the two cases. In one there is both a landlord and a tenant, each capable of performing his respective duties, while in the other there is not. Upon these considerations it may be that, the reason for the rule stated in the Jefferson Case ceasing, the rule would not apply to the case of a bankrupt landlord. The question does not, of course, arise in this case, but I am glad of the opportunity of pointing out what may be a marked difference.

The Jefferson Case was one of a claim against a bankrupt tenant for rent accrued after the adjudication, and being entirely satisfied with the ruling then made, after a studious re-examination of the question on this hearing, the court must regard the action of the referee upon the claim of Max B. Nahm as altogether proper. It is accordingly approved and confirmed, and the petition for a review will be dismissed.

THE ITASCA.

(District Court, S. D. Georgia, E. D. July 31, 1901.)

1. COLLISION—ANCHORED DREDGE AND PASSING STEAMER—IMPROPER ANCHORAGE.

A dredge anchored at night in a navigable channel of a river was sunk in collision with a passing steamer. Owing to her light draught, the dredge might readily and with little inconvenience have anchored further inshore in a place of safety, and she therefore violated the statute (30 Stat. c. 425) in taking the more exposed position. On the other hand, her lights were burning, and were seen by the steamer, the night was calm and bright, and there was ample room for the steamer to have passed at a safe distance. *Held*, that both vessels were in fault, and the damages should be divided.

2. SAME—DAMAGES RECOVERABLE.

The libellant in a suit for collision is not entitled to the allowance of an item of damages which was not claimed in the pleadings, nor while the testimony was being taken.

3. SAME.

The owner of a dredge injured in a collision is not entitled to recover as damages the salary paid his general superintendent in charge of his dredging work during the time the dredge was being repaired, where it appears that he attended to his regular duties in addition to overseeing the repairs.

4. SAME.

Evidence considered relating to the damages recoverable for injury to a dredge in collision, including cost of repairs, loss of time, etc.

5. SAME—INTEREST.

In a suit for collision, where both vessels are found in fault, and the damages divided, interest is not recoverable except from the date of final decree.

6. COMMISSIONERS IN ADMIRALTY—FINDINGS OF FACT.

Findings of fact by a commissioner in admiralty should be made, if practicable, in distinct paragraphs, numbered successively. Exceptions

¶ 1. See Collision, vol. 10, Cent. Dig. § 296.

of the parties and briefs of proctors should refer by number to such paragraphs. Precedents: Form 195, p. 331, 4 Desty, Fed. Proc.; form 490, p. 627, Id.

In Admiralty. Suit for collision.

Robert M. Hitch, for libelant.

Daniel H. Hayne and William Garrard, for claimant.

SPEER, District Judge. The libel in this cause was brought to recover damages resulting from the sinking of the steam dredge Alabama by the steamship Itasca. The collision occurred in the Savannah river August 16, 1899. The questions involving the liability of the Itasca were submitted to the court, and were determined on the 8th of February of this year, when, on the conclusion of the argument, the following oral opinion was rendered:

"This cause has been argued very exhaustively, and for almost all of two entire daily sessions of the court. I stated in the outset to counsel that I would take the papers and examine the authorities, but the very exhaustive character of the arguments has rendered this unnecessary. There is no difficulty as to the law, and the evidence has produced in my own mind a conviction which is clear and satisfactory to myself, and therefore I think it proper that I should at once announce it. The libelants violated the law, in that the dredge anchored in a deep, navigable portion of the channel, in violation of the act of congress, approved March 3, 1899 (30 Stat. c. 425, § 15), when she could have been readily hauled out into water where the Itasca could not possibly have gone. This provision of the act of congress is very satisfactorily discussed in Hughes, Adm. p. 264. The Alabama might have obeyed it without inconvenience, delay, or other interference with her work at all proportionate to the security to be attained or the risk to be incurred by the neglect of this obvious duty. That the dredge remained in the actual, if not the official, channel, is plain enough, because, with her considerable draught, the Itasca struck her there without going aground, and the steamship Augusta, with her greater draught, passed in eight feet of her, after backing, without going aground, a considerable distance to the southward, — the direction in which the dredge should have been moored. That this negligence of the Alabama contributed to the injury is not fairly questionable. On the other hand, all agree that the dredge had out her lawful, customary, and sufficient lights, indicating to the Itasca that she should pass to the northward, or port side. These lights were seen in good season on the Itasca, and were reported by the lookout. The Itasca, therefore, could readily have passed a sufficient distance to the northward to have avoided all possibility of collision. There was 220 feet breadth of channel on that side, in which she could have been safely navigated. There was no occasion, then, for the Itasca to go so near to the Alabama as to subject herself to the mysterious influence of an 'inscrutable cause,' which produced the 'unavoidable accident,' to which the proctors for claimant so earnestly ascribe the collision. Nor may I accept the theory that the Itasca was moved to sheer in an uncontrollable manner by a deep cut which the dredge had just made. The evidence is that the dredge was merely restoring a depth which had previously existed, and the theory of the respondent's proctor that the excavation and the deep water it produced caused this sheer is scarcely maintainable. There was but a trifling difference in the depth of the water in which the Itasca was pursuing her proper course and that she is said to have sought through unexpected physical forces resulting in a sudden and impetuous rush toward the Alabama. It is, on the contrary, plain that a proper exercise of caution by the people of the Itasca would have easily avoided the collision. The officer in charge was perfectly familiar with the river. The night was calm, clear, moonlit, and starlit. There was no wind, no obstacle in her way. The fault is that she failed to lay her course a

sufficient distance to the northward of the dredge, and therefore incurred the danger of the collision which actually followed. I conclude that the fault was mutual, and about equally aggravated, and that the damages and costs should be apportioned between the respondent and libellant; in other words, that the libellant should recover half damages and half costs. The evidence having been taken, a further reference will be directed to ascertain the correct amounts."

A decree was taken in accordance with the views thus expressed by the court, in which it was also provided that a further reference be had to T. P. Ravenel, Esq., commissioner, "to ascertain and compute the amount of the total damages, and report the same to the court with all convenient speed." This reference having been made by the court of its own motion, the findings of the commissioner, while advisory and serviceable, have not precluded the necessity of an independent investigation by the court of all the facts essential to the proper computation of damages. The libellant has claimed the damages following: For raising the dredgeboat Alabama, for expenses incident to her repairs, and to damages for loss of time, aggregating 90 working days, \$34,838.42. The total damages computed by the commissioner and reported to the court are \$20,198.32. Both the libellant and claimant filed numerous exceptions, which they have attempted to support not only by comprehensive oral arguments, but written briefs. Unhappily, also, the commissioner and the learned proctors for the libellant and for the claimant have discussed the various topics in a different order,—a fact which has not contributed appreciably to their easy ascertainment.

Adopting, however, for the time, the order of the libellant's proctor, the first exception of the libellant is to the refusal of the commissioner to allow a claim of \$150 for the use of the tug Turner for 15 days while she was assisting in raising the dredge. This finding is based upon the fact that the Turner was loaned or given to libellant by his father, and upon the further ground that no claim was made on this account in the pleadings, or while the testimony was being introduced. Had this item been brought to the attention of the claimant either by the pleading or in the introduction of testimony, it might well have been allowed. It does not matter to the claimant, to whom may belong the tugboat used to restore the values lost by his marine tort. He is none the less properly chargeable with the fair value of her services. The trouble as to this item, which the libellant cannot overcome, is that the claimant had no adequate notice of the demand, either in pleadings or proof, and it must therefore be denied.

Libellant's exception No. 2, which also involves claimant's exception No. 1, relates to the finding of the commissioner which charges the libellant with \$200, or one-fourth of the total expense for dockage and "lay days" while the dredge Alabama was on a marine railway undergoing repairs. The libellant insists that this entire expense should have been borne by the claimant, and the claimant contends that one-half of \$400 should have been charged against the libellant. The finding of the commissioner is based upon the fact that while the dredge was on the dry dock the libellant seized the opportunity to put a new bottom in her, which was not made necessary by the collision. This work had been contemplated by the libellant

long before the collision, and the necessary lumber purchased and stored for the purpose. Willink, the ship carpenter, testified that the bottom was worm-eaten, and that the sheathing had been entirely worn away. The libelant concedes that a new bottom was put in by himself, and that he had contemplated doing this work for some time, and had provided the lumber. When the work for the collision repairs commenced, the libelant states that neither he nor his superintendent knew that the bottom would have to come out on account of the damage done by the collision. They soon reached the conclusion, however, that the collision had occasioned the defective character of the bottom, and so the libelant filed an amendment demanding \$1,421.50 for the cost of putting in the bottom. This was quite properly denied by the commissioner. The finding of the commissioner on this item is at least approximately correct, and, in view of the amendment of libelant on this point, and the evidence showing the expenditures chargeable to the collision and chargeable to the libelant's personal account, is regarded satisfactory. For the same reasons the exceptions of libelant and of the claimant to the finding of the commissioner which charged the libelant with \$133.87, the same being one-fourth of the cost of the tug Turner and her coal during 17 days' service to the dredge while on the marine railway undergoing repairs, must also be overruled.

The commissioner finds that during the time the repairs were being made, E. W. Robinson, employed by the libelant, was superintending generally the repairs, and also putting in the new bottom, and also giving a general supervision to the entire dredging business of the libelant. The libelant, in view of these facts, insists that he should be paid by the claimant \$375 for the entire salary of his superintendent for that period covering the repairs. The commissioner disallows this demand, and charges the claimant with one-fourth of Robinson's salary, amounting to \$93.75. Both the libelant and the claimant except to this finding; the former urging his demand as above stated, and the latter insisting that the libelant is not entitled to claim anything on this account. On this exception we think the claimant is right. The superintendent was in the employment of the libelant before the collision. His salary was not increased. No other superintendent was employed while he was giving a general supervision to the repairs. It does not affirmatively appear that any loss to the dredging business of libelant resulted, because the superintendent was devoting the larger portion of his time to inspecting or directing the repairs of the Alabama. On this point we are unable to agree with the conclusions of the commissioner, and sustain the exception of the claimant.

Departing from the order of treating the exceptions heretofore pursued, it will be convenient to consider the next succeeding topics under the sixth exception filed by the claimant. This is that the commissioner erred in finding and allowing to the libelant damages for repairs in the sum of \$11,368.76, the said allowance being excessive, and unsupported by the evidence. Under this general exception we may consider the following exceptions of libelant: That the commissioner deducted \$102.65 from the bill of N. Paulsen, and

again \$70.05 from the bill of Paulsen, \$484.53 from Kehoe's bill, and \$138.38 from Palmer's bill. Under the same general exception we consider the exceptions of claimant, as follows: Because the commissioner should have rejected the bills of Kehoe, and allowed reasonable prices, shown by the evidence to be sufficient, and because the commissioner should have rejected the bill of Paulsen for the same reason, and for the same reason should have rejected the bill of Palmer. This method brings under consideration the whole question of repairs to the machinery which were made necessary by the collision. It will be understood that this does not include \$1,336.89, allowed by the commissioner for raising the dredge, or the bill of Willink, the ship carpenter, for \$5,268.55, for woodwork rendered necessary by the collision. To these items the claimant has made no exception save as to dockage and lay days, which have already been disposed of. Subtracting from his figures this and other items, such as the hire of the Turner in September, \$133.37, which has been already allowed, and Robinson's salary of \$375, which has been disallowed, it is insisted by the claimant that the following bills for materials and supplies, to wit, those of Wm. Kehoe & Co., Estate of Paulsen, Palmer Hardware Company, J. D. Weed & Co., Vulcanized Fiber Company, John Rourke & Son, Savannah Foundry & Machine Company, L. Adler, Leo Frank, Standard Oil Company, Savannah Building & Supply Company, and Neal-Millard Company, aggregating the sum of \$4,438.98, and also the pay rolls, time checks, and bill for labor, amounting to \$1,629.27, making a total of \$6,068.25, should be eliminated from the amount allowed by the commissioner, and the sum of \$3,010.33 substituted therefor, as representing what would have been a proper finding in view of the evidence. With regard to the bill rendered by the estate of Paulsen for spikes, nails, tar paper, tar brushes, galvanized tacks, coal tar, etc., amounting in the aggregate to \$1,386.62, from which the master deducts \$172.70, there is much conflict in the testimony. The claimant, as before stated, contends that the entire bill should have been disallowed. The libellant, as stated, excepts to the disallowance made by the commissioner. This bill was paid in full by the libellant for a variety of articles used in the repair or reconstruction of the dredge. With regard to the bills of Kehoe & Co. and Palmer Hardware Company, which relate to machinery, it seems that the disallowance of one-fourth made by the commissioner is altogether arbitrary. Indeed, the commissioner states that these bills for repairs are of such a character it is difficult for him, from his want of knowledge of machinery, to arrive at a proper conclusion between the parties in this cause. An illustration of the difficulties which the commissioner encountered, and which also present themselves to the court, may be gathered from the following passage of the report:

"Kehoe, one of the witnesses for the libellant, states that a portion of the work done by Kehoe & Company and charged for in their bills was for work that belonged to repairs to hull. However, he does not state how much, and therefore the commissioner cannot select specific items from this bill to disallow and others to allow; but, from the necessities of the case, being satisfied that the bill is too large, the commissioner reduces it by taking off of the whole bill one-fourth, namely, \$484.53."

For the same reason the commissioner also reduces by one-fourth the bill of the Palmer Hardware Company, to wit, in the amount of \$138.38.

A familiar rule for the ascertainment of truth in the presence of irreconcilable conflict between witnesses for the contending parties is to accept the testimony of those witnesses who have the best opportunity of knowing the facts to which they testify, and the least inducement, from interest or other cause, to testify falsely. We have the testimony of several witnesses of this character. They are Rourke, Avery, Freiberg, and Ponder. The witness Rourke is a member of the firm of John Rourke & Son, of Savannah, which owns and operates a large establishment for the repair of steam vessels, and particularly marine engines. The witness Rourke is general manager of this firm, and has been engaged in repairing dredge and other vessels for many years. If he has an interest in the outcome of this case, it does not appear. Avery is a practical engineer, machinist, dredgeboat captain, and builder of dredgeboats and tugs, has been master and engineer of a dredge, has had large experience, which is set out in the evidence, and is also disinterested. Freiberg was a witness for libellant, and, with Louis Wiggins, port warden, made a survey and examination of the dredge, lasting from September 19th to 28th, while it was on the marine railway. Ponder is a practical machinist. He was employed by Kehoe & Co. to do this work. Avery and Rourke read over the testimony of the witnesses for the libellant; examined the bills of Kehoe, and other bills relating to the machinery work, with great care, went to Charleston and inspected the dredge itself, made up an estimate of the cost of taking out the machinery after it was submerged, cleaning it, and putting it back, and all necessary repairs. All of these witnesses agree that it might have been done for the sum of \$1,650. This Rourke regards as a very liberal estimate, and Avery states that this amount covered everything, including breakages, and taking apart and putting together machinery, etc. This testimony is supported by the survey made by Wiggins and Freiberg. The commissioner states in his finding that Ponder testified positively that the sum of \$900 of the Kehoe bills was not necessarily expended on account of the collision, but was caused by general improvement of the machinery of the dredge. This proctor for claimant insists is an underestimate of the amount which Ponder testified was expended for general improvement; that it was \$1,005.11. The testimony of Ponder is given full credence by the commissioner, and, as he was the machinist who did the work, it seems to possess much importance, and by comparing his testimony with the testimony of Avery and Rourke it is found that the items he rejects as not attributable to the collision were those which Rourke and Avery had marked doubtful. Kehoe himself testifies that he furnished material and did a lot of work for the libellant on the hull and woodwork. This was in his account, but could not be properly chargeable to the collision, because the contract for repairs to the hull and woodwork was in Willink's hands, and, as we have seen, no contest was made about it. In view of the very unsatisfactory and indefinite character of the proof which

the testimony of the libelant's witnesses affords upon the items involving the repairs to the machinery and involved in the bills of Kehoe, the Palner Hardware Company, and similar bills, it is deemed safer to be guided by the testimony of Avery and Rourke, of Wiggins and Freiberg, and of Ponder and Kehoe, as above quoted. This will result in the rejection of the claim made for the bills paid to the Paulsen Estate, Kehoe, and the Palmer Hardware Company, and others similarly situated, and the substitution of the estimate made by Rourke, Avery, and the other witnesses. This conclusion may not be precisely accurate, but it is the best the court can do in view of the uncertainty of the evidence, and is preferable to the fixation of an arbitrary proportion, to be subtracted. In other words, in view of all the evidence, we prefer to accept the testimony of the expert and disinterested machinists and surveyors, who went over all the items, and furnished estimates, rather than hazard a guess as to how much work was done on the machinery, and how much material was furnished for the repairs, and how much for the large amount of improvement properly chargeable to libelant.

The ninth exception of libelant is based upon the fact that the commissioner refused to allow libelant's claim of \$1,421.50 as cost of the new bottom to the Alabama. This finding was manifestly proper, as appears from the facts hereinbefore stated.

The tenth exception is because the commissioner refused to allow any compensation for demurrage on account of the lost time of the dredge Alabama during the month of December, 1899. This exception is based upon the fact that the new machinery put in by the libelant did not, at first, work well. It will suffice to say that these facts are too uncertain and indefinite to afford any basis for the just estimation of damages, if any were thereby sustained. Besides, the entire value of this dredge was only \$20,000. She was submerged in shallow water. She was raised within a short time, and repaired. Libelant is entitled to restitution in integrum, and nothing more, and it seems unreasonable to conclude that the repairs to the coarse and simple machinery of the dredge under the circumstances amounted to \$11,368.76. There are several items which create mistrust as to the exactitude of the figures afforded by libelant's witnesses. For instance, the charge of \$1,629.27 for the pay roll of the crew and labor. It is true that the libelant was probably obliged to continue the wages of his crew during the period in which the repairs were being made. It is doubtless true that he employed additional labor. It is, however, unreasonable to conclude that doing work on his own account, and having other dredgeboats; that he permitted his crew to remain in idleness, or that he expended without any return whatever anything like the sum stated for their wages and for labor. Certainly, if we may accept the testimony of libelant's witnesses, a most unwarrantable time was consumed in taking mud from the dredge, especially when it is understood that her bottom, bow, and stern were taken out altogether. Applying to the consideration of this charge the teachings of ordinary experience, and ascribing to the libelant the usual regard to his interest which men having laborers employed would exert, it is clear that he must have received such valuable

services on his own account from the work of the crew and the other laborers employed during the period of the repairs as will justify the court in reducing the allowance on this item by one-half. If he did not in fact utilize the services of the crew, it was his own fault. We are strengthened in this conclusion when we reflect that experts testified that the mud could have been removed from the dredge for the sum of \$128. It seems impossible to arrive at any other satisfactory basis of estimating the cost of the repairs than that we have adopted, and largely for the reason that the libelant, for the general purposes of improving his dredge, has so complicated the calculation by the intermixture of innumerable items which appear from the 1,500 pages of testimony in such manner that it is impossible to say whether or not they were necessary for the repairs. This will reduce the finding of the commissioner on these items from \$11,368.76 to \$9,511.47.

To the finding of the commissioner with relation to the demurrage both sides except; the libelant because the commissioner did not base his finding upon the market value of the daily hire of the dredge, and the claimant upon the ground that he made an error in the number of working days. It, however, appears that no market value for the dredge was ascertained. On the other hand, there seems to be no good reason to discredit the finding of the commissioner as to the number of working days. He has laboriously and carefully estimated the sum which should be allowed on this account, and it appears to be, under all the circumstances, reasonable and just. The dredge, at the time she was sunk, was actively engaged on a contract with the government in the improvement of the channel of the Savannah river, which would have lasted for a much longer period than that covered by the stoppage resulting from the collision. The commissioner estimates the amount of her earnings by taking the average months of July, 1899, and February and March and April, 1900, and, dividing the amount of profits for those four months by the number of working days, he finds the average net profits to be \$82.37 per day, and, multiplying this amount by the number of days detention, to wit, 91 days, he ascertains \$7,495.67, which he allows as compensation for the time lost to libelant while he was deprived of the use of his dredge by reason of the collision.

An additional exception is filed by the libelant because the commissioner did not allow interest. This question he left for determination by the court. Upon this subject it will suffice to say that in the decision on liability the court held the parties jointly at fault, and therefore jointly liable for the damage. In cases of mutual fault, the amount, proportion, and extent of which must necessarily be determined by judicial proceedings, interest cannot be charged for the period covered by such proceedings. It follows that in this case interest cannot be allowed except from the date of the final decree which will be filed in accordance with this opinion.

In view of the great complexity of this record, the innumerable disallowances and exceptions, for a clearer understanding of the conclusions reached the following summary is made:

Summary.

- (1) For raising the dredge, and expenses incident thereto..... \$1,336 89
 (2) For cleaning and repairing dredge, etc.

Items.	Claimed.	Allowed by Commr.	Allowed by Court.
Port Wardens	\$ 30 00	\$ 30 00	\$ 30 00
Est. of Paulsen.....	\$1,386 62		
Wm. Kehoe & Co... 1,938 25			
Palmer Hardware Co.	553 52		
Weed & Co.....	59 02		
Vul. Fiber Company	10 00		
Rourke & Son.....	29 70		
Sav. Foundry & M. Co.	273 41		
Adler	55 14		
Frank	42 90		
Standard Oil Co....	32 93		
Neal-Millard Co. ...	54 85		
Sav. Bld. & Sup. Co.	3 00		
	<hr/>	<hr/>	<hr/>
	\$ 4,439 34	\$ 3,643 73	\$2,882 33
Pay rolls and labor.....	1,629 27	1,629 27	814 63
E. W. Robinson.....	375 00	281 25	000 00
W. J. Moore.....	20 00	20 00	20 00
Seaboard Contracting Co.....	28 00	28 00	28 00
Freiberg	35 00	35 00	35 00
Kelly & Sons.....	18 75	18 75	18 75
Silva	78	78	78
Willink	5,268 55	5,068 55	5,068 55
Tug Turner	500 00	366 13	366 13
Coal for Turner.....	130 00	130 00	130 00
Coal lost on Alabama.....	81 25	81 25	81 25
Refrigerator	38 00	38 00	38 00
	<hr/>	<hr/>	<hr/>
	\$12,593 94	\$11,370 71	\$9,513 42
Error reported by Commr..	1 95	1 95	1 95
	<hr/>	<hr/>	<hr/>
	\$12,591 99	\$11,368 76	\$9,511 47
(3) Demurrage as reported by commissioner and allowed by the court			7,495 67
			<hr/>
Total.....			\$18,344 03

From these figures it will appear that the total amount of damages resulting to the libellant from the collision of the Itasca with the dredgeboat Alabama and the sinking of the latter is found to be the sum of \$18,344.03. The libellant being equally at fault, and therefore only entitled to recover one-half of this sum, will be allowed to enter a decree for the sum of \$9,172.01½.

The court will add that the perplexing and extended labor which has been encountered in the determination of the innumerable issues of this cause would have been greatly diminished, and its duty not only simplified, but the conclusion made more satisfactory, had the findings of the commissioner been made in a sufficient number of distinct paragraphs successively numbered, and had the exceptions of the respective parties and the briefs of their proctors likewise related to such paragraphs, and in the order presented by the commissioner's report. A precedent for a commissioner's report may be found in

form 195, p. 331, 4 Desty, Fed. Proc. This requires the commissioner to state a résumé of facts, which was not done in this case. But this method would be additionally very much improved if the findings of the facts should be reported in numbered paragraphs, as required with relation to a report of a master in chancery. See form 490, p. 627, Id.

THE YUMA.

(District Court, W. D. New York. September 4, 1902.)

1. COLLISION—VESSELS MEETING—STEAMER AND SCHOONER IN TOW.

Evidence considered, and held to show that a steamer passing up the St. Clair river and a schooner coming down in tow were both in fault for a collision in which the schooner was sunk,—the steamer for sheering to starboard, toward the course of the schooner, after passing the ship having the latter in tow, and in failing to take timely action to keep at a greater distance after the exchange of passing signals, which she might safely have done; and the schooner for the same reason, it appearing that she did not promptly change her course, as did the steamer having her in tow, which was exonerated from fault.

In Admiralty. Suit and cross-libel for collision.

Goulder, Holding & Masten, for libelants.

Shaw, Waite, Cady & Oakes, for claimant and respondent.

HAZEL, District Judge. The original libel in this cause was filed against the steamship Yuma to recover damages arising out of a collision in St. Clair river on September 21, 1900, at about 7:30 o'clock p. m. The navigable channel is 700 feet wide at this point in question. The Yuma collided with the two-masted schooner John Martin, which was in tow of the steamship Morris G. Grover. A cross-libel has been filed on the part of the Yuma against the Grover. The impact almost instantly—within 20 seconds—sunk the Martin about 40 feet from the range line, in about 50 feet of water, resulting in loss of ship, cargo, and four of the crew, including her captain and mate. The lives of others of the crew were saved by aid rendered from the shore and by the Yuma. The chief injury sustained by the Yuma was to her starboard bow. After rendering assistance to the Martin's crew, her bow was swung over to the port or west bank, which is the American side of the river, near the place of collision. The Grover and Martin in tow were bound down from Two Harbors to Lake Erie. The Grover, 287 feet long, carried about 2,500 tons of iron ore, her draft being 17 feet 10 inches. The Martin was 220 feet long, with 1,600 tons of iron ore. The towline was 900 feet long, and, although it is alleged by the answer to the libel and by the cross-libel that both the Grover and Martin were in fault for not shortening it before entering the channel, the alleged fault is not pressed, and no proof was given to establish it. The three vessels were stanch, strong, and were well manned and equipped. The night was clear and starlight, with a light southwest breeze. The electric lights at Ft. Gratiot partly illumined the locality where the collision occurred. The signal lights of the

approaching vessels were in their proper places, and fully visible. The Grover, in addition to her regular lights, carried a light indicating that she had a tow, and a steering light for her tow abaft her funnel. Five-mile currents in St. Clair river flow parallel to the Ft. Gratiot light, and also turn to the westward thereof. This current and strong eddies running upstream from below the point of collision require the exercise of skillful and prudent navigation by vessels passing each other in opposite directions on the American side, or between the range line and west channel bank. The course of the river is nearly north and south. Where the Grover and Yuma encountered each other the range line is 350 feet from the visible, and about 300 feet from the channel bank. It is entirely safe for vessels properly and carefully navigated to pass each other at this point. No difficulty to safely pass in opposite directions was apprehended by either vessel. The Yuma, 322 feet long, laden with coal, was ascending the channel on the west, or American, side, guided by the Ft. Gratiot light, about two points on her port bow. She had easy and perfect control of her movements. The Grover and Martin were descending. The Grover was admittedly to the eastward of the course of the Yuma, while that of the Martin is in dispute. The distance between the Grover and Martin and the shore is in conflict. As to the former, the master of the Yuma says, "The Grover came on down past us at a reasonable distance away, so much so as to give me no anxiety in regard to her movements." He also testifies that the collision with the Martin occurred probably 175 or 200 feet from the shore. The Yuma, not wishing to overtake an up-going tow,—the Hurlbut and Clint,—had reduced her speed to 2 miles per hour over the land and 7 miles through the water. On the whole evidence I have become well satisfied that the distance between the Grover and the Yuma when abreast was in the neighborhood of 150 feet. The Grover passing a little to the eastward of the range line, and about 350 feet from the shore, there was ample room for the Yuma to safely pass the Grover, and she was, therefore, not hampered in her movements, nor crowded to the shore. Her master regarded it as a safe and perfectly proper place to pass. The Grover and Martin were descending southward with the current at the rate of 7 miles per hour through the water and 12 miles over the land, and therefore they had the right of way against the Yuma. The *Galatea*, 92 U. S. 439, 23 L. Ed. 727; The *Dasori* (D. C.) 47 Fed. 330; The *Anne E. Valentine* (D. C.) 22 Fed. 620.

The facts of the collision are these: As the Grover and Martin came down and approached the Ft. Gratiot light, the entrance to St. Clair river, reaching a point 500 feet northerly of the Fontana wreck, which lies in mid-channel about 1,000 feet above the point of collision, the master of the Grover sounded two blasts of the whistle to the up-bound Yuma, then below, indicating that she desired to direct her course to port, and to pass the ascending steamer at a safe distance to starboard, and on her east, or Canadian, side. The Yuma, having heard the signal, replied with two blasts of her whistle, indicative of her assent, and that she likewise would direct her course to port, taking the west, or American, side of the channel. A spe-

cial rule in navigation, promulgated by the department of war, dated August 6, 1900, requiring down-bound vessels to pass to the westward and up-bound to the eastward of the Fontana wreck, was not followed. This point is not urged. The Grover disregarded this regulation by her signal, and the respondent assented. The signals of the Grover and Yuma to pass at this point, with regard to each other's safety, were perfectly understood. The Yuma maintained her reduced rate of speed until a few seconds before the actual collision, when she starboarded and increased the revolutions of her propeller wheel to avoid the impending disaster. The impact of the two moving bodies with terrific force on an angle of about two points was then inevitable. The Grover, prior to signaling the Yuma, and when about one-half mile above the Ft. Gratiot light, passed an up-bound tug with tow. She then sounded two blasts of her whistle to another up-bound tow, which proved to be the steamer Hurlbut and schooner Clint. This tow was on the west side of the channel. The Grover passed the Hurlbut 50 feet above the Ft. Gratiot light, and, proceeding down, came abreast of the Clint on her starboard with the Fontana wreck on her port side. She was then 100 feet west of the wreck, and about 75 feet to the eastward of the Clint. When abreast of the Fontana wreck, the Grover starboarded one-half or three-quarters of a point, which brought her to the eastward of the Ft. Gratiot ranges, coming abreast of the Yuma in about one minute after passing the Clint. Capt. Mooney says they came abreast starboard to starboard 150 feet apart between 400 and 800 feet below the Ft. Gratiot light; that he stood on top of the pilot house, and when abreast of the Yuma's pilot house, which is aft, he suddenly heard her master exclaim "hard astarboard!" and also heard a signal given to the engineer to increase her speed, but, on looking aft, saw that she had crossed the Grover's stern. The libel specifically alleges as fault on the part of the Yuma: (1) That those in charge of her navigation were incompetent and inattentive; (2) in swinging to starboard and toward the schooner John Martin, after passing signals of two blasts had been exchanged; (3) in not keeping to starboard while approaching and passing the Martin; (4) departing from her course, and striking the Martin. Libellant's testimony is solely directed upon this issue to place the responsibility for the collision. It is not claimed that the Yuma should have remained below to allow the Grover's tow to pass down. There was ample space between the navigable channel bank and the range line. The Yuma proceeded at as moderate speed as the situation required. The strength of libellant's contention rests on the Yuma's failure to exercise such care as the surrounding circumstances required. The Yuma, as contended by libellant, was permitted to swerve or sheer from her proper course. Instead of displaying the attention required by the situation, unmindful of concealed dangers and obstacles and a steady and even up-bound course, the Yuma lost control of her propeller wheel, and yielded to the rapidity of the current. A sheer to starboard resulted in carrying her across the Grover's stern towards the towline of the Martin, then striking the Martin in the forward rigging. After examining the evidence, I have reached the conclusion that the Yuma

is in fault for sheering to starboard towards the Martin away from her course, and thereby contributing to the collision. This was owing to inattention by those in charge of her navigation. The conclusion I believe to be supported by the evidence and surrounding circumstances, and therefore she must be held in fault. *The Sagua v. The Grace* (D. C.) 42 Fed. 461. Weaver, watchman of the Grover at the time of the collision, was in a favorable position to observe the movements of the Yuma, as well as to form an estimate of the distance separating the two steamers. Witness Losie, who stood on the beach a short distance above the point of collision, about abreast of the Yuma's engine house and from 250 to 300 feet distant; and Church, the witness for libellant, who stood on the beach a short distance below the point of collision,—were in a like situation. Weaver testifies that he saw the Yuma when her bow was amidships of the Grover, and, as he turned to look aft, he saw the port and starboard lights of the Martin. He says the Yuma began sheering when her bow was abreast of the Grover's stern, and that she was closer to the Grover than passing vessels usually are. He observed she was about 35 feet closer to the Grover's stern than her bow. Instantly, he says, the green light of the Martin was shut out. Just before the impact he again saw her green light, and when within an instant it was again shut out. Losie testifies that he saw the Yuma sheer out and heard a crash. He explains that he was not in a position to see the Martin sheer because she was directly opposite to where he stood on the beach. Church also stood on the beach a short distance below the point of collision. He says the Yuma seemed to sheer, and seemed to be out in the river as far as the range line. Christner, a marine reporter, who, just prior to the collision, was engaged in delivering newspapers to the Grover from a boat as she passed down, testifies that he noticed the Yuma sheering to starboard towards the Martin, and he called to the master of the Grover. At this time he was on the port side of the towline, and in an excellent position to observe the Yuma's course. He says that to the best of his judgment her bow was sheering 60 or 70 feet, and she struck the Martin in the forward rigging on the starboard side, and at the instant of the impact the Yuma's engine bell rang. I am much persuaded by this testimony. No substantial reason is suggested why it should be disregarded. Testimony of other witnesses was to a similar effect. I deem the proofs sufficient to establish an unjustifiable sheering to starboard by the Yuma, notwithstanding the testimony of the respondent's witnesses that the Yuma did not sheer, and that the collision happened solely on account of the Martin's sheering or sagging and appropriating the course of the Yuma. Testimony for the respondent on this point further tends to establish that, when the Yuma unexpectedly ascertained danger to be imminent, she immediately swung to port in obedience to the commands of her master. As I am of opinion, for the reasons stated, that the Yuma sheered, it is an evidential inference sufficiently clear to outweigh the testimony of the respondent that she did not promptly obey her starboard wheel. Her sheering and the rapidly flowing current were undoubtedly impediments sufficient in themselves to re-

tard swinging quickly and accurately to port. Had she swung seasonably to port (which she could have done without danger to herself), or held her helm with necessary directness to starboard, she could not be held in fault. Her unexpected sheering was, under the circumstances, an occurrence not unlikely. The passing of the heavily laden steamer and tow, the rapidity of the current, the existence of eddies, and the proximity of the passing ships are all strong circumstances which should have admonished the Yuma that a firm starboard helm was required while passing the tow.

The movements of the Martin and the course which she assumed to take must now be considered. The answer and cross-libel of the respondent charge negligent navigation of the Grover and Martin as the sole cause for the collision. The alleged faults to which respondent's testimony is directed are: (1) That the Grover was in charge of inattentive and incompetent officers and men; (2) navigating well to the American side of mid-channel; (3) in not allowing for the leeway or drift of the Grover's tow. The schooner John Martin is particularly claimed to have been at fault: (1) For not having her towline properly shortened before entering the Narrows; (2) in not allowing for the leeway or current at that place, and in not navigating accordingly; (3) in not directing her course more to port as she was approaching and well up from the Yuma; (4) in wrongfully departing from her proper course, and in running over and into the Yuma, she having abundant room on her port hand. There are many ways in which the collision may have happened. Sheering from their course by either or both vessels, or the Martin swinging across the channel, in disregard of the Yuma's right as an ascending vessel, are cases toward which the testimony is chiefly directed. It was dangerous, on account of darkness, for the Yuma at this point to proceed up the river nearer the dock or shore line than 150 feet. An examination of all the testimony seems to establish that the Yuma was at least 200 feet from the dock or shore line when abreast of the Grover. It is not clear that she would have encountered any dangers had she acted upon the necessity, which became apparent before coming abreast of the Grover, of diverging sufficiently from her straight course to safely pass the approaching Martin. Her course, however, was not altered, because the master of the Yuma believed that the Martin would turn out, and more closely follow in the wake of the Grover. Ordinarily, he would be justified in so believing, but the character of the channel at this point with its five-mile current was well known. The Martin was deeply laden, and a straight course of a tow going with a strong current (for such it was) is often interfered with. He ascribes the collision to the sheering of the Martin to starboard and from his course. Counsel for the respondent earnestly contends that the Grover as well as the Martin was off the course which each had elected to take; that both vessels were too far to the westward to secure safe passing to the Yuma. The soundness of this contention, as to the Grover at least, is not borne out by the proofs, for, as already stated, the passing distance between the Yuma and Grover was not unusual, nor in any degree hazardous. It gave the Yuma no anxiety. In the judgment of Capt. Buie, assuming the Martin to have been properly navigated, the

Grover, in coming so close to the Yuma, gave the tow no chance, due to the current, to keep sufficiently over toward the east and in the wake of the Grover. Capt. Buie says:

"I saw the tow heading for us,—the consort,—but at the time I was abreast of the Grover I realized the schooner ought to be straightened down the river, but she crossed the line of my course. Then I saw something desperate was liable to happen, and I rung our engine up strong, first ordering the wheelsman 'Hard astarboard,' with the hope of throwing our boat on the bank to avoid the collision; but we came together on an angle of probably a point and a half."

This testimony justifies the presumption that before coming abreast of the Grover he saw her heading for him. Both of her lights were open to his view. Why not starboard then? Why wait until the ship was abreast of the Grover in a parallel course? He believed it prudent to continue in an unhampered course, believing that the Martin would turn to starboard. The inquiry, therefore, seems to be relevant whether the Yuma, irrespective of her sheering, was not in fault for her failure to guard against an obvious danger. A judicious and timely movement on her part to port before coming abreast of the Grover would have avoided the collision. As she was 200 feet from the dock, this could have been done with safety.

As to the fault of the Martin, it is quite true that the men at the helm (Kyle, and Peterson, who stood by) testify that the Martin followed the Grover under starboard helm, and was steering on her port quarter. Kyle says that the Martin, when passing the Hurlbut and Clint was 100 feet to starboard. This I believe to be error. The distance apart was perceivably less. Giving consideration to the manner in which the colliding vessels came together, the distance of the Martin from the range line, the manner in which she lies at the bottom of the river, the testimony of Peltier leaves little doubt of the fault of the Martin. She was too far west of the Grover's course. For some unexplained cause she was not following closely enough in her wake. Having heard the passing signals, she knew of the approach of the ascending steamer. Her master is presumed to have known of the tendency of passing vessels to sheer, and undoubtedly knew the current to be westward. Her duty, in the circumstances, was to steer further to the eastward. Failure so to do was a fault. Parsons, master of the steamer Hurlbut, witness for respondent, testified that both the Grover and Martin passed him from 50 to 75 feet to starboard. Peltier, master of his tow, the Clint, testifies that the Grover passed him to starboard from 75 to 100 feet distant, the Martin about 25 to 30 feet closer. He heard a "starboard" order given by the Martin after leaving his stern. It would seem, therefore, that an attempt to follow the Grover was not seasonably made, for the collision was then inevitable, and occurred within one minute thereafter. I have given the testimony bearing upon the distance which the Martin was to the westward of the Grover careful consideration. As a whole, I think it justifies the conclusion that the Martin passed down too far to the westward. The inference to be adduced from the testimony does not permit finding that she was actually in the course of the Yuma. Nevertheless, I think her steering made it impossible for the

Yuma to break her sheering in time to avoid disaster. This view is strengthened by the position of the Martin after she was sunk. Considering the character of her cargo, and the depth to which she was laden, as well as the force of the impact, I incline to the opinion that her bow went to the bottom without being carried an appreciable distance to the eastward. Her stern was carried to the westward. Had she immediately followed the Grover's starboarding to eastward, she would have been in her course, and undoubtedly the Yuma would have recovered from her sheer, the Martin passing unharmed. As the collision is, therefore, owing to the concurrent negligence of the Yuma and Martin, both are condemned. The proofs do not justify holding the Grover in fault. She seasonably starboarded abreast the Fontana wreck, and went to the eastward of the range line. No fault is attributable to her for the failure of her tow to follow in her course. The Martin could have avoided contributing to the collision independently of the Grover.

It follows that a decree must be entered for a division of the damages and costs, and a reference to compute the amount.

LONDON & SAN FRANCISCO BANK, Limited, v. BLOCK, Tax Collector.

(Circuit Court, N. D. California. August 13, 1902.)

No. 12,390.

1. TAXATION—FRANCHISES.

Const. Cal. art. 13, § 1, declares that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, and that the word "property," as there used, shall include, inter alia, franchises. Pol. Code Cal. § 8617, declares that the term "property" shall include moneys, credits, bonds, stocks, franchises, and all other matters and things capable of private ownership. *Held*, that while the franchise of a foreign banking corporation, engaged in business in California, "to be" a corporation, was not taxable as a franchise, under such statutes, the corporation's franchise "to do business" in such state was taxable.

2. SAME.

A foreign banking corporation's right to do business in the state of California is taxable, under Const. art. 12, § 15, declaring that no corporation organized without the limits of the state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of the state.

3. SAME—BRANCH BANKS—CREDITS—LOCATION.

A credit found on the books of a branch of a foreign banking company located in San Francisco, which was created by drawing drafts on the bank's main office, in London,—the drawer residing in New York,—was not a credit originating in the state of California, and was therefore not taxable to complainant in that state.

4. SAME.

Where complainant maintained branch banks in San Francisco, Portland, Or., and Tacoma, Wash., credits on the books of its San Francisco office, consisting of sums debited to its branches in Portland and Tacoma, representing money drawn by such branch banks from the San Francisco branch, were credits arising in the state of California, and taxable therein.

In Equity.

Charles P. Eells, for complainant.

Franklin K. Lane, City Atty., and W. S. Brobeck, Asst. City Atty., for defendant.

MORROW, Circuit Judge. The London & San Francisco Bank, Limited, a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland, brings this suit in equity against the tax collector of the city and county of San Francisco for the purpose of securing an injunction restraining and enjoining the said tax collector from making a threatened sale of the real property of the complainant, and from instituting any suit or suits against the complainant for the collection of certain unpaid taxes, and to obtain a decree compelling said tax collector to accept a certain designated sum in full payment of all taxes due from the complainant for the fiscal year ending June 30, 1897. The court is also asked to decree the cancellation of a certain tax and assessment for franchises, and that the tax and assessment of solvent credits in excess of a certain valuation be canceled. The complainant conducts a general banking business in the city and county of San Francisco, receiving deposits of money, buying and selling exchange, and making loans and discounts, in accordance with the power and authority conferred upon it by its articles of incorporation. Its principal place of business and head office is in the city of London, in England, and it conducts and maintains agencies or branch offices for the convenient transaction of its said business; one of said branch offices being in the city and county of San Francisco, another in the city of Portland, in the state of Oregon, and still another in the city of Tacoma, in the state of Washington. The head office and each of the branch offices is respectively designated and known as the London & San Francisco Bank, Limited, and the business transacted in each and all of said offices is the banking business of the complainant. The office in San Francisco is under the management of a manager, assistant manager, and cashier, holding a joint and several power of attorney from the directors of the corporation in England to do everything required in the carrying on of the banking business. In the month of April, 1896, the assessor of the city and county of San Francisco demanded from the complainant, at its branch office in the city and county of San Francisco, a statement, under oath, setting forth specifically all the real and personal property in California owned by the complainant, or in its possession or under its control, at 12 o'clock noon of the first Monday in March in the year 1896. In compliance with this demand, complainant made a return, under oath, which showed, among other things, solvent credits, unsecured by deed of trust, mortgage, or other lien on real and personal property, amounting to \$1,599,811. The complainant also set forth and declared that the aggregate amount of all debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by the complainant to bona fide residents of the state of California, amounted to \$1,511,046, and that the taxable difference or balance of solvent credits due to complainant was the sum of \$88,765. The complainant made no return or statement of

any franchise as the property of the complainant. Thereafter the assessor estimated and assessed the value of the property in the possession and under the control of the complainant, and in such estimate and assessment included an item of \$999,298 as the amount of solvent credits, instead of \$88,765, as returned by the complainant. The said estimate and assessment contained the further item of "franchises, \$10,000," which last-named item was afterwards increased by the state board of equalization to \$12,000. The rate of taxation fixed by the state board of equalization for state purposes for the fiscal year ending June 30, 1897, was \$0.4290 upon each \$100 in value of the taxable property in the state of California, and the rate of taxation found by the board of supervisors of the city and county of San Francisco for the purposes of said city and county was \$0.9692 upon each one hundred dollars in value of the taxable property in said city and county. The aggregate rate of taxation thus levied for all purposes was \$1.3982 for the fiscal year ending June 30, 1897. The total personal property assessment levied upon the complainant was for \$1,264,560, made up as follows:

1. Franchises.....	\$ 12,000 00
2. Furniture.....	1,800 00
3. Money.....	251,462 00
4. Solvent credits.....	999,298 00
	<hr/>
	\$1,264,560 00
The tax on \$1,264,560 at the rate of \$1.3982 was the sum of.....	17,681 08
Tax on real estate.....	2,545 28
	<hr/>
Total tax assessed and demanded.....	\$20,226 36
Tax admitted by complainant as properly assessable against its property	7,327 51
	<hr/>
Taxes in controversy in this action.....	\$12,898 85

The taxes in controversy are made up of the following items:

1. Franchises	\$ 12,000
2. Solvent credits, \$999,298	
less \$88,765 admitted	910,533
	<hr/>
	\$922,533

\$922,533 at the rate of \$1.3982—\$12,898.85.

The complainant offered to pay the sum of \$7,327.51 as the total amount legally due, in place of the amount demanded, namely, \$20,226.36. A temporary injunction issued, testimony was taken, and the cause submitted. In the meantime, in accordance with an ordinance of the board of supervisors of the city and county of San Francisco, the tax collector accepted the sum of \$6,086.29 from the complainant in part payment of the taxes levied and assessed against it for the year 1896, receipting therefor; said payment not to affect the rights of either party as they should be determined by this court. The contested items still remaining, after various concessions and agreements on the part of both parties to this suit, are: (1) Franchises of the bank, \$12,000; and (2) certain solvent credits due the bank. The solvent credits now in controversy are: (1) The sum of \$164,576.60, which at the date of assessment was due and ow-

ing to complainant at its home office, in London, from the banking house of J. P. Morgan & Co., of New York; (2) the sum of \$116,774, debited upon the books of the complainant at its San Francisco office to complainant's branch office at Portland, Or., and listed and assessed by said assessor as a debt due and owing by complainant in Portland to complainant in San Francisco; (3) the sum of \$428,539, debited upon the books of complainant's San Francisco office to complainant's branch office at Tacoma, Wash., and listed and assessed by said assessor as a debt due and owing by complainant in Tacoma to complainant in San Francisco, making a total of \$709,889.60.

The law of this state relating to the assessment and taxation of property is found in the constitution of the state, and the laws passed to carry the provisions of the constitution into effect. The provision of the constitution involved in the present inquiry is article 13, section 1 of which provides as follows:

"All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. * * * The legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state."

The Political Code provides, under the title of "Revenue," and "Definitions of Property for Purposes of Assessment," as follows:

"Sec. 3617. * * * First. The term 'property' includes moneys, credits, bonds (except of railroad or quasi-public corporations), stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. * * * Sixth. The term 'credits' means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation, or association assessed. The term 'debt' means those unsecured liabilities owing by the person, firm, corporation, or association, assessed to bona fide residents of this state, or firms, associations, or corporations doing business therein."

Section 3628 of the same Code provides:

"The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority, they must be assessed in the county in which the corporations, firms, or persons holding them have their principal place of business."

It is contended on behalf of the complainant that it has not in this state any franchise taxable under the law. This contention is based upon the grounds that the right to be a corporation is not a franchise of the corporation itself, but belongs to the members composing the corporation. At common law the forming of a corporation was prohibited, but in England a corporation may be formed under a grant of the king or an act of parliament, and in the United States the chartering of corporations belongs to the legislature alone, and the grant is made either by general or special laws. This right to form a corporation is a grant to individuals, and the franchise belongs

to them. But this is the franchise to be a corporation, and not the franchise of the corporation to do, which is a separate and distinct franchise, belonging to the corporation, and having in most instances a value. This distinction is clearly stated in *Railroad Co. v. Berry*, 112 U. S. 609, 619, 5 Sup. Ct. 299, 303, 28 L. Ed. 837, where Mr. Justice Miller, speaking for the supreme court, said:

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchise of the corporation."

This distinction is also found in cases dealing with the power of a corporation to mortgage or sell the corporate property, where it has been held that the franchise to be a corporation cannot be mortgaged or sold, but the franchise of the corporation to do the business in which it is engaged may be mortgaged or sold. *Willamette Woolen Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 197, 7 Sup. Ct. 187, 30 L. Ed. 384.

But it is contended by the complainant that in carrying on the banking business in which it is engaged it is not exercising a franchise; citing the case of *Bank of Augusta v. Earle*, 13 Pet. 519, 595, 10 L. Ed. 274. In that case the supreme court held that "franchises are special privileges conferred by government upon the individuals, and which do not belong to the citizens of the country generally of common right." It was also held in that case that the right of banking, except the right to issue circulating notes, belonged to the individual citizens, and might be exercised by them at pleasure. Upon this authority it is claimed by the complainant that, as it does not issue circulating notes, it is not exercising a franchise in conducting its business. But this claim ignores the franchise of a corporation, which the complainant does exercise in this state, and which the assessor has determined has a value as property. The assessment is not upon the franchise granted to individuals to form the corporation, nor upon the business or occupation of a banker, but upon the property of the complainant embraced in the unity of the franchise of the corporation to have perpetual succession, to have a common seal, and to act in all its business transactions of a general banking business with those special advantages which are incident to corporate existence. With this authority the conditions under which the banking business of a corporation may be conducted are very different from those attending an individual in the same business, who cannot furnish to his customers any of these advantages or privileges. He cannot, for instance, furnish to depositors the very important advantage of perpetual succession, and without it how can the individual banker, if he is a nonresident, expect to command the business of banking? Manifestly these advantages of being a corporation are the important elements of the banking business, and constitute property in a very substantial sense. Like capital, they contribute to the power of the corporation to make money. "The franchise to do is an independent franchise, or, rather, a combination of franchises embracing all things which the corporation is given power to do; and this power to do is as much a thing of value and a part of the

intangible property of the corporation as the franchise to be." *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 224, 17 Sup. Ct. 604, 607, 41 L. Ed. 965. "The very existence of a corporation, as such, is a franchise, and it exercises its franchise in every act which it performs as a corporation. A corporation, whose existence is a franchise, may possess powers and privileges which in themselves are not franchises, but it usually owns along with such privileges some that are franchises; but, whether the powers be entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise." *Waterworks v. Schottler*, 62 Cal. 69, 108.

In dealing with the franchise of the complainant as a corporation, the assessment must be held as applying only to the franchise as property in this state. The state has no power to assess or tax property located outside its borders. But the complainant has come into this state, and has brought with it the franchise of a corporation to exercise its corporate powers in this state. It has no mere silent existence in the state, but it has entered into active competition with similar institutions chartered by the state. This fact brings us to the consideration of the conditions under which foreign corporations are permitted to do business in this state.

Section 15 of article 12 of the constitution provides that "no corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." This provision of the constitution has been held applicable to foreign banking corporations by the supreme court of this state. *Bank of British North America v. Alaska Imp. Co.*, 97 Cal. 28, 31 Pac. 726; *Same v. Madison*, 99 Cal. 125, 133, 33 Pac. 762. Moreover, while the charter of the complainant is not before the court, it appears from the very name of the complainant, and is to be inferred from the business in which it is engaged, that it was organized for the purpose of transacting corporate business and owning corporate property in the city of San Francisco. This fact brings the complainant within the rule that, where a corporation is organized in one state or country for the purpose of doing business in another, it must be assumed that the charter contract was made with reference to the laws of the state or country in which the business is to be carried on, and that it is to be subject to the liabilities which those laws impose. *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125. The constitution and laws of this state declare corporate franchises to be property, and under this law the franchises of domestic corporations are taxed. *Waterworks v. Schottler*, 62 Cal. 69. It is this property in a corporate franchise in the possession of and owned and controlled by the complainant in this state that is involved in this assessment. It follows that the assessment was made in accordance with law, and must be enforced.

The remaining question relates to the assessment upon solvent credits. The first item is the sum of \$164,576.60, which at the date of the assessment was due and owing to the complainant at its head office, in London, from the banking house of J. P. Morgan & Co., of New York. This credit was created by the drawing of drafts by J. P.

Morgan & Co. upon the complainant in London in the aggregate sum stated; that is to say, the transactions took place between the banking house of J. P. Morgan & Co., in New York, and the banking house of the complainant, in London, and was therefore a credit originating outside of the state. And while it may be that the credit, under certain circumstances, might be made available to the complainant in its banking business in San Francisco, it does not appear that it represented a money transaction arising out of the property or business of the complainant in San Francisco. For the purpose of taxation the property and business of the complainant in San Francisco must be treated as separate and distinct from the property and business of the complainant elsewhere. This credit in favor of the banking house in London was therefore not property in the possession or under the control of the banking house in San Francisco, and was not subject to the assessment.

The second item is the sum of \$116,774, debited upon the books of the complainant at its San Francisco office to its branch office at Portland, Or. The amount was made up of remittances made by the banking house of the complainant in San Francisco to the banking house of the complainant in Portland, Or. In other words, the money was drawn by the Portland bank from the San Francisco bank, and invested in Portland by the Portland bank. This was a transaction in which the corporation in San Francisco, having property in its possession and under its control, secured a credit in its favor by sending money to the Portland bank. If the money had been retained in the complainant's banking house in San Francisco, it would have been taxable as money in the bank here. It was therefore a credit which arose out of the property and business of the complainant in this state, and was taxable as property here.

The third item is the sum of \$428,539, debited upon the books of the complainant's San Francisco office to complainant's branch office at Tacoma, in the state of Washington. This transaction was of precisely the same character as the preceding one, and is subject to the same consideration.

A decree will be entered in accordance with this opinion.

THE NORTHERN QUEEN.

(District Court, W. D. New York. September 18, 1902.)

1 COLLISION—SPEED IN FOG—MODERATE SPEED.

The moderate rate of speed in a fog required by rule 15 (28 Stat. 648) of the rules for navigation on the Great Lakes is such a rate as will enable a steamer to stop in time to avoid collision after coming within view of a vessel at anchor; and such rate must be rigidly observed, unless circumstances exist which make it dangerous to proceed at such moderate rate.

2. SAME—ANCHORAGE IN FAIRWAY.

The steamer Pathfinder, with the whaleback barge Sagamore, laden with ore, in tow, coming down Lake Superior, reached Whitefish Bay

† 1. See Collision, vol. 10, Cent. Dig. § 170.

at night, and was compelled by the dense fog to anchor a short distance above the entrance to St. Mary's river. The two vessels were lashed together and anchored in the usual sailing course of vessels, which is at that point from a quarter to a half mile in width; the navigable channel being about four miles wide. There were no established or customary anchorage grounds, and owing to the proximity of a number of other vessels, whose fog signals could be heard, some of which were drifting, the master, who was an experienced navigator, deemed it unsafe to attempt to move out of the fairway. About 10 o'clock the following morning, while the fog was still dense, the barge was struck and sunk by the steamer Northern Queen, bound up, which was going at full speed. *Held*, that the Queen was clearly in fault for maintaining such speed, especially in a place where vessels bound down would be expected to anchor during the fog; that the Pathfinder and barge could not be charged with contributory fault for anchoring in the fairway under the circumstances, considering the width of the channel, nor for neglect of proper precautions, it appearing that fog signals were regularly sounded, and an alarm signal blown on hearing the second signal from the Queen, and before she came in sight.

3. SAME—FOG SIGNALS—STEAMER AND TOW AT ANCHOR.

Where the fog bell on two vessels, 300 feet long, which were lashed together and anchored during a fog, were at opposite ends, so that the ringing of both might confuse approaching vessels, it was not negligence for the master, in the exercise of his best judgment, to direct that but one should be rung.

4. SAME—CONTRIBUTORY FAULT—BURDEN OF PROOF.

Where a moving steamer was clearly in fault for a collision with an anchored vessel, the burden rests upon her to prove contributory fault on the part of the latter, which is entitled to the benefit of every reasonable doubt.

5. SAME—ANCHORED VESSELS OBSTRUCTING CHANNEL—CONSTRUCTION OF STATUTE.

Act March 3, 1899 (30 Stat. 1152), providing that it shall not be lawful to anchor vessels "in navigable channels in such manner as to prevent or obstruct the passage of other vessels," does not apply to vessels anchored in a bay where there is navigable water four miles in width, although they are in the usual course of passing vessels.

6. SAME—PROCEEDINGS FOR LIMITATION OF LIABILITY—CLAIMS FOR WRONGFUL DEATH.

Where by statute in force at a place of collision a right of action for wrongful death survives to the widow or next of kin of the decedent, a claim for damages for the death of a person who lost his life in such collision may be enforced in a court of admiralty in proceedings by the owner of the offending vessel for a limitation of liability.

In Admiralty. Suit against the steamship Northern Queen to recover damages for collision, and petition by the owners for a limitation of liability.

Hoyt, Dustin & Kelley and Harvey L. Brown, for libellant, Elizabeth B. Ives, administratrix, and Wildridge G. Terry, administrator.

Shaw, Waite, Cady & Oakes (Brundage & Dudley, of counsel), for respondent.

HAZEL, District Judge. The libel in this cause of collision was filed on September 23, 1901, by the Huron Barge Company, owner of the Sagamore, against the steamship Northern Queen, owned by the Northern Steamship Company, a corporation organized under the

¶ 6. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. A. 387.

laws of the state of Wisconsin. On October 4, 1901, a petition was filed by the Northern Steamship Company for limitation of liability for collision between said steamship Northern Queen and the whaleback barge Sagamore, at the same time denying liability, and averring that other libels might be filed by other interests against the Northern Queen, and praying that her liability upon all claims filed might be determined under the limited liability act. A cross-libel has been filed on the part of the Northern Steamship Company against the libelant and the steamer Pathfinder. A stipulation was entered into by proctors for libelant, for Elizabeth B. Ives, administratrix of the estate of Ira Ives, deceased, and Wildridge G. Terry, administrator of the estate of Ernest C. Joinder, deceased, who have filed claims in the limited liability proceeding, and proctors for the Northern Steamship Company, that the suit instituted by the Huron Barge Company, which was the owner of the whaleback barge Sagamore, be consolidated with the proceeding instituted to limit liability, and that the issues raised by the pleadings and claims for damages be heard together by the court; the motion having directed that all claims for damages by reason of the collision that occurred between the Sagamore and Northern Queen in a dense fog at about 10 o'clock in the morning of July 29, 1901, be presented to the court in the first instance. The whaleback barge Sagamore, about 300 feet in length over all, laden with iron ore, drawing $17\frac{1}{2}$ feet, was almost instantly sunk, stern first, in 12 fathoms of water. There was not sufficient time to her crew to escape with safety. They were precipitated in the water, and two were drowned,—her master and steward. Claims for damages have been filed by their legal representatives.

The collision took place at the head of St. Mary's river, off Point Iroquois, about a half mile northwest of Gros Cap gas buoy, directly in the course of sailing vessels, but at a point where the river is four miles wide, and opening into Whitefish Bay, which extends northerly into Lake Superior. The sailing course is well known to navigators as about one-quarter to one-half mile in width, with a mile and a half navigable water on each side. Under ordinary circumstances, therefore, it is neither dangerous nor in any degree hazardous to attempt an anchorage at the side of the fairway. There are no established anchorage grounds in Whitefish Bay or in the neighborhood of St. Mary's river. The expert testimony offered by respondent does not satisfy the court that an anchorage ground is established by prevailing custom of navigators on the lakes. No established usage is shown, although it quite satisfactorily appears that a majority of the expert witnesses are strongly of the opinion that it would have been far safer for the Pathfinder and Sagamore to have anchored off the course. A number of the experts testify that they would have done so, other experts for libelant deemed the action of Capt. Mallory wise and prudent. Ascending vessels do not ordinarily anchor in foggy weather outside and to the northward of Gros Cap gas buoy. At this point the bay widens into what may be regarded as an arm of the lake, and risks of collision are relatively minimized. South of the Gros Cap gas buoy, in St. Mary's river, where, for

safety, vessels are required to remain in the channel, navigation in a dense fog is involved with considerable danger.

The whaleback steamer Pathfinder, with the whaleback barge Sagamore in tow, both heavily laden with iron ore, left the port of Duluth, Minn., bound for Lake Erie, at midnight on July 26, 1901; weather clear. Soon after, it became very foggy. The fog was dense until after the collision. The distance from Duluth to St. Mary's river is about 365 miles, and the trip down was in straight sailing courses. They passed Whitefish Point on July 28th at about half past 4 o'clock in the afternoon. The point could not be seen, because of the density of the fog. The fog whistle on Whitefish Point, however, easily recognized and distinctly heard far off and near, enabled the master of the Pathfinder to distinguish the locality, his proximity to the point, and to the usual pathway of vessels from the point southerly through Whitefish Bay. It was difficult for him to determine merely by the sound of the fog whistle on the point his exact distance and bearing therefrom. Nevertheless, after hearing it he shaped the course of his vessel in the direction of Point Iroquois, about 25 miles distant, reaching there in the early evening. He passed very close to a steamboat between Parisian Island and Point Iroquois. The fog continuing dense, he drew his consort to his starboard side, and lashed her to the Pathfinder forward, aft and amidships. Thus made fast, the Pathfinder dropped her anchor about one-half mile northwest of the Gros Cap gas buoy, which brought her diagonally across the fairway. The Sagamore did not drop her anchor. Just before anchoring, a number of other bells and whistles of vessels lying at anchor or drifting were heard. Fog signals were sounded ahead and to starboard. Capt. Mallory, of the Pathfinder, testifies that, in his judgment, it was unsafe to proceed farther, and therefore he let go his anchor. It was in the ordinary course of vessels up and down bound. No attempt was made to anchor either to the eastward or westward. The wind—a light breeze—was on her starboard. Because of the density of the fog, other vessels at anchor, or their lights, were not visible. During the night and early morning, between the hours of 2 and 7, the steamers Harlem, Senator, and Miami, upbound, passed very near. The masters of these vessels testify that passing was affected within a distance of 75, 150, and 500 feet, respectively; that aport or hard aport movement by each vessel was necessary to clear the vessels at anchor. They heard no bell on the Sagamore, whose lights suddenly and unexpectedly loomed up out of the fog. This is disputed by Howard, mate of the Pathfinder on watch, who testifies that no vessel passed early that morning nearer than 1,000 feet, and that the Sagamore's bell was regularly sounded.

The undoubted weight of the evidence establishes that the Sagamore, while at anchor prior to the collision, seasonably complied with rule 14, subd. "e," 28 Stat. 648, which requires any vessel at anchor near a channel or fairway to, at intervals of not more than two minutes, ring her bell rapidly for three to five seconds. Her bell,—the prescribed signal,—when sounded, was clear and distinct. The Pathfinder did not ring her bell or give any signal. Her master testi-

fies that, as the bells of the Sagamore and Pathfinder were at different ends of the two vessels, he considered that, if he sounded a bell on each vessel, passing steamers might regard that the sounds were from vessels lying apart, and might therefore attempt to steer their course between them. Hence one bell was used to signal for both vessels. His reasoning would seem to be correct. It is contended by respondent that the Sagamore's bell was improperly placed, was insufficient, and the clearness of its sound impaired. The Sagamore was of ordinary whaleback build. Heavily laden, her widest part was three or four feet underneath the surface of the water. Her bell was fastened to a frame or crosspiece of timber, attached to the upper part of the after turret. The testimony of Hendricks, master of the Harlem, Irvine, of the Senator, and Huyser, of the Miami, that when they passed the Sagamore at different times between 2 and 7 o'clock she was not ringing her bell, and any presumptions that may arise therefrom, cannot be permitted to outweigh the corroborative testimony of the masters of the Colby, Barge 110, Uranus, Madden, and Stephenson. These vessels were anchored or drifting in the immediate vicinity of the collision,—the Uranus, under way, blowing an alarm signal, one-quarter of a mile southerly and to the windward, which was in the direction of the Northern Queen as she approached; the Colby and Barge 110, at anchor, three-quarters mile to windward; the steamer Madden and barges under way, about one-quarter mile astern; the Stephenson, blowing a whistle and ringing her bell, one-quarter mile to the southeast. These vessels frequently and at regular intervals heard the fog signals of the Sagamore during the morning just prior to the collision. Their fog bells and whistles were distinctly heard on the Pathfinder and Sagamore. The Northern Queen did not hear them, nor any bells, just before the collision. It was a light, southeast wind. The testimony of the master of the Pathfinder and of Seamen Smith and Graham shows that they heard the bells and whistles of the other vessels anchored near them quite distinctly. Suddenly three blasts of the whistle of an approaching steamer were heard. They were the fog signals of the Northern Queen. Smith was ringing the bell on the Sagamore, increasing the frequency of the sound whenever he heard a whistle. He heard signals sounded two or three times at regular intervals on the Northern Queen, each signal indicating her approach. The last brought her very close, evidently coming head on. The master of the Pathfinder quickly ran to the top of his pilot house and pulled an alarm signal. Simultaneously the Northern Queen loomed up through the fog from a southeasterly direction on the Sagamore's starboard side, about three or four hundred feet distant. The bell of the Sagamore was then constantly ringing. The signal to reverse was quickly sounded by the Northern Queen to her engineer. She did not comply. It is claimed that her engineer misunderstood the order. Mr. Hunt, the engineer, witness for libellant, testifies that he was running under check up to 9:30 o'clock, when he received an O. K. bell, which indicated to proceed at full speed. She averaged $72\frac{1}{3}$ revolutions of her wheel, which resulted in a rate of speed through the water of 12 miles and a half an hour. Her speed was not altered. Just before the collision he received a

signal to reverse. Instantly he received another to work the engine strong. The engine was therefore not reversed before the collision. The master of the Northern Queen admits that she came swiftly on her course at the rate of about 7 miles per hour over the water, but by the testimony of the engineer it appears quite clearly that she was proceeding at full speed. The engineer is corroborated by witness Radenmacher, employed at the time as oiler on the Northern Queen. Her wheelsman testifies that her speed was about 7 or 8 miles an hour. He says she ran from the point where she made a change of course at the Round Island Ranges, just before reaching the Middle Ground, to the place of collision, in 35 minutes; the distance being about $7\frac{1}{2}$ miles. The time consumed in going that distance would indicate that he was in error, and that the vessel was moving at her full speed. Her master, who was on the pilot house, testifies that she was going about eight miles an hour. It was practically undisputed that she was proceeding in a dense fog at an immoderately excessive rate of speed, and in violation of rule 15, by which it is provided that every vessel shall, in a fog, mist, or thick weather, go at a moderate speed. She struck the Sagamore a glancing blow with terrific force on the starboard side, just forward of her after turret. The Sagamore sunk immediately, and became a total loss. The Northern Queen after the collision proceeded on her course. She hove a line to a seaman, pulling him on board, then swung around, her momentum carrying her across the towline of the Madden, and disappeared in the fog. Subsequently she returned to the "Soo" for necessary repairs. It may be that the density of the fog and her proximity to the Madden demanded her undivided attention. Some water came in through her bow. The lines parted by which the Pathfinder and Sagamore were lashed together. Perault, the wheelsman of the Northern Queen, testifies that he heard a bell just dead ahead before he sighted the Sagamore. She was then 500 or 600 feet away. The Pathfinder was blowing an alarm. He received and obeyed an order to hard astarboard. The Northern Queen, when swinging to port, crashed into the Sagamore. The master of the Northern Queen heard no bells until the Sagamore came in view. He heard the alarm from the Pathfinder, but thought at first that the barge was under way.

It was held in *The Chattahoochee*, 173 U. S. 548, 19 Sup. Ct. 491, 43 L. Ed. 801, that "moderate speed" consists in such a rate as will enable a steamer to stop in time to avoid collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. The Sagamore being at anchor, the principle enunciated in this case would require the Northern Queen to proceed at such a moderate rate of speed as would have prevented the collision by proper management, after the Sagamore came in view, unless circumstances existed which made it dangerous for her to proceed at moderate speed. *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148; *The Colorado*, 91 U. S. 692, 23 L. Ed. 379; *The Batavier*, 40 Eng. Law & Eq. 19; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687. This rule is well settled, and, where properly applied, has been reaffirmed and followed. Undoubtedly the rule ought not to be rigidly enforced where the circumstances tend to

show, as in *The Eagle Point* (D. C.) 114 Fed. 971, that it was hazardous and unsafe to strictly comply with its provisions. Is it proper to invoke these principles in this case? The immoderately excessive speed of the *Northern Queen*, so clearly established, must be condemned. Navigation in the locality of the collision in a dense fog admittedly requires caution and prudence. The master of the *Northern Queen* must be presumed to have known that vessels bound down, nearing the mouth of St. Mary's river in a dense fog, would be forced to anchor. Furthermore, the circumstances justify a fair presumption that the fog bell sounded by the *Sagamore* would have been heard upon the *Northern Queen*, had her deck watch been vigilant and discriminating, unless their hearing was impaired by the speed of the vessel and the resultant noises, which undoubtedly interfered with the power of the deck watch to hear as clearly as they should. On the other hand, if it be true that the ordinary sound of the bell could not be heard, owing to atmospheric conditions, it was still more the duty of the *Northern Queen* to have exercised greater caution to avoid unseen danger. I conclude that the *Northern Queen* failed in her duty to exercise such caution as the circumstances and conditions of the weather required. At the time of the collision she was in actual violation of the statutory rule enacted to prevent collisions, by virtue of her excessive speed. The *Nacoochee*, supra; *The Batavier*, supra. The burden therefore falls upon her to show that the collision was not owing to her neglect. Having failed to use the proper measure of precaution prescribed by the statute, she must be held in fault. I am well convinced that, had she proceeded more moderately, her movement could have been controlled in time to avoid the disaster.

The respondent, by its cross-libel and its petition in the limited liability proceeding, also charges negligence against the *Pathfinder* and the *Sagamore*. Such charges of fault are (1) negligently anchoring in the fairway or by the ranges, when there was ample safe anchorage on either side; (2) insufficient and incompetent watch; (3) failure to give statutory fog signals. Some of these charges have already been noticed. It is contended that before anchoring the *Pathfinder*, knowing that at least she was approximately in the fairway, should have made for anchorage to east or westward of her course. This could have been safely accomplished by taking soundings. She would not then have been a menace to moving steamers. This alleged negligent omission is claimed by counsel for the respondent as the proximate cause for the collision. Capt. Mallory's judgment, inducing him to anchor at the point in question, has already been alluded to. He was a navigator of 17 years' experience. The proximity of other vessels, significantly indicated by their signals, was a controlling circumstance inducing him to anchor immediately, though in his course. Howard, mate of the *Pathfinder*, also deemed it unsafe to go farther. The question, therefore, presented, is whether the *Pathfinder* and *Sagamore* shall be held in fault for anchoring in the fairway in a dense fog in Whitefish Bay at the head of St. Mary's river. Under the existing circumstances, by so doing did they ignore a rule of precaution which is ordinarily required in the course of navigation? I have already said that the proofs do not establish a cus-

tom requiring anchoring out of a sailing course. No regulation prohibited it. There was no special insecurity for lying at anchor at this place, fog signals being sounded, where the fairway was one-half mile wide, with an abundance of navigable water on each side; the navigable channel being four miles in width at the point of collision. It has often been held that, if there is no rule or custom requiring a vessel to bring up out of the fairway, she might anchor there, although directly in the track of ships. *Mars. Mar. Coll.* 234; *Spencer, Mar. Coll.* § 111; *The Ogemaw* (D. C.) 32 Fed. 924. In *The City of Dundee*, 47 C. C. A. 581, 108 Fed. 679, the court held the ferry-boat which came in collision with the Dundee solely at fault, notwithstanding the fact that the Dundee had anchored outside of the anchorage grounds prescribed by the authorities of the city of Philadelphia. Her pilot (an experienced one) had used his best judgment to find an anchorage. The one found in the middle of the stream was the safest one available, and the court held that, notwithstanding the regulations establishing anchorage grounds in the vicinity, circumstances might exist justifying a vessel anchoring beyond or outside the anchorage limits, without the imputation of negligence. Assuming that the master of the Pathfinder and tow knew he was in the sailing course, he was justified in considering the surrounding circumstances in choosing his anchorage. His judgment as to what was best to be done was controlled by his knowledge of the rules and law governing the movements of vessels in a fog. He rightfully assumed that moving vessels would comply with the statutory requirements. The law required him, when at anchor, to sound his bell at prescribed intervals, giving notice of his position. He complied with the duty imposed upon him. The Northern Queen was not lightly laden, and therefore under control. She was well equipped, and laden with 1,200 tons of freight. No reason is apparent why she did not proceed at a moderate rate of speed. If rules enacted for the safety of vessels navigating the Great Lakes, and rivers connecting them, may be varied or altered to suit the masters of ships, their very purpose is defeated. The language used in *The Clara Davidson v. The Virginia* (D. C.) 24 Fed. 763, may in this connection be fittingly quoted:

"Those rules are the law of laws in cases of collision. They admit of no option or choice. No navigator is at liberty to set up his discretion against them. If these rules were subject to the caprice or election of masters and pilots, they would be not only useless, but worse than useless. These rules are imperative. They yield to necessity, indeed, but only to actual and obvious necessity."

I am clearly of the opinion that there is no fault attributable to the Pathfinder for anchoring in the sailing course at this point. In coming to this conclusion I have given weight to the width of the channel, the surrounding atmospheric conditions, and the number of vessels in the immediate neighborhood. Nor do I think that the circumstances called for a more vigilant anchor watch than was maintained upon the sunken Sagamore. The conditions rendered such a watch unnecessary. She gave the statutory signals. When those finally failed, she sounded an alarm. What more could be required? The cases to

which my attention is called by respondent's counsel—The Raynor, Fed. Cas. No. 9,267; and The Ogemaw (D. C.) 32 Fed. 919—do not seem to have application to the case at bar. In those cases the court held that it was essential to take all the precautions to avoid collisions which the exigencies of the situation might require. This language can only be held applicable in cases where it was established that the adoption of those specified precautions would have been of service in avoiding the disaster. The Northern Queen was clearly at fault. This fact is obvious and inexcusable. The evidence tending to condemn the Sagamore is not sufficiently clear and convincing to establish her fault, or divide the damages between the colliding vessels. The Victory and The Plymothian, 168 U. S. 429, 18 Sup. Ct. 149, 42 L. Ed. 519. Just prior to the collision, Capt. Mallory acted as watch on the Pathfinder. Instantly on hearing the second signal of the Northern Queen, just before she came out of the fog, he blew the alarm. There seems to have been no necessity for blowing it sooner. The preponderance of the evidence shows the anchored vessels complied with their full duty in sounding fog signals at intervals, and giving such warning as appeared necessary. The alarm was sounded as soon as danger was apparent. In this view, special-danger rules 27 and 28 were not violated. I am favorably impressed by Capt. Mallory's reason for not sounding bells on both vessels. For greater safety, it seemed to him better that but one of the vessels should do so. There is undoubted force in his suggestion. Confusion might arise from ringing two bells placed at different ends of two vessels lashed together. However that may be, the failure to ring both bells did not contribute to the disaster. On the whole case, I am of opinion that the Northern Queen failed to meet the burden which, through her plain fault, the law has placed upon her,—of showing fault on the part of the Sagamore or Pathfinder. Every presumption is adverse to the contention, and a reasonable doubt with regard to the propriety of the conduct of the Sagamore and Pathfinder must be resolved in their favor. The City of New York, 147 U. S. 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Oregon, 158 U. S. 187, 15 Sup. Ct. 804, 39 L. Ed. 943.

Since the argument the attention of the court has been called to U. S. v. St. Louis & M. V. Transp. Co., 184 U. S. 247, 22 Sup. Ct. 350, 46 L. Ed. 520. Counsel for the Northern Queen claims the decision in that case supports the theory that the anchorage of the Sagamore and Pathfinder was improper, and therefore they must be condemned. In the case cited the collision was in the Mississippi river, at the port of New Orleans. The anchorage ground chosen—to adopt the language of the court—"rendered the navigation of the river by towboats with tows pursuing their usual and customary course hazardous and extremely dangerous." It cannot be held that the Sagamore's position accomplished any such result. The anchored vessels were also placed, in the St. Louis Case, without the orders of the harbor master of New Orleans, who had supervision of the river at the point in question. The navigation in the case at bar was rendered hazardous, not by the position of an anchored vessel, but by the heavy fog. This con-

dition was under the sole control of a power infinitely higher than the officers of the Sagamore.

Proctors for respondent claim that the act of congress of March 3, 1899, § 15 (30 Stat. 1152), applies in the present case. The section in question is as follows:

"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

This can have no application to the case at bar. Here the anchoring, though in the usual pathway of steamers, was not such an obstruction of the navigable channel as was contemplated by the act referred to. Congress has the undoubted power "to regulate commerce," which comprehends the control, to the extent necessary, of all navigable rivers. 21 Am. & Eng. Enc. Law, 432. A liberal interpretation of the act implies that navigation shall not be hindered or interfered with by obstruction, either by anchoring or otherwise, in such a manner as to prevent its safe accomplishment. Hughes, Adm. 263. A "channel" is defined by the Century Dictionary to be "the deeper part of a river, or of an estuary, bay, etc., where the current flows, or which is most convenient for the track of ships." Assuming, then, that the sailing course was a channel, the waters at the point of collision were very deep and wide. They certainly afforded abundant room for safe passing. The anchorage of the Pathfinder and Sagamore did not impede or prevent the passage of other vessels using such caution as the circumstances required. No difficulty at all would have been experienced, had the fog not obscured the Northern Queen's path; nor, indeed, would the disaster have happened if she had not proceeded at an immoderate rate of speed. For the foregoing reasons, I do not think that the charges against the Pathfinder and Sagamore can be sustained.

The disaster occurred in waters dividing the state of Michigan and the province of Ontario, Canada. It was close to the division line. It is not disclosed whether Joiner, master, and Ives, steward, of the Sagamore, were drowned in American or foreign waters. The statutes of the state of Michigan and the province of Ontario were read in evidence by stipulation of proctors. By these statutes it appears that a right of action survives to the widow or next of kin of the decedent. Therefore the claims filed to recover damages for their deaths are maintainable in admiralty (The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358), and in this proceeding for limitation of liability.

I find that the collision occurred solely by reason of the fault of those in charge of the navigation of the Northern Queen. The owners of the Queen are entitled to a limitation of liability. The libellant, Huron Barge Company, and the other claimants are entitled to recover damages as they may be fixed in that proceeding. There must necessarily be a reference to a commissioner to compute them. Such a decree may be entered accordingly.

SHINKLE v. VICKERY et al.

(Circuit Court, D. Indiana. September 27, 1902.)

No. 9,854.

1. RES. JUDICATA—MATTERS CONCLUDED—TITLE OF PLAINTIFF TO SUBJECT-MATTER OF SUIT.

A decree dismissing a bill for the redemption of a pledge of stock of which complainant alleged his equitable ownership, through an assignment made by the pledgor, based on a finding that such assignment conveyed to complainant no right, title or interest in the stock, is conclusive between the parties against any claim of title which complainant then held, and he cannot maintain a second suit against the pledgee for the same relief by merely alleging a different source of title.

In Equity.

Maxwell & Ramsey, for complainant.

Thomas K. Skinker, for defendants.

BAKER, District Judge. The subject-matter of the suit is 470 shares of stock of the Hemingray Glass Company, evidenced by a single certificate. The aim of the suit is its recovery, with a proper transfer of legal title. The bill shows the certificate of stock to have been issued to and in the name of the defendant Vickery, its sale by Vickery to Gibson without transfer of legal title, the loan by Vickery to Gibson of \$10,000, and the deposit of the stock by Gibson with Vickery as security for the loan, the assignment for value by Gibson of his equitable title to the stock to Shinkle, the tender of the amount of the loan at maturity, and the refusal of Vickery to accept the tender and to deliver up the stock. The bill also asserts that Vickery holds the stock as trustee, and that he is estopped to assert any right to the stock after the payment or tender of the loan. Gibson is made a party defendant apparently to assert his interest, if any, in the stock. Vickery answered, denying every charge of the bill, and further setting up a prior decree in bar. Vickery also filed a cross-bill against Gibson and Shinkle as defendants thereto. The cross-bill was answered. On the hearing complainant's counsel made the point that the prior decree should have been set up by way of plea, and not by way of answer. The court, however, stated, and counsel assented, that it should be treated as though set up by plea. The former suit was by Shinkle as complainant against Vickery and the National Bank of the Republic. The latter was made a defendant simply because in possession of the note of \$10,000 and of the certificate of stock. The bill in the former suit alleged that Vickery was the owner and in possession of a certificate for 470 shares of stock of the Hemingray Glass Company; that for a valuable and sufficient consideration he sold and delivered the certificate and stock to Gibson; that Gibson, being the owner and holder of the certificate and stock, executed his note to Vickery for \$10,000, and also executed to Vickery an agreement assigning, pledging, and delivering the certificate and stock to Vickery to secure said note, and authorizing the sale of the stock upon default in payment of the note; that at the same time Gibson delivered the cer-

tificate of stock to Vickery, who executed an agreement with Gibson, whereby Vickery agreed to turn over and deliver to Gibson the stock upon payment of the note; that interest on the note was paid in advance, and on its maturity its payment was extended six months; that for a valuable consideration, paid to and received by Gibson, he did assign, transfer, and set over in writing to Albert Engel the certificate of stock held by Vickery as collateral to his note, and that Engel, for a valuable consideration, did assign, transfer, and convey to plaintiff all his right, title, and interest in and to the stock and certificate therefor; that immediate notice of both assignments was given to Vickery. The bill then proceeds as follows:

"And the plaintiff further states that all the right, title, and interest in the said Russell B. Gibson in the said certificate of stock and in the said shares of stock represented by the said certificate of the said Hemingray Glass Company of the said Russell B. Gibson and of the said Engel have been duly assigned and transferred to the plaintiff, and that the plaintiff is now entitled to the said shares of stock and the said certificate of stock, subject only to the rights as aforesaid of said Samuel Vickery, the holder of said promissory note of \$10,000."

The bill then states, in substance, that the note and collateral have been sent to the defendant bank, which now has them in its control and possession; that the plaintiff at the proper time duly tendered payment in full of said note, and demanded the surrender and delivery to him of the certificate of stock, which was refused; alleges that at the same time the plaintiff exhibited to the bank assignments from Gibson to Engel and from Engel to the plaintiff; alleges that by oversight Vickery had neglected to transfer the certificate of stock in writing to Gibson, and that such transfer is required by the rules and regulations of the company issuing the certificate of stock; alleges that plaintiff is remediless at law; alleges danger of loss of the certificate of stock by its being transferred; that the plaintiff, as assignee of Gibson, is entitled to the possession of the certificate; and that, unless the same is delivered to the plaintiff, Vickery will transfer it to some other person, to the plaintiff's irreparable injury. The prayer is that the plaintiff may bring into court the \$10,000 so tendered for the use of the defendant Vickery; that each of the defendants be enjoined from transferring the certificate of stock, and be ordered to bring said certificate of stock into court, and to deliver up the same to the plaintiff; that the defendants be decreed to make a proper assignment and transfer in writing of the certificate of stock; and for general relief. The defendant Vickery, answering the bill, denied that he delivered the certificate of stock to Gibson; denied that Gibson assigned the certificate of stock to Engel, and averred that, if any such assignment was made, the same was wholly colorable, and without consideration; denied notice of any assignment; denied that Engel assigned to the plaintiff any right, title, or interest in the certificate or stock, and averred that, if any assignment was made by Engel, the same was colorable, and without consideration; denied that any interest in said stock or certificate had been assigned or transferred to the plaintiff, or that the plaintiff is now entitled to the said shares or certificate of stock; denied tender and demand; denied that plaintiff

exhibited any assignments; denied that omission of written transfer was from oversight or neglect; averred that Vickery is solvent, and that Gibson is insolvent. The defendant also set up an answer of counterclaim, which the court regards as immaterial here. The suit was heard on the pleadings and proofs of the parties, whereupon the state court of St. Louis county, Mo., entered the following decree:

"Now at this day come the parties by their respective attorneys, and submit this cause to the court upon the evidence, pleadings, and proof adduced, and the court, having duly considered the same, doth dismiss the plaintiff's bill herein. It is therefore considered and adjudged by the court that plaintiff take nothing by his suit in this behalf, but that defendants go hence without day, and recover of plaintiff their costs and charges herein expended, and have execution therefor."

An appeal was taken from the decree of dismissal to the supreme court of Missouri (55 S. W. 456), where the cause was heard upon the same pleadings and proofs as in the court below. The decree was affirmed, and a petition for rehearing was overruled, and the motion of the plaintiff to have the supreme court modify the decree by adding to the order of dismissal the words "without prejudice" was likewise overruled by the court.

It is unquestionably the general rule that both at law and in equity a judgment or decree is conclusive between the parties on the matters determined. It is also equally well settled that an adjudication is final and conclusive not only as to the matters actually determined, but as to all matters which the parties might have litigated and have had decided as essentially connected with the subject-matter of the litigation, and coming within the legitimate purview of the original action. It is not meant by this that it is conclusive against the plaintiff as to another matter constituting another cause of action which he might, but was not required, to have joined with the claim asserted in his action. The rule does mean, however, that when a suit is brought for a specific purpose,—as, for example, a bill in equity to redeem a pledge, or to enforce the delivery of property held under a claim of trust to which the party has more than one claim of title,—the plaintiff must assert in his bill all his claims of title, and all the grounds upon which he bottoms his right to a decree. He cannot be permitted to file a bill asserting only one of the claims held by him to the property sought to be recovered, and, when defeated, institute another suit or suits counting on other sources of title. He must present his whole case. He will not be permitted to experiment with the court by setting up successively the different titles by which he claims the subject-matter in litigation. He will not be permitted to withhold a part of his right or title, and, if he does, he will be concluded from asserting it in another suit. Failing to assert his entire right or title, the decree is as conclusive as to every right and title which he might and ought to have set up as it is as to the particular right and title actually asserted and relied upon. It is enough to bar the second suit that the same grounds of recovery might have been set up and relied on in the first suit. But the allegations of the bill filed in the prior suit above quoted were broad enough to have admitted evidence of the right

and title set up and relied upon in the present suit. Those allegations were put in issue, and the contract evidencing the title now relied upon was in evidence, and was considered by the trial court and by the supreme court, both of which held that it failed to communicate any right or title to the complainant. The identical contract now relied upon in the present suit to show title in complainant was in evidence in the former suit, was carefully considered by the supreme court, and it was held that the complainant took no right or title thereby to the certificate of stock. It is true that the contract was introduced in evidence at the former suit by the defendant Vickery, but it was expressly relied upon in the supreme court by the complainant, Shinkle, as showing that the defendant Vickery held the stock in trust, and that he was estopped, as against Shinkle, to assert any claim to the stock except the right to be paid the \$10,000 note. Both of these contentions were held to be unfounded on the ground that the contract now relied on to show title to the stock in Shinkle did not convey to him any right, title, or interest in the stock. The complainant's counsel says that, "profiting by his better knowledge of the facts which developed upon the former trial, Shinkle now not only introduces a new party, but seeks a recovery upon entirely new and different causes of action." It is further said: "The bill counts upon the Gibson-Shinkle contract of February 12, 1895, and ignores the Engel title. It alleges that said Gibson has wholly failed to procure from said Vickery the transfer and delivery of said stock, as by the terms of said contract with your orator he was required to do." This allegation simply shows a breach of duty by Gibson, and adds nothing to the cause of action set up in the former bill against Vickery. So far as Vickery is concerned, the above allegation is immaterial, and adds nothing to what was at issue and in evidence in the former suit. The Gibson-Shinkle contract was in evidence in the former suit when it was determined, after mature consideration, that Shinkle took no right to the stock under that contract. Besides, the complainant had no right to rely on his title from Engel, and to withhold his title under the Gibson-Shinkle contract, if it conveyed any to him. It is enough to bar the present suit that the title under this contract might and ought to have been set up and relied on in the former suit. Indeed, the allegations in the former suit were broad enough to admit the Gibson-Shinkle contract, and the same was admitted in evidence and was construed upon the former trial. The construction there given to it, namely, that it conveyed no right, title, or interest in the stock to Shinkle, is binding upon Shinkle in the present suit. It is further said: "Again, it [the present bill] counts upon the equitable title acquired from Gibson, and not upon the mere equity of redemption of a legal title, which, in equity, is a legal title. It alleges that when Vickery sold the stock to Gibson he retained the possession and legal title, thereby making himself a trustee of the shares; and that when Gibson afterwards borrowed money from his trustee he pledged his equitable title. The bill seeks the execution of that trust." The bill, as well as the evidence in the former suit, showed the title of the stock to be in precisely the situation in which it is shown to be in the present suit.

It showed that Vickery had the possession, that he had never made any assignment, and that an assignment was necessary to complete the legal title after redemption. Thus every fact creating the trust, if any there was, was in issue in the former suit, both in the pleadings and proofs, and so Shinkle's counsel understood it, because he argued and relied on this trust relation in the supreme court. It is further said: "Again, it [the present bill] counts upon an estoppel against Vickery growing out of his written acknowledgment of July 24, 1894, and alleges that Shinkle relied and acted upon that writing to his prejudice." But the contract now claimed to work an estoppel was in issue and in evidence in the former suit, and was relied upon by Shinkle as an estoppel. The defendant ought not to be vexed anew with that question, which has once been solemnly determined adversely to the complainant. It is further said: "Lastly, the bill alleges that the stock is not purchasable in the market, and is without market value, and that damages would not afford compensation, by reason of which complainant has no adequate remedy at law." The bill in the former suit exhibited a cause of equitable cognizance and averred a want of remedy at law. The above allegation, while new, really adds nothing material to what appeared in the bill in the former suit. Besides, the former bill was not dismissed by the supreme court on the ground that the suit was not of equitable cognizance.

The decree in the former suit, in my judgment, discloses a trial on the merits, and the dismissal of the bill constitutes a bar to the prosecution of the present bill by the complainant against Vickery. The bill will be dismissed as to Vickery for want of equity. The bill as against Gibson will be dismissed without prejudice. The cross-bill of Vickery against Shinkle and Gibson will be dismissed without prejudice. A decree may be prepared in accordance with the foregoing opinion.

HUNTER v. ROBBINS et al.

(Circuit Court. E. D. Arkansas, W. D. September 22, 1902.)

No. 1362.

1. PARTIES—SUIT TO RECOVER FUNDS OF CORPORATION—RIGHT OF TREASURER TO SUE.

The treasurer of a corporation, as the proper custodian of its funds and trustee of an express trust, may maintain a suit in his own name against his predecessor in office for an accounting, and to recover money of the corporation alleged to have been wrongfully withheld by defendant, where the corporation authorizes or consents to such suit.

2. SAME—INDISPENSABLE PARTIES—SUIT BY TRUSTEE.

To such a suit in a federal court the corporation is not an indispensable party, and, under equity rule 47, it need not be made a party where its joinder would oust the jurisdiction of the court.

3. EQUITY JURISDICTION—SUIT TO CHARGE DEFENDANT WITH A TRUST.

Equity has jurisdiction of a suit to require an accounting by a former treasurer of a corporation, and also to charge a bank as trustee in respect to funds of the corporation which it is alleged to have held on deposit with knowledge of their ownership, and to have fraudulently permitted its codefendant to withdraw and convert to his own use.

In Equity. On demurrer to bill.

The complainant, a citizen of the state of Missouri, as treasurer of the Searcy & Des Arc Railroad Company, a corporation created by and existing under the laws of the state of Arkansas, filed this bill against E. A. Robbins and the People's Bank of Searcy, Ark., both citizens of the state of Arkansas, alleging that prior to April 8, 1902, the defendant Robbins was the treasurer of the railroad company and as such had on that day in his hands a sum of money exceeding \$7,000, which was on deposit with the defendant bank, which had full knowledge of the capacity in which Robbins held the money, and that it was the money of the railroad company; that on the 8th day of April, 1902, complainant was duly elected treasurer of the railroad company to succeed Robbins, and duly qualified as such; that he made a demand upon both the defendants for an accounting and a delivery to him of the funds of the company, which was refused; that the bank, in collusion with Robbins, has fraudulently permitted him to withdraw the funds from the credit of Robbins as treasurer of the railroad company, and to deposit them with the bank, in some other way to complainant unknown, with the fraudulent intent of assisting said Robbins in appropriating said funds to his own use. By resolution of the board of directors of the railroad company, duly passed, complainant was directed and authorized to institute this action. The prayer of the bill is that the defendants be required to render an account of the funds to which complainant is entitled as such treasurer, and for a decree against them for the amount. To this bill, defendants demur.

Rose, Hemingway & Rose, for complainant.

S. Brundidge, J. W. House, and Menifee House, for defendants.

TRIEBER, District Judge (after stating the facts). The demurrer challenges the jurisdiction of this court, and also the sufficiency of the bill. As to the jurisdiction, the contention of the defendants is that the treasurer is not the proper party to maintain this action, but that the railroad company alone can prosecute it; that the railroad company being a corporation existing under the laws of the state of Arkansas, of which state both of the defendants are citizens, this court is without jurisdiction, and a corporation cannot delegate authority to its treasurer, who is a citizen of a state other than that of defendants, to institute a suit in this court which the corporation itself could not maintain, for want of a diversity of citizenship. It is further urged that, even if the plaintiff is a proper party, the railroad company is also an indispensable party complainant, which would defeat the jurisdiction of this court.

Is the railroad company an indispensable party to this action? It is well settled that, although persons may be proper parties to an action, unless they are indispensable to a proper and final determination of the controversy they need not be made parties. Equity rule 47 specially provides that:

"When parties who might otherwise be deemed necessary or proper parties to the suit cannot be made parties, by reason * * * of the fact that their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such case the decree shall be without prejudice to the rights of the absent parties."

In *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124, this subject is so fully discussed,

and the authorities collected, by Judge Sanborn, who delivered the opinion of the court, that it is unnecessary to cite them here. See, also, *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. 212. Besides, the sole object of this bill is to collect the fund of which the complainant alleges, and the demurrer admits, he is the proper custodian, or, in other words, this is an action by a trustee of an express trust to recover a fund for the benefit of his cestui que trust. The court is not called upon to administer or distribute the fund, nor is there anything in the bill in any wise affecting the relations of the complainant with the railroad company of which he is the treasurer. While it is true that the general rule is that, in suits respecting trust property brought either by or against the trustees, the cestuis que trustent, as well as the trustees, are necessary parties, there are several exceptions to this rule. One of them is that where the suit is brought by the trustee to recover the trust property or to reduce it to possession, and in no wise affects his relation with his cestui que trust, it is unnecessary to make the latter a party. *Horsley v. Fawcett*, 11 Beav. 569; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469; *Ross v. City of Ft. Wayne*, 11 C. C. A. 288, 63 Fed. 469; *Dickenson v. Harris*, 48 Ark. 355, 3 S. W. 58. In *Carey v. Brown*, supra, the court, speaking of this exception, say, "Such is now the settled rule of equity pleading and practice." 92 U. S. 172, 23 L. Ed. 469. The treasurer of the corporation is the proper custodian of its funds, and his receipt to his predecessor for the funds in his hands is a good release, if the money was paid over to him. As such treasurer, he is a trustee of an express trust for the use of his corporation, and responsible to it for the proper discharge of his duties. There is no reason why he should be treated differently than a trustee in a mortgage, and the law is well settled, at least in the national courts, that such a trustee may maintain a suit for the protection of the cestui que trust without joining him as a party, unless the court is to make a distribution of the funds. Nor will the citizenship of the beneficiary affect the jurisdiction of the court, that of the trustee alone determining it. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Knapp v. Railroad Co.*, 20 Wall. 117, 22 L. Ed. 328; *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501; *Morris v. Lindauer*, 4 C. C. A. 162, 54 Fed. 23; *Pennington v. Smith*, 24 C. C. A. 145, 78 Fed. 399; *Moon, Removal*, § 134. The supreme court of Arkansas has held, in two well-considered cases, that to recover moneys which should be paid into the county treasury, either by the former treasurer or the collector of taxes, the suit may be maintained either by the treasurer of the county in his own name, or by the state for the use of the county. *Haynes v. Butler*, 30 Ark. 69; *Hunnicut v. Kirkpatrick*, 39 Ark. 172. And those decisions were rendered in the absence of any statute authorizing the treasurer to sue. So, in the case at bar, perhaps the corporation could have maintained this action; but so can the treasurer, if the corporation sees proper to permit him to do so. The duty of the treasurer, upon the expiration of his term of office, is to pay the funds of the corporation to his successor, who is the proper custodian of all the corporate funds. Being entitled to the possession of a thing, whether in his own right or as trustee,

pledgee, or bailee, such person may maintain a suit for the recovery thereof in his own name. *Clifton v. Wynne*, 80 N. C. 145; *Johnson v. Goodridge*, 15 Me. 29; *Cobbey*, Repl. § 423.

The suggestion of counsel for defendants that the decree of the court will not be conclusive on the railroad company, if not a party to the action, is fully met by the allegation in the bill, which the demurrer confesses to be true, that the suit is prosecuted by complainant by authority, and in pursuance of a proper direction of the corporation.

It is next urged that the complainant has a complete and adequate remedy at law. In the national courts, equity will not assume jurisdiction if the law courts afford a complete and adequate remedy, regardless of the practice prevailing in the courts of the state in which the cause of action accrued or is pending. Section 723, Rev. St. U. S., prohibits it. But to have this effect it is not enough that there is a remedy at law. It must be plain and adequate, and as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655; *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; *Smith v. Bank*, 32 C. C. A. 368, 89 Fed. 832. Were this a bill to seek to recover the funds from the former treasurer alone, the remedy at law would be adequate and complete; but the main object of this bill is to charge the defendant bank as a trustee, upon the ground that, with full knowledge of the fact that the fund deposited with it by its co-defendant belonged to the railroad company, it fraudulently assisted Robbins in appropriating the money to his own use by changing the account from that of treasurer of the railroad company to himself individually. This allegation clearly entitles the owner of the money to have the bank declared in equity a trustee. *Perry, Trusts*, § 828; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142. Nor is the character of trust money changed, although the trustee deposits it in the bank to his personal credit, if the bank has notice of the trust, and the beneficial owner is entitled in equity to a charge upon the new investment to the extent of the trust fund. *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. 519, 32 L. Ed. 959; *Carroll Co. Bank v. Rhodes*, 69 Ark. 43; *Pennington v. Smith* (C. C.) 69 Fed. 188; *Stock Yards v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724. In the last-cited case, Mr. Justice Brewer, speaking for the court, says:

"We are met with the proposition that equity ought not to interfere when the law furnishes a remedy; that when a bank has money in its possession which in fact belongs to a third party, received from whatever source it may be, an action at law will lie; and that therefore no case for equitable cognizance is presented. But this latter proposition has some limitations. It may be true if the full legal title to the moneys is in such third party, but it is not true when his title is equitable, rather than legal; and the right of these complainants, as against the bank, to the moneys deposited by their factor, is equitable. True, the obligation of a factor to his principal for moneys received on the sale of property consigned to him for sale is not a debt created by one acting in a fiduciary capacity, within the meaning of the bankrupt law, but it does not follow that no fiduciary obligation inheres in

such debt. The case of *Chapman v. Forsyth*, 43 U. S. 202, 11 L. Ed. 236, turned not so much on the existence of a trust obligation as on the question as to what trust obligations were intended by the bankrupt act. The court observes: "The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special, trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act." It cannot be doubted that an element of a fiduciary nature enters into the obligation of the factor,—an element different from that which exists in case of vendor and purchaser. There is a confidence beyond that in the capacity and willingness of a debtor to pay. There is a reliance of a principal on his agent,—a confidence that the agent will do as his principal directs, and be loyal to the duties springing from such relation. When property is consigned to a factor, and before sale, who doubts the continuing title of the principal, or his power to restrain unauthorized disposition of such property, or to compel observance by the factor of all the conditions of the trust reposed in him? Can it be that on the moment of sale all these rights of the principal and consignor end, and that there has arisen in their place nothing but a simple debt from factor to principal, with absolute power on the part of the factor to dispose of the moneys received as he sees fit, and with no power on the part of the principal to challenge such misappropriation, when the party who receives the moneys knows the wrongful act of the factor? While it may be true that a legal title to the moneys received on such sale is in the factor, rather than in the principal, so that the principal may not maintain an action at law as against one receiving such moneys from the factor, yet equitably those moneys belong to the principal, and equitably they may be followed into the hands of any person who receives them, chargeable with notice of their trust character. The case of *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693, is in point. In that case one Dillon was the agent of the insurance company. He kept an account with the bank. The account was entered on the bank books with him as general agent. As agent of the insurance company he collected, and it was his duty to remit, the premiums. In the course of his dealings with the bank he borrowed money on his personal obligation. Finally the bank sought to appropriate his deposits to the payment of his debt. The insurance company filed its bill in equity to recover the amount of those deposits, as equitably belonging to it. The fact that they were premiums received for the insurance company was shown. It was held that, under the circumstances, the bank received them with knowledge that, though the legal title to the moneys was in Dillon, the beneficial ownership was in the insurance company, and the decree in favor of the insurance company was therefore sustained. This court, by Mr. Justice Matthews, discusses the question of the liability of the bank to the insurance company, and the necessity of a suit in equity to establish the rights of the company, in these words: "It is objected that the remedy of the complainant below, if any existed, is at law, and not in equity. But the contract created by the dealings in a bank account is between the depositor and the bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillon, as was decided by the court in *Central Nat. Bank of Baltimore v. Royal Ins. Co.*, 103 U. S. 783, 26 L. Ed. 459; and, conversely, for the balance due from the bank no action at law upon the account could be maintained by the insurance company. But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, 'To whom, in equity, does it beneficially belong?' If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account." 137 U. S. 422, 11 Sup. Ct. 121, 34 L. Ed. 274.

In *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183, a fund had been deposited by the parties to a contract with the stock exchange for the purpose of securing the performance of the contract. A bill in equity having been filed for the fund, it was claimed that the remedy was at law; but the court, in sustaining the jurisdiction of the equity court, said:

"It is shown that the money deposited by Schwartz & Co. was deposited by them for and in behalf of the complainants, and Schwartz & Co. lay no claim to the fund, or any portion of it. Complainants demanded from the committee the payment of the whole fund to them on the ground that they were entitled to such payment by the terms of the trust, and because of the violation of the contract by Jamieson & Co., to secure which the latter deposited \$7,000 of the fund in question. The committee has refused to pay over any portion of this fund to complainants, although it lays no claim to it, or any portion of it, on its own behalf. There is a dispute in regard to the right of the complainants to any portion of this fund, and a refusal on the part of the committee to pay it over to them. By reason of the facts, the committee occupied, from the time of the deposit of the funds, a fiduciary relation towards the parties depositing it, and it became a trustee of the fund, charged with the duty of seeing that it was applied in conformity with the provisions creating it." 182 U. S. 479, 21 Sup. Ct. 852, 45 L. Ed. 1183.

In the case at bar the bill charges that the money was deposited by Robbins with the bank as treasurer of the railroad company, which was full notice to it that the money did not belong to him individually, but to the company. By accepting the deposit in this manner, and having full notice of Robbins' fiduciary position, it assumed the same relation, and became a trustee of the fund, charged with the duty of seeing to it that it was applied only in conformity with his duties as treasurer, and by aiding him to convert that fund to his own use it became liable to the company therefor.

The allegations in the bill are sufficient to entitle complainant to relief in equity, and the demurrer is accordingly overruled.

FIELD v. BARBER ASPHALT PAV. CO.

(Circuit Court, W. D. Missouri. July 15, 1902.)

No. 2,407.

1. CLOUD ON TITLE—REMOVAL—ACTION IN EQUITY—POSSESSION OF PLAINTIFF.

A suit in equity may be maintained for the removal of a cloud on title under the Missouri statutes, though plaintiff is not in possession.

2. UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where complainant sued to set aside special tax bills assessed against certain lots in a city, of which he owned the fee, and he was the equitable owner of other lots assessed, and the tax bills on all the lots amounted to over \$2,000, the federal court had jurisdiction.

3. MUNICIPAL CORPORATIONS—SPECIAL TAXES—TAX BILLS—REGISTRATION BY CITY CLERK.

The failure of the city clerk of a city to register tax bills for special assessments, as required by the Missouri statutes, is not a sufficient defense against the bills, the statute being directory merely.

¶ 2. Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

4. SAME—STREET GRADING—ASSESSMENT.

Where the evidence, in an action to restrain a special city assessment, showed that the grading, for which the city was not entitled to charge the abutting property, was not included, at least to any great extent, in the cost of paving, and no extra charge or expense for the grading was made, the fact that some grading was done was immaterial.

5. SAME—CITY IMPROVEMENTS—PROTEST—STATUTES—CONSTITUTIONALITY—REVIEW.

Where a nonresident property owner did not appear after notice and attempt to protest against a city street improvement, he cannot, in an action to restrain enforcement of tax bills against his property, obtain a review of the constitutionality of Laws Mo. 1895, § 95, limiting the right to protest to resident owners.

6. CONTRACT FOR IMPROVEMENT—ACTS OF ALDERMEN—REVIEW.

The board of aldermen of a city, in procuring the improvement of streets and letting the contract therefor, do not act in a legislative capacity, but act in an administrative or business capacity, and hence their acts are reviewable on the ground of fraud or corruption.

7. VALIDITY OF CONTRACT—LIMITATION AS TO MATERIAL.

Where a contract for the paving of a street with asphalt limited the kind of asphalt to be used to Trinidad asphalt, such fact, and the further fact that such asphalt was controlled by a single corporation, did not affect the validity of the contract.

8. SAME—EVIDENCE.

Evidence in an action to vacate special tax bills for municipal improvements reviewed, and held not sufficient to show corruption on the part of the city council.

9. SAME—NECESSITY OF IMPROVEMENT—REVIEW.

Where one of the streets of a city, located in an extreme and thinly populated portion, had been well paved with macadam in 1892, and at the time the street was ordered paved with asphalt by the city council, in 1897, the macadam was not badly worn, and the street was in good condition, the subsequent improvement was unnecessary, and special assessments therefor void.

In Equity.

R. H. Field, for complainant.

Scarritt & Scarritt, for defendant.

McPHERSON, District Judge. Not being able to announce my views in the presence of counsel, I reduce my conclusions to writing, that they may be advised, and a decree accordingly prepared.

This case is one in equity to cancel certain alleged tax bills, which defendant asserts are liens on plaintiff's real estate. Under the Missouri statutes, plaintiff, in or out of possession, by proceedings in equity can remove any wrongful cloud upon his title, and this court may follow such procedure. Complainant is the owner of certain lots facing on three streets in the city of Westport, state of Missouri, which, December 2, 1897, on due proceedings, was merged in and became part of Kansas City. Excepting as to one matter to be presently noticed, this date is not material, because all things done which are now the subject of controversy were done prior to that date, and when Westport was an independent and separate municipality. The jurisdiction of this court is challenged on the ground that an amount less than \$2,000 is in controversy. This contention arises on the following facts: The complainant, R. H. Field, owns certain lots, and has the legal title thereto, in front of which paving

was done. The tax bills for paving in front of those lots amount to less than \$2,000. But complainant has an equitable ownership, at least, in certain other lots. The title was taken in another as a mere convenience, and a declaration of trust executed in favor of plaintiff as to those lots. Why complainant is not liable for those taxes I do not understand, and why he is not interested in clearing those lots of an alleged illegal tax has not been made to appear to me. Adding those tax bills to the others, all held by defendant, and the jurisdictional sum is in controversy. The paving was done on three streets in Westport, under certain resolutions and ordinances of Westport and contracts between that city and the defendant company. The paving and work was done, and the tax bills made out and signed by the proper officer, prior to December 2, 1897, on which day, by a general election, the town became part of Kansas City. But the complainant insists that, because the tax bills had not then been registered in the books of the city, and, of course, not delivered, such registry and delivery could not subsequently be made. I am content to state that in my judgment the statute is directory, and in no event could the failure of the city clerk to register the tax bills defeat the defendant, and deprive it of compensation for labor and material, if otherwise it would be entitled to such compensation. Such technicalities ought not to defeat substantial rights.

And it is urged that the three streets, or some of them, had not been brought to the established grade, and that for grading the streets tax bills could not be issued as against the adjacent lots. And such seems to be the law. But the evidence shows that the matter of grading was but little more, if any, than what was required as part of the paving; that is, evening the surface, and putting it in proper condition. And, at all events, there was no extra expense or charge for the so-called grading. I therefore conclude that this contention is without merit.

Section 95 of the Laws of 1895 (statutes of Missouri), under which the proceedings in question were had, in substance provides that the resolution for paving can be defeated or nullified by a protest filed by a majority of the resident owners liable to be taxed on account of such improvement; and by implication, at least, the non-resident owner cannot protest. Complainant was a resident of Kansas City, and therefore a nonresident of Westport; and he urges that this was an unjust and arbitrary discrimination in favor of a resident and against him and other nonresident owners, for the reason that resident owners, by protest, could defeat the resolution, whereas the law would not allow the city officials to receive or recognize the protest from him and other nonresident owners. It is a well-recognized rule, and familiar to all, that parts of a statute may be void, as being in conflict with the constitution, and the balance of the statute will stand and be enforced; and it is likewise recognized that courts will not decide questions that are not practical, or necessary for the determination of the case, or some phase of the case. If rights of parties have been trampled upon by reason of this statute, and a property right accorded to a resident of Westport which is denied to a resident of Kansas City, it would be

readily seen that there would be great force in the argument of complainant's counsel that the provision in question is in conflict with the federal constitution. But I fail to find any fact of record in this case that calls for a determination of the question so elaborately argued. It seems to me that the conclusive answer is that complainant had some knowledge of what was going on and what was being done, and he made no remonstrance, and did not file or offer to file a protest, although it may be that he had no actual knowledge until too late to protest. But he had notice the same as residents, to wit, by publication. If the resolution or proceeding could be defeated by protest, and if the complainant had the same right to protest, not by the statute, but under the constitution, as a resident owner had, then why did he not protest, or offer to protest? And must he not do that or offer to do that which was required of a resident, before he can claim that he is denied equal protection? It seems clearly so to me, and a discussion of or deciding the question is wholly academic.

The evidence in this case is voluminous, and I have read and studied it with care, because of the charge of fraud in the procurement of the contract. When the board of aldermen were acting in this matter, I believe, and so hold, that it was not acting in a legislative capacity, but was acting in an administrative or business capacity. And, this being so, the charge of corrupting influence demands consideration. The charge, generally speaking, is that one McGowan, a long-time and active politician of Kansas City and of the county, was the active agent of defendant, receiving his compensation quite likely in the shape of commissions; and, the more contracts, the larger his receipts for his work. His method was to procure the signature of resident owners, asking for the paving of the streets, which he did for a double purpose. The one was to give a moral backing to the aldermen, who would then say they were merely carrying out the will of the people. The other purpose was to forestall the protests which might otherwise be made, and thereby defeat the scheme. That such were his purposes I have no doubt. And that he was very active I have no doubt. It is alleged in the bill that, in order to obtain these signatures, McGowan offered rebates on the special tax bills of such signers thus obtained. If this be so, it would be bribery and corruption, as fully as if money were paid directly to prevent protests, and, in my judgment, ought to and would defeat the special tax bills. Corruption, such as bribery, will not defeat legislative action, yet the action of aldermen and of others necessarily connected therewith in a business or administrative transaction would be defeated by a showing of knavery like that charged. And, if the proofs were present, I would not for a moment hesitate to so decide. It is within the knowledge of all that there is no other burden so great as that of municipal government, and no other matter calling for closer scrutiny than the administrative affairs of municipal government.

The conclusions I have reached are not entirely satisfactory to myself, but they are more nearly so than if I were to find otherwise. The agent, McGowan, as already stated, was active in working up these contracts; and, while the proofs do not show it, was, I assume,

working on a commission. He no doubt importuned the resident property owners to sign his petitions. The board of aldermen, as it seems to me, was swift to pass the resolutions and make the contracts for paving those three streets connecting the two cities, which streets were but a block from a street to another, and all parallel streets, with but very few buildings thereon. That the action of the aldermen was very oppressive to the property owners, and particularly to those nonresident, need only be stated, as there is practically no evidence to the contrary. But the fact that the aldermen acted oppressively does not show bribery, or other corruption; and I have searched the record, and find no evidence of corruption. The whole story is that McGowan worked for and obtained the contracts, pressing the people with the supposed advantages that paving would be, and then pressing upon the aldermen that the will of the people must be carried out. But I fail to find evidence that there was any sharing of the profits with any of the aldermen, or the receiving by or offering of rebates to any of the property owners. There is evidence that the attorney for the defendant company prepared the resolutions and ordinances. I see nothing wrong in this, for my experience and observation have been that contractors with municipalities either insist upon having their own attorneys do such work, or at least work in conjunction with the solicitor for the city, to the end that there will be a contract upon which a recovery can be had, or the bonds floated, when the contractor has done his work. That there were some irregularities in the adoption of the resolutions and ordinances and in making the contract is apparent; but, without discussing them, it is enough to say that these defects were not substantial. Complainant resided near by, had some knowledge of what was going on by publication, if not actual notice, and made no protest, and ought not now be allowed to have the paving, and escape payment by proceeding in equity, on the grounds above referred to.

The evidence shows that the contracts called for "Lake Trinidad asphalt." There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing the commerce clause of the constitution was violated, and that the federal anti-trust statutes were likewise violated. And this argument is emphasized by complainant's counsel, because, as he contends, the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so. But, if it does have the monopoly, I do not believe the point is well taken. An individual certainly has the right, in the erection of an improvement, to get that which he believes the best, and that which he prefers, regardless of the reason; and he should not defeat a recovery by showing that in fact something else was as good or better, or that the vendor had a monopoly. And why should not the same holding be made as to a city? Can it be so that because the city concludes, although wrongly, that Trinidad is the best asphalt, that its contract must be canceled on a showing that the Trinidad is not the best, and that it is

the subject of a monopoly? Why limit the evidence to other asphalts? Why not receive evidence as to brick or other paving? I think this matter was in the province of the city to determine, and that the courts have no right to review it.

Other objections are made, such as alleged violations of the state constitution, and a failure to observe the state statutes, which I feel that I need not present in detail, believing that they are without merit. But there is an objection to part of the paving which is not one of irregularity, but an objection calling for special consideration, and a ruling thereon. The claim is made as to part of the paving that it was unnecessary and unreasonable, because the streets had recently been paved with other material, as yet but little worn, and which was substantial, and sufficient for all practical purposes, and that this former paving had been done at the expense of the adjacent property owners. That a city council can pave its streets on due proceedings is conceded by all. But when this power has been exercised, and the streets paved, and the expense thereof taxed up against the adjacent property owners, and they have paved the same, when may the city council again have the street paved? I concede that, if it is doubtful whether the former paving is still suitable, the judgment of the city authorities to repave should not be ridden down by the courts. But can the city council one year macadam the streets, and the next year, with new officers, pave with brick, and the next year with asphalt, all at the expense of the adjacent property owners, merely to suit the whims of supposed taste of the yearly change of city officers? Must not such oppression, which amounts to confiscation, be controlled by the courts? Can such matters be under the exclusive control and jurisdiction of the officers of the city? I am clearly of the opinion that the courts should and must interfere if the streets are already covered by a substantial paving. The evidence shows the following: Wyandotte street, one of the streets in question, was paved with macadam in the year 1892 or 1893, four or five years before the asphalt in question. To all practical purposes the part of the street in question was in the country, with but few houses, and quite a distance from any place that could be called a city, or part of a city, other than by name. There were no sidewalks. The macadam was about 12 inches thick, and when swept off was all right, and in good condition. It was but very little worn, and good for many years' service. It had been put down by municipal authority, and assessed up and against the adjacent property, and special tax bills had been issued therefor, and paid for by the owners of the adjacent property. It therefore seems to me, and I so hold, that the repaving could not be lawfully done solely because the municipal authorities within the four years had changed their minds as to the materials for paving, and that, as a matter of taste, asphalt to them seemed the better, or smoother, or the more beautiful. These suggestions do not apply at all to Baltimore street, and only in a measure to Main street.

The decree in this case will afford the complainant the relief prayed for as to Wyandotte street, and the relief prayed for will be denied as to the other two streets; each party paying half the costs.

COLWELL v. FULTON.

(Circuit Court, D. New Jersey. August 27, 1902.)

1. CONTRACT—MONEY—INSTALLMENTS.

Where the payment of installments of money is provided for in an agreement, suit may be brought for them as they accrue during the currency of the agreement.

2. CONTRACT OF SALE—RIGHT TO TERMINATE.

C., in consideration of \$193,000, agreed to convey to F. certain land, to transfer shares of stock in a company, and assign a mortgage of \$340,000 given by the company, an installment of \$15,000 on the consideration to be paid when the deed was delivered and the stock transferred, and \$500 a month thereafter to be paid for 10 years on account of interest on the balance of \$178,000, F. having the right at any time within the 10 years to pay the \$178,000, with interest, when all claim of C. should be relinquished, and it being provided that moneys received from sales or rents should be applied on the purchase price with a release of all claim by C. when the \$178,000, with interest, was paid from any source. It was also provided that if F. had to foreclose the mortgage, and bought in the premises, he might execute a mortgage thereon to C. for the balance due, with interest, without personal liability, or end the matter by conveying the premises to C. There was a further provision that, if F. was in default for 30 days, C. could foreclose the mortgage, which was to be reassigned to him as collateral, or he might, on notice, sell it. *Held*, in an action for the monthly installments of interest, that the contract was not a terminable one, amounting to no more than an option, from which F. could retire at any time.

Demurrer. Action at law to recover monthly installments of \$500, alleged to be due from the defendant under the first numbered paragraph of the following agreement:

"Articles of agreement made and entered into this seventeenth day of August, A. D. 1892, between Charles R. Colwell, of the village of Weymouth, in the county of Atlantic, and state of New Jersey, of the one part, and Elisha M. Fulton, of the city, county, and state of New York, of the second part, in the manner following:

"The said party of the first part, in consideration of the sum of one hundred and ninety-three thousand four hundred and forty-two dollars, to be paid to him as hereinafter mentioned, hereby agrees to sell unto the said party of the second part, his heirs and assigns, by a proper deed of conveyance containing a general warranty and the usual full covenants in fee simple, free from all incumbrance, twenty-five hundred acres in lots of about twenty acres each, known as the 'Twenty-Acre Lots' on the plan of farms of the late Weymouth Farm and Agricultural Company, situated near Hamonton, in the county of Atlantic, and state of New Jersey; and to transfer and deliver four thousand shares of the capital stock of the Industrial Land Development Company. And the said party of the second part, on the delivery of the said deed at the time and in the manner hereinafter mentioned, and the said stock, does agree to pay to the said party of the first part the sum of fifteen thousand dollars, the said sum to be paid and taken as a first installment on account of the entire consideration of this agreement. It is understood and agreed that the said deed will be delivered, and the shares of stock transferred, when and as soon as opportunity can be had for a full and complete investigation of the title of the said premises, and the said party of the first part is able to make the title thereto required by this agreement, at the office of Samuel Fulton, in the Bullitt Building, in

¶ 1. See Action, vol. 1, Cent. Dig. § 614.

the city of Philadelphia, when the said sum of fifteen thousand dollars shall be paid by the said party of the second part. And the said party of the first part does also hereby agree to sell, assign, transfer, and set over unto the said party of the second part a second indenture of mortgage, bearing date the 3rd day of September, A. D. 1891, made by the Industrial Land Development Co. to him, the said party of the first part, to secure the payment of \$340,000, which said mortgage is recorded in Liber 30 of Mortgages for the county of Atlantic, in the state of New Jersey, at page 303, and upon which said mortgage the said party of the first part does covenant that there is now due and owing the sum of \$337,380, with interest thereon from Sept. 3, 1891, together with the lands therein described, and the covenants and stipulations therein contained, and the bond or obligation therein recited, and the money due and to grow due thereon, with the interest, for the consideration, at the time, at the terms, and in the manner following, that is to say:

"First. For the term of ten years beginning on the 3rd day of September next ensuing the date of this agreement the said Fulton shall pay to the said Colwell monthly, on the 3rd day of each and every month, five hundred dollars. Said monthly payments shall be on account of the interest accruing on the said \$178,442.

"Second. The said Fulton may at any time within the period of ten years from the date hereof pay to the said Colwell the said sum of \$178,442, with interest from the date hereof, or the balance thereof, after deducting all moneys received by the said Colwell on account of said sum as hereinafter provided; and the said Colwell will relinquish any claim he may have for the said bond and mortgage or the said mortgaged lands in case of a foreclosure sale as hereinafter provided, and this agreement shall cease.

"Third. The rate of interest under this agreement shall be six per cent. per annum.

"Fourth. That all payments shall be in cash, or check equal to the cash, without abatement, defalcation, or discount.

"Fifth. That the said Fulton shall at all times during the operation of the terms of this agreement hold the said Colwell harmless from the operation of any mortgage or other liens that now is or that may hereafter be upon or against the lands and premises described in the mortgage hereinbefore mentioned; and this covenant, numbered 'Fifth,' the said Fulton guarantees absolutely, whether such mortgage or lien is a prior or subsequent lien to the mortgage hereby agreed to be conveyed on said lands and premises, or any part thereof.

"Sixth. That so long as the terms, times, payments, conditions, and limitations are observed and executed on the part of and by the said Fulton, the said Colwell, at the request of the said Fulton, shall release portions of the land subject to the lien of said mortgage from the operation thereof. The lands so to be released by the said Colwell upon the request of the said Fulton, as aforesaid, shall be such, and only such, as is provided for in a certain agreement between these said land companies and the said Colwell bearing date the 3rd day of September, 1891. The proceeds from said releases shall be paid to the said Colwell upon and as part of the principal sum of the above-mentioned consideration.

"Seventh. That all moneys which may be or which may hereafter become due upon any lease of the mortgaged lands or contract made or to be made by the said Fulton with the said the Industrial Land Development Co. for rent, or upon sales of wood, clay, stone, sand, or other product of the said lands, shall, in case it can be so arranged with the said company, be paid to the said Colwell, to be applied by him as well upon the moneys due upon the said mortgage as upon the consideration of this agreement. The said Fulton shall report, when requested so to do by the said Colwell, the amount of wood, clay, stone, sand, or other product of the said mortgaged property; and the said Colwell, or his agents, shall have access at all times to the books of the Industrial Land Development Co., and the firm or company about to lease and operate the paper mills and saw mills at Weymouth upon said lands, or upon any other company or companies that may be formed by the said Fulton under any contract or lease he may make with the Indus-

trial Land Development Co., for the purpose of ascertaining the amount of wood, clay, stone, sand, or other produce of said property which may be sold.

"Eighth. All moneys received by the said Colwell on account of the principal or interest on the said mortgage, or derived from release of the mortgaged lands, from the sales of land in case of a foreclosure of the said mortgage, and the purchase of the mortgaged lands thereunder, as hereinafter provided, and all money received under the provision of the last preceding clause of this agreement, shall be credited as well on account of the principal and interest of the said mortgage as on account of the consideration of \$178,442, and the interest thereon, the consideration of this agreement. When and as soon as the said Colwell shall have received on account of the said mortgage, or the said lands in case of foreclosure sale, from any or either of the sources aforesaid, or from any other source, the sum of \$178,442, with interest thereon from the date hereof, all interest he may have in the said bond and mortgage or the said lands shall cease, and he shall release to the said Fulton any claim or interest he may have thereto or therein; and from and after the receipt by the said Colwell of the said sum the said Fulton shall be entitled to the said bond and mortgage, or the said lands in case of foreclosure sale, as hereinafter provided, and all moneys due and to become due thereunder.

"Ninth. The said Fulton shall have the right to foreclose the said mortgage at any time in case default shall be made in the payment thereof, under his own direction, in the name of the said Colwell, or otherwise, as may be proper, and by such solicitor or counselor at law as he may employ for that purpose: provided, nevertheless, that he shall assume and pay all the expenses of such foreclosure, and shall agree that, in case at such foreclosure sale the sum of \$178,442, or such balance as may be due on the consideration of this agreement, shall not be realized, the said Fulton will buy in the said mortgaged premises, and immediately thereafter convey the same to the said Colwell, or in lieu thereof execute to the said Colwell a mortgage thereon (to be a naked mortgage, and not to involve any personal liability upon the part of the said Fulton) for the consideration of this agreement, or such balance as may remain due thereon after deducting the payments thereon provided for in this agreement, payable at a date thereafter equal to a day ten years from the date of this agreement, and containing the ordinary interest, tax, and insurance clauses; and shall, before entering upon such foreclosure proceedings, execute to the said Colwell a bond in \$100,000, with ample surety, conditioned for the faithful performance of the agreement relative to such foreclosure and sale as contained in this clause of this agreement. And in case of said foreclosure, the purchase of said lands thereunder, and the execution of said mortgage, the said lands shall thereafter be treated and considered in the place and stead of the said mortgage, and be otherwise governed by the terms of this agreement. In case he should elect to convey the said lands to said Colwell, this agreement shall be terminated.

"Tenth. As soon as practicable after the execution of this agreement, the said Colwell shall assign to the said Fulton, by a proper deed of assignment for that purpose, the said bond and mortgage, and the said Fulton shall thereupon immediately and contemporaneously reassign the same to the said Colwell as collateral, and under an assignment conditioned for the faithful performance by the said Fulton of his promises and covenants in this agreement contained.

"Tenth A. In the event of a default by the said Fulton of any covenant of this agreement for the space of thirty days, the said Colwell shall have the option either to foreclose said mortgage, or dispose of the same, on demand and notice to the said Fulton, at public sale.

"Eleventh. That this agreement shall be binding upon the heirs, executors, administrators, and assigns of both the parties hereto as fully as though the same had been mentioned and covenanted in each and all the covenants hereinbefore and hereinafter mentioned.

"Twelfth. That for the due performance of all and singular the covenants and agreements aforesaid the said Elisha M. Fulton and Charles R. Colwell do bind themselves, their heirs, executors, and administrators, each, to the other, his heirs, executors, administrators, and assigns, in the sum of one

hundred and seventy-eight thousand and four hundred and forty-two dollars, firmly by these presents; said sum to be a lien upon said bond, mortgage, and shares of stock, and to be considered as liquidated damages.

"In witness whereof the parties to these presents have hereunto interchangeable set their hands and seals the day and year first written above.

"[Signed]

Charles R. Colwell. [Seal.]

"E. M. Fulton. [Seal.]

"Sealed and delivered in the presence of

"[Signed] Edward A. Day."

The defendant paid the installments up to March 1, 1894, but no further, and on August 28, 1894, he served the plaintiff with the following notice:

"New York, August 28th, 1894.

"To Chas. R. Colwell, Esq., and Mrs. Laura R. Colwell—Dear Sir and Madam: I no longer desire to become the owner of the indenture of mortgage dated December 3rd, 1891, and made by the Industrial Land Development Co. to Charles R. Colwell, and I therefore hereby notify you that I terminate and retire from the option of purchase contained in the agreement of August 17, 1892, between Mr. Colwell and myself.

"Truly yours,

E. M. Fulton."

The plaintiff answered this with the following letter:

"Weymouth, N. J., August 31, 1894.

"E. M. Fulton, Esq., Mays Landing, N. J.—Dear Sir: For Mrs. Colwell and myself I acknowledge receipt of your letter of August twenty-eighth. Please take notice that you will be held to the strict fulfillment of the contract of August 17, 1892. I am obliged to infer that you wish to withdraw from your outline of a proposition of August 27th, which you requested Mr. Stuart and I to figure on and discuss with you later.

"Very truly,

C. R. Colwell."

The agreement and these two notices were set out in the declaration.

R. V. Lindabury and E. A. Day, for the demurrer.

D. J. Pancoast, for plaintiff.

ARCHBALD, District Judge.¹ According to the agreement which is the basis of this action, Colwell, the plaintiff's testator, in consideration of \$193,442, was (1) to convey to the defendant, Fulton, 2,500 acres of land near Hammonton, Atlantic county, N. J.; (2) transfer to him 4,000 shares of the Industrial Land Development Company; and (3) assign and transfer a mortgage of \$340,000, given by the said Industrial Land Development Company, on which he guaranteed \$337,380 to be due. As the first installment on the entire consideration named, Fulton was to pay \$15,000 when the deed for the land was delivered and the shares of stock were transferred to him. This left \$178,442 to be still taken care of, and it is with regard to this that the rest of the agreement is particularly concerned. Without going over it in detail, I see no special ambiguity in it, nor any great difficulty in construing its different provisions. It was evidently framed to carry out an arrangement by which Colwell was to turn over to Fulton the several things which he did, for which Fulton was to pay him \$15,000 down, and so handle the property that Colwell would realize \$178,442 more out of it; Fulton making all that he

¹ Specially assigned.

could over and above that, which was evidently the inducement for him to go into the scheme. The demurrer is based upon the idea that the agreement was a terminable one, amounting to no more than an option, from which Fulton was entitled to retire at any time, and that, having given notice of his intention to do so in his letter of August 28, 1894, which is set out in the declaration, he is no longer liable thereon. There is nothing, in my judgment, in the various provisions which it is claimed sustain this contention, either singly or collectively, to support any such idea. It is averred in the declaration, and is admitted by the demurrer, that the agreement was fully complied with on the part of Colwell. It is therefore to be taken as a fact that Colwell conveyed to Fulton the 2,500 acres of land near Hammonton, and transferred to him the 4,000 shares of the Industrial Land Development Company, as he undertook to do, and further assigned the \$340,000 mortgage. All this property is now in the defendant's hands, and, notwithstanding that he has accepted the consideration so furnished by Colwell, which there is no suggestion that he proposes to hand back, he would have us believe that there was to be no continuing reciprocal obligation on his part which he could not throw off at any time. If this is the way the agreement reads, well and good; but it is not to be made to do so by doubtful implication. While it is true that Colwell was paid the \$15,000 which he was to get at the outstart, this is distinctly stated to be the first installment on the \$193,442, which is declared to be the entire consideration due him, and the rest of the agreement, as already stated, is concerned with the way the balance, \$178,442, was to be worked out. When Colwell secured this, his interest in the matter was to cease. This was to be the specific result, according to the second paragraph of the agreement, if Fulton at any time within the 10 years should pay him whatever of the \$178,442 had not been taken care of; and it was also to follow, according to the eighth paragraph, whenever this sum was realized from any source. There was but one other way practically provided for bringing the agreement to an end. According to the ninth paragraph, if Fulton had to foreclose the mortgage, and bought in the premises, he might either execute a mortgage thereon to Colwell for the balance due, with interest, without personal liability; or he could end the matter by conveying the premises directly to him without more. It is, indeed, provided by paragraph 10 A that, in case of a default by Fulton for 30 days in any of his covenants, Colwell could foreclose the mortgage (which, according to another paragraph, was to be reassigned to him as collateral), or he might, at his option, after demand and notice to Fulton, dispose of it at public sale. Just what would be the effect if the latter course were pursued, is not clear. To a certain extent it would terminate the agreement, and perhaps may be recognized as another means for doing so. But this comprises all that there is, either directly or indirectly, for bringing the agreement to a close, and the means so provided necessarily preclude any others. But in the meantime, while the scheme was in process of being carried out, Colwell was not to be left without any return from the property which he had turned over to Fulton, and hence we have the provision with regard

to the payments on account of interest, which is the subject of this suit. By the very first of the numbered paragraphs of the agreement Colwell was to receive \$500 monthly on the 3d day of each month as a payment on account of the interest accruing on the deferred \$178,442. This undertaking by Fulton is absolute, and is not conditioned on the outcome of the transaction, or anything else. He was to pay it month by month until the agreement was brought to an end in some one of the ways which we have discussed. For a year and a half he recognized the obligation, making payments up to March 1, 1894; but he has done nothing since. At the time this suit was brought there were some ninety-odd of these installments due, and the plaintiff is clearly entitled to recover them in this action. There is no difficulty because it is brought during the currency of the agreement. It does not sound in damages for a breach, but is simply for the monthly sums of \$500 which the defendant covenanted to pay; and it is well settled that, where installments of money are provided for, suit may be brought for them as they accrue. *Bush v. Stowell*, 71 Pa. 208, 10 Am. Rep. 694; *Tucker v. Randall*, 2 Mass. 283; *Cooley v. Rose*, 3 Mass. 221.

Let judgment be entered on the demurrer in favor of the plaintiff for the installments due on the agreement in suit at the time of the bringing of this action, with leave to defendant within 10 days, for cause shown, to apply to be allowed to answer over.

McCANN v. WALLACE.

(Circuit Court, D. Oregon. September 12, 1902.)

No. 2,672.

1. MINES—INJUNCTION AGAINST FLOWAGE OF LANDS—GROUNDS.

Plaintiff brought suit to enjoin defendant from discharging the water used in operating a placer mine, brought through a tunnel by defendant, into an artificial creek or ditch which flowed through plaintiff's farm and which was in some places higher than the adjacent land, alleging damage from subirrigation and overflow, and the deposit of mining débris on the land. The preponderance of evidence was against the claim of injury from subirrigation, and tended to show that the ditch, if kept in proper repair, was sufficient in size to carry the water from the mine in addition to the natural flow therein at ordinary stages without overflowing, and it was shown that defendant had offered to build levees where necessary and to keep the ditch in repair through plaintiff's land, but that plaintiff refused to permit it. It was also shown that he made no objection while defendant was expending a large sum in constructing the tunnel to bring the water to his mine. *Held*, that plaintiff had no equity upon the facts shown which entitled him to an injunction.

In Equity. Suit for injunction. On final hearing.

Wm. M. Colvig and George H. Durham, for complainant.

Robert G. Smith and Williams, Wood & Linthicum, for defendant.

BELLINGER, District Judge. This is a suit to restrain the defendant, in the operation of a placer mine, from damaging plaintiff by flowing water over his land and depositing mining débris or

slickens thereon. Since the commencement of the suit the mine complained of has been sold to the Althouse Mining Company, and the company is in fact the real party in interest.

The water used in the operation of the mine in question is taken from Althouse creek by means of a tunnel through a divide that separates the waters of that creek from Democrat creek. The amount of water so taken is some 2,000 inches, miners' measurement. Below the mine defendant has built a slum dam 216 feet long. This dam is built by driving piling, six feet apart, and planking the same on the inside with 2-inch plank, 12 feet long, put down close. The piles are from 10 to 12 inches in diameter and 20 feet long. They are driven in the ground so that they protrude above it 10 feet. The water flowing over this dam spreads over a flat thickly covered with willows to a width of some 300 or 400 feet for a distance of from 800 to 1,000 feet, where it is taken up by Democrat creek or gulch, a part of it by means of an intersecting ditch. The point where this overflow reaches Democrat creek is about half a mile above plaintiff's land. This creek, or gulch, runs on a line, straight or nearly so, through plaintiff's land for a distance of about a mile. This ditch is artificially made, and is higher than some of the adjacent land. It has a fall of some 14 or 16 feet in going through the land in question. One of plaintiff's witnesses, testifying from actual measurement, gives the width of Democrat gulch through plaintiff's premises at from 10 to 11½ feet, and the depth at from 3 to 5 feet. It is intersected by Mulvaney's gulch a little below the center of plaintiff's tract. This gulch is used mainly as an irrigating ditch. In high water it carries as much or more water than Democrat creek. Defendant's mine was first operated by water from Althouse three years ago. Prior to that time for many years mining operations had been carried on on a small scale above plaintiff's farm, and the débris carried into Democrat gulch. Probably the extent of such mining altogether was about equal to that done by the defendant in the three years that the mine complained of has been in operation.

Plaintiff's land consists of 425 acres, of which he owned 320 acres at the commencement of this suit. Something over 200 acres is what would be called level land, over half of which has been cleared. The remainder is brush land, that has once been cleared, but has grown up again with brush. Of the land in cultivation, 50 acres are devoted to raising timothy hay, 15 to alfalfa, 4 to natural grass, and from 15 to 25 to wheat, oats, barley, and potatoes. This land lies on either side of Democrat gulch. Plaintiff testifies that it is pretty good land, and that he paid \$3,500 for it 11 years ago. There is testimony tending to prove that its present value is about \$10,000.

The complaint is that mining débris is carried in the water from defendant's mine, and is filling up the channel of Democrat gulch so that it is being carried over the sides of such channel and deposited on plaintiff's land, and that the water flowing from the mine into Democrat gulch is more than the channel can carry, and as a result it spreads out over plaintiff's meadow and other land, rendering them boggy and unproductive and impossible of cultivation. Plaintiff testifies that when the creek is full of water it overflows his

land on the north side out from the creek for a distance of four or five hundred yards, covering 25 acres of meadow; that on the other side the overflow will extend about 300 yards; that when the mine tunnel is run full of water his land subirrigates, and is so wet that he cannot plow it, and sour grass comes up on the meadow where the water stands; that the mine is usually operated from about the middle of November to the 1st of May; that the deposit on the land is sand and slickens; that since the mine has been operated this deposit has accumulated to an average depth of from 1 to 8 inches, and that the land so affected comprises 8 or 10 acres. On cross-examination, in answer to the question, "You say 25 acres are covered with slickens?" the plaintiff answered, "Yes." In fact he had not so stated. What he had stated was that on one side of the ditch 25 acres had been flooded with water. Further on in his cross-examination he testified that about $5\frac{1}{2}$ acres are covered from 8 to 15 inches deep, and that the rest of the 25 acres have "little rises in spots." He further testified on his cross-examination as follows: "How much of that (the meadow) is covered with them (slickens)? A. Nearly all covered where the water went through. Q. Covered with slickens? A. Six, eight, or ten acres." The witness explains that this refers to the timothy meadow. He testifies that there are four acres of natural grass land affected, and something "over an acre on the other side,"—a total of from 10 to 15 acres; that he cleared the brush out of the channel of Democrat creek and repaired the banks; that since the operation of the mine the banks of the channel have been flooded off and the levee built by him washed out, and the work of keeping the channel in repair increased to the amount of \$40 or \$50 a year; that it is not possible to control the flow of water through this channel when the mine is being operated; that the débris fills up the channel, and when this is cleared out it will fill up again in two days.

Patton, a brother-in-law of plaintiff, and Maurer, a neighbor, testify that between 15 and 25 acres of plaintiff's land have been affected by débris. Croxton, another witness for plaintiff, places the amount of land affected at 10 or 15 acres. Carson testifies that between 30 and 40 acres are affected, and that the débris will eventually destroy the land entirely. This witness produced samples of the slickens taken from plaintiff's land. He has débris litigation himself, and came from Grant's Pass, some 35 or 40 miles distant, where he resides, for the purpose of examining plaintiff's land so as to testify as a witness. Lovelace testifies that there was quite a territory of it, land flowed over, with débris. Morey, a witness for plaintiff, testifies that "there have been several acres of McCann's land" covered more or less with fine gravel and sediment. George, another witness for plaintiff, testifies that the value of plaintiff's land is from \$8,000 to \$10,000, and that the continued operation of the mine is liable to do the land great damage. One of defendant's witnesses, J. E. Holland, testifies that he examined plaintiff's land; that he saw a little sediment or sand, not enough to amount to anything; saw some slickens; but that the operation of the mine will be some damage to plaintiff's land. On the other hand, 12 witnesses, farmers, miners and others,

without interest in the controversy, testify in effect that there are no slickens or other débris upon plaintiff's land in quantities to injure or affect it. Thirteen other witnesses, who are, with two exceptions (one that of a small stockholder and the other that of Mr. Rourke, who owns a mine on Althouse), miners in the company's employment, testify to the same thing. There is also testimony to the effect that neither the ground worked by defendant, nor that of the Rourke mine on Althouse, from which stream the water used in defendant's mine is taken, contains slickens, or the clay from which they are produced, in any considerable quantity.

Witnesses for both parties testify to the existence of a break in the ditch or channel of Democrat creek on the south side, some 19 feet in width, through which water was pouring on the day the witnesses examined the land as to its condition.

Several of the witnesses for the defendant testified to a particular examination of the channel of the creek with reference to any deposit of sand or slickens therein, and these witnesses testify that the ditch or channel was clean; that there was no accumulation of sediment of any kind. Such testimony is free from the difficulty that attends opinion evidence. Witnesses are not likely to be mistaken about a fact so palpable and easily known; and it is a safe assumption in the case that the flow of the water in the channel of Democrat gulch is not impeded by deposits of débris from the mine, and, if not, there ought to be little trouble in maintaining a channel that will carry the flow of water from the mine at all times, except during periods of flood, and at such times it appears that the mine is not operated. The superintendent of the mine testifies that a ditch eight feet wide and five deep, with a grade of three-fifths of an inch to the mile, will carry about 9,000 inches of water, miners' measurement,—four and one-half times as much water as defendant's mine uses. This is a fact which admits of exact information; the formula for this measurement is given, and there is no dispute about it. Hansen, the former owner of defendant's mine, testifies that, when there is no storm, Democrat creek carries about 25 inches of water. The plaintiff testifies that he has seen it with as much water as comes through the defendant's tunnel. This was presumably during extreme high water. The creek rises and falls suddenly. It will fall from the freshet stage to ordinary water in "a day or two." The present dimensions of the creek through plaintiff's place, according to his testimony, are as follows: Width 10 feet, average depth $2\frac{1}{2}$ feet. George, a witness for plaintiff, called to testify to the dimensions of the channel from measurements made by him, gives the narrowest measurement at 10 feet and the minimum depth at 3 feet. From these dimensions there can be no question but that the ditch, when in repair, will carry the water used in the mine and the creek water during ordinary winter stages. According to King, the superintendent of the mine, the grade of this ditch is as great as is desirable in ditches of that size.

While there will be subirrigation from such a ditch, yet I am convinced that the flooding complained of is not the result of subirrigation, but of breaks in the ditch through want of repair. It is a matter of common knowledge that mining and irrigating ditches are success-

fully maintained in Southern Oregon and Northern California, and that they are common throughout that region. It is in itself extremely improbable that plaintiff's farm is so exceptional in its character that water cannot be carried through it by means of a ditch. During March and April, and earlier, at the time the witnesses in the case examined this farm, much water was running out of Democrat gulch through a sluice in the side of the channel already mentioned. This break could have been easily repaired. The wet and boggy condition of the adjacent land, if it was in that condition, indicated nothing as to the extent of subirrigation from the broken ditch.

Before starting the mine, the superintendent offered to levee all the low places on plaintiff's land so that the water could not get out of the ditch, and offered to pay \$50 per acre for the land occupied by the ditch, but both these offers were refused, and the plaintiff testifies that he would not permit the defendant to repair the ditch through his land. The question which elicited this answer was objected to by his attorney upon the ground, among others, that such permission, if granted, would enable the defendant in the course of time to acquire a right to do so. The plaintiff afterwards, in answer to a question, said that if the defendant should waive any right acquired by such permission, still he would not allow the defendant to make repairs. Thereafter he testified that the reason why he would not permit such repairs or other work along the creek by defendant was that the defendant's mine "has such a very large water power that they themselves cannot control it at times." Neither of these reasons is a reason. A right that is exercised in plaintiff's interest and for his protection can never be adverse; and if there is anything to justify an opinion that the 2,000 inches of water employed by the mine, added to the usual flow in Democrat gulch, with the mine shut down in periods of feshet, would at times get beyond defendant's control, the plaintiff could not be injured by such control as it is possible for defendant to keep under the circumstances. And, as already appears, if Democrat gulch is put in a state of good repair, it will take care of the water which it is required to carry, without injury to plaintiff. The attitude of plaintiff is uncompromising. It involves the destruction of the defendant's mining property, representing an investment of more than \$30,000. He saw the work of building the tunnel by defendant, through which the water to be used in the mine was to be brought from Althouse creek, go on at great expense, and said nothing until the work was completed, and thereupon he appeared with a witness and forbade the operation of the mine. He now says that he thought that a dredge was to be used, and that this water would not be turned into Democrat gulch. After having delayed making objection until the defendant's position became irretrievable, he ought to be willing now to give the defendant the opportunity to repair, and, if it so desires, improve Democrat gulch, so that it may be known from actual experience whether the injury complained of is irremediable. When the truth is demonstrable, why should the matter be left to the conflicting opinions of witnesses? Enough is shown to make it reasonably certain that Democrat gulch, 10 feet in width and 3 feet deep, with a minimum grade of between 7 and 8 feet in a half mile, will carry

the water coming from defendant's mine and the water otherwise ordinarily flowing therein, and it is unlikely that there will be any such subirrigation as will flood the adjacent lands in the way complained of.

The preponderance of the evidence from inspection of the ground is against the claim of injury and damage. But without this, the refusal of the plaintiff to permit the defendant to build levees along the ditch, to improve and keep it in repair, is unreasonable. His demand that the operation of the mine shall be enjoined, as the only measure of relief with which he will be satisfied, is under the circumstances inequitable. This court cannot thus destroy the defendant's property unless there is imperative necessity therefor. If, the opportunity being offered, the defendant refuses to build necessary levees along the ditch, or refuses to maintain the ditch in a state of repair, or, having done so, if these measures are inadequate to prevent injury and damage to the plaintiff, it may then become the duty of the court to grant such relief as is prayed for.

The plaintiff, upon the facts appearing, is not entitled to such relief, and the bill of complaint is dismissed.

BEAR VALLEY LAND & WATER CO. v. SAVINGS & TRUST CO.
et al.

(Circuit Court, S. D. California. July 21, 1902.)

No. 659.

1. CORPORATIONS—CANCELLATION OF DEED AS ULTRA VIRES—ESTOPPEL.

Where a corporation sold and conveyed all its property to another corporation, in part consideration for which the latter assumed payment of the grantor's debts, some of which it paid, while it renewed others, and paid the remainder of the consideration agreed upon, the grantor cannot maintain a suit in equity, after the lapse of five years, to set aside the conveyance as ultra vires, or on the ground of fraud, and recover the property, to the prejudice of third persons, who, without knowledge or notice of such claims, have acquired interests in or liens upon the property through the grantee.

In Equity. On exceptions to second amended answer and second amended cross-bill of the Bear Valley Land & Water Company.

John G. North, for complainant.

Hunsaker & Britt, for defendant Savings & Trust Company.

ROSS, Circuit Judge. A careful consideration of the second amended answer and the amended cross-bill of the Bear Valley Land & Water Company satisfies me that its case as presented by these pleadings (the averments of which are substantially the same) differs in no material respect from that presented by its second amended answer and its original cross-bill heretofore under consideration and disposed of in the opinion of this court reported in 112 Fed. 693. There is still no denial of the fact, and, indeed, now an affirmative allegation of the execution by the Bear Valley Land & Water Company to the Bear Valley Irrigation Company, on the 30th day of

¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 1556, 1557.

December, 1890, of a deed purporting to convey to the latter company all of the property now claimed by the Bear Valley Land & Water Company. The new averments are that:

"On the said 30th day of December, 1890, your orator [cross-complainant] was induced by the said Bear Valley Irrigation Company to make an attempt, and did attempt, to alienate all of its property required by it, and necessary to it, as aforesaid, to enable it to perform its public duties aforesaid; and your orator was induced by the said Bear Valley Irrigation Company, on the said 30th day of December, 1890, to adopt by its board of directors, at a meeting of the said board upon the said last-named day, the following resolutions, to wit:

"Resolved, that this company will sell to the Bear Valley Irrigation Company all its corporate property of every character, except its corporate stock, books, papers, and seal, for the sum of two million dollars, subject to all obligations of every character between this company and every person and corporation; and said Bear Valley Irrigation Company is to assume and pay all the debts of this company, and carry out all its contracts and obligations; the assumption and payment of such debts and the carrying out the contracts being a part of the consideration of the transfer of said property. And be it further resolved, that this company purchase of the Bear Valley Irrigation Company, for the sum of two million dollars, twenty thousand shares of its fully paid up common capital stock, and the president and secretary of this company are hereby authorized to make, execute, and acknowledge all muniments of title necessary to vest the title to said property in said Bear Valley Irrigation Company, and deliver the same upon receipt of (20,000) twenty thousand shares of the fully paid up common capital stock of said Bear Valley Irrigation Company."

"And on the same day the vice president and secretary of your orator, in pursuance of the said resolutions, signed, sealed, and delivered to the said Bear Valley Irrigation Company a certain instrument purporting to convey all the property of your orator to the said Bear Valley Irrigation Company, the said instrument being in the words and figures following, to wit:

"The Bear Valley Land and Water Company, a corporation organized under the laws of the state of California, does hereby grant, bargain, sell, and convey, assign, transfer, and set over, unto the Bear Valley Irrigation Company, a corporation organized under the laws of the state of California, and having its principal place of business in the city of Redlands, San Bernardino county, California, all lands and interests in lands, all water and water rights, ditches, canals, flumes, pipes and pipe lines, owned by the Bear Valley Land and Water Company, or in which it has any interest, situate in the counties of San Bernardino and San Diego, state of California; also all other corporate property of every kind owned by the Bear Valley Land and Water Company, except its corporate stock, or capital stock, its books, papers, and seal; subject to the payment by said Bear Valley Irrigation Company of all the corporate debts of the Bear Valley Land and Water Company, and the performing and carrying out of all the contracts and agreements of every kind and character of the Bear Valley Land and Water Company with any person or persons or corporation, which said debts and the performance of all contracts, by the acceptance of this instrument, the Bear Valley Irrigation Company agrees to pay, carry out, and perform. In witness whereof, the Bear Valley Land and Water Company has hereunto subscribed its name by the hand of its vice president (its president being absent), and affixed its corporate seal by the hand of its secretary, this 30th day of December, 1890, by virtue of a resolution of its board of directors regularly passed the 30th day of December, 1890, authorizing this conveyance.

"Bear Valley Land and Water Company,

"[Corporate Seal.] Ammon P. Kitching, Vice President.

"Attest: Fulton G. Feraud, Secretary."

"That the said instrument was duly acknowledged and recorded as set forth in complainant's bill. Your orator further alleges that at the time the

above resolution was adopted and the said instrument executed as aforesaid, and for some time prior thereto, and for many years thereafter, to wit, until the year 1895, your orator was under the influence, domination, and absolute control of the said Bear Valley Irrigation Company and its incorporators. Your orator further alleges that the said influence, domination, and control exercised by the said Bear Valley Irrigation Company over your orator was exercised by the said Bear Valley Irrigation Company fraudulently, and in pursuance of the fraudulent intent of the said last-named company to acquire and retain the property of your orator without the payment to your orator of any money or valuable consideration therefor, and that at the time said resolution was adopted and said instrument executed the board of directors and officers of your orator were under the said influence, domination, and control of the said Bear Valley Irrigation Company, and in the interest of the said Bear Valley Irrigation Company, and seeking to further its aforesaid attempt to secure the said property of your orator; that the said resolutions were adopted and the said instrument executed by the directors and officers of your orator solely by reason of the said influence, domination, and control of your orator and its directors and officers by the said Bear Valley Irrigation Company, and the conspiracy hereinafter set forth, and, but for said influence, domination, and control, and said conspiracy, the said resolutions would not have been adopted, nor the said instrument executed; that the purpose of the said Bear Valley Irrigation Company in so securing the adoption of the said resolutions and the execution of the said instrument by your orator was to perpetrate a fraud upon your orator, and to secure its property without valuable consideration, and in violation of law, and contrary to the purposes for which this corporation Bear Valley Land and Water Company, your orator, was created; that in the month of November, 1890, one F. E. Brown was a director of the corporation Bear Valley Land and Water Company, your orator; that the said Brown had been one of the incorporators of the corporation Bear Valley Land and Water Company, your orator, and the general manager thereof, and as chief engineer for your orator had constructed the Bear Valley dam about the year 1883, and in the said month of November, 1890, the said Brown was the principal and most influential member of the board of directors of your orator, and that the other members of the said board were guided and controlled by the said Brown; that the said Brown was one of the incorporators and the moving spirit in the Bear Valley Irrigation Company, which was incorporated in the said month of November, 1890; that the incorporators of the said Bear Valley Irrigation Company and the directors named in its articles of incorporation met for the first time, and for the purpose of organizing and electing the officers of the said board and the said company, on the 19th day of December, 1890, at which meeting the said F. E. Brown was chosen and elected vice president of the said Bear Valley Irrigation Company; that two days before the said Brown was so elected vice president of the Bear Valley Irrigation Company aforesaid, to wit, on the 17th day of December, 1890, the said F. E. Brown was a member of the board of directors of the corporation Bear Valley Land and Water Company, your orator; that on the said 17th day of December, 1890, the said Brown had under consideration the project of acquiring for the said Bear Valley Irrigation Company all of the property of your orator, and conspired with certain other members of the board of directors of your orator and other persons for the purpose of so acquiring the said property for the said Bear Valley Irrigation Company; and your orator alleges that the said Brown, in order to induce the said directors of the corporation Bear Valley Land and Water Company, your orator, to consent to the said transfer of its property to the said Bear Valley Irrigation Company, did promise and represent to the then directors of your orator that the stock which they held in the corporation Bear Valley Land and Water Company, your orator, in case the proposed transfer of property was agreed to by them and carried out, would be purchased by the said Brown and his associates at a price in excess of any price theretofore paid for the said stock, and in excess of the market value thereof, and in excess of the price which the said Brown and his associates would be willing to give for the said stock of your orator in case the said transfer should not be made; that on

the said 17th day of December, 1890, in order to give the said transfer an appearance of fairness, and in order to avoid an appearance of fraud, the said F. E. Brown resigned his directorship in the corporation Bear Valley Land and Water Company, your orator, and had F. G. Feraud chosen by the board of directors to fill the vacancy caused by his said resignation, and the said Feraud was, on the said last-named date, so elected and chosen a director in the corporation Bear Valley Land and Water Company, your orator; that the sole purpose of the said resignation of the said Brown and the said election of the said Feraud was to enable the said Brown to appear of record as interested upon only one side of the transaction of the said transfer of property, instead of appearing as interested on both sides of the same, and manipulating and controlling and directing the same, as he was in fact doing; that on the 30th day of December, 1890, at the meeting of the board of directors of the corporation Bear Valley Land and Water Company, your orator, which passed the resolution above set forth and authorized the aforesaid attempted conveyance of all the property of the corporation Bear Valley Land and Water Company, your orator, to the said Bear Valley Irrigation Company, there were present, including the said F. G. Feraud, only four out of the seven directors constituting the full board of directors of the corporation Bear Valley Land and Water Company, your orator; that the resolutions above set forth were adopted and the said attempted transfer of the said property authorized on the said 30th day of December, 1890, by the vote of the said four directors only, and that the said was never ratified by the stockholders of the corporation Bear Valley Land and Water Company, your orator, and was never presented before any meeting of the said stockholders, and the said stockholders never had any notice thereof; that the said adoption of the said resolutions and the authorization of the said attempted transfer of property were made and enacted by the said four directors of the corporation Bear Valley Land and Water Company, your orator, by reason of, in pursuance of, and because of the said fraudulent conspiracy of the said F. E. Brown with the said directors and others, and the aforesaid control by the said Bear Valley Irrigation Company, and would not have been done or authorized except for the said conspiracy, and the said promise by the said Brown and his associates to purchase the said stock of the said directors at a price in advance of the market price, as hereinbefore set forth, and the said control aforesaid.

"Your orator further alleges that the said conspiracy embraced also the further purpose to prevent the subsequent assertion by your orator of its rights, and the repudiation of the said attempted conveyance; and that the said influence, domination, and control of your orator by the said Bear Valley Irrigation Company and the said Brown, its vice president and his associates and co-conspirators, were exercised for that purpose, and with that effect, up to and until the election of the present board of directors and officers of the corporation Bear Valley Land and Water Company, your orator, in the year 1895. Your orator further alleges that the consideration for the said attempted conveyance of all the property of your orator to the said Bear Valley Irrigation Company was, as stated in the aforesaid resolutions, twenty thousand shares of the capital stock of the said Bear Valley Irrigation Company, and the promise by said Bear Valley Irrigation Company to pay all debts of your orator, and to carry out all of the contracts of your orator. Your orator further alleges that, notwithstanding its execution of its promissory notes and deeds of trust to the said Savings & Trust Company, it never received from said Savings & Trust Company the full sum of \$300,000, as set forth in its said amended bill, and your orator alleges that it never received from said Savings & Trust Company, prior to the 30th day of December, 1890, or at any other time, or at all, any more than the sum of \$150,000, and was never indebted to the said Savings & Trust Company in any amount greater than the said last-named sum; and your orator alleges upon information and belief that the said Bear Valley Irrigation Company never paid the said sum of \$150,000 aforesaid, and that the said Bear Valley Irrigation Company never paid any of the debts or fulfilled any of the contracts of your orator, the promise to pay and fulfill all of which constituted all of the consideration, other than the said twenty thousand

shares of the capital stock of the said Bear Valley Irrigation Company, for the said attempted transfer of the said property of your orator. And your orator further avers that the instrument last above set forth, and purporting to convey all the property of your orator to the said Bear Valley Irrigation Company, was and is ultra vires and void, and contrary to law and public policy, and contrary to the purposes for which this defendant corporation was created, and that the same passed no title or interest in any of the said property of your orator, and conferred no right whatever upon the Bear Valley Irrigation Company or any other person or corporation;" and the further averment that the Bear Valley Land & Water Company "is ready, willing and able to return and deliver over to such person or corporation as this honorable court may decree to be entitled to receive the same the aforesaid twenty thousand shares of the capital stock of the Bear Valley Irrigation Company, and whatever sum or sums of money were paid by the said Bear Valley Irrigation Company in consideration of the attempted conveyance to it by your orator of its property as aforesaid, and whatever sum or sums of money this court may, by its decree, declare that your orator ought to pay as a condition of the delivery to this defendant of its property hereinbefore described and set forth."

There is nothing tending to show any knowledge on the part of the complainant Savings & Trust Company of the alleged frauds on the part of Brown and the directors of the Bear Valley Land & Water Company and the directors of the Bear Valley Irrigation Company, and nothing that, in my opinion, takes the case out of the decision of the court heretofore rendered in the matter. For the reasons then given, the complainant's exceptions to the second amended answer and to the amended cross-bill of the Bear Valley Land & Water Company are sustained, without leave to further amend. An order to that effect will be entered.

HOSFORD et al. v. WAKEFIELD.

(District Court, D. Oregon. September 12, 1902.)

No. 4,602.

1. NAVIGABLE WATERS—COLLISION OF STEAMER WITH BRIDGE PIER—NEGLIGENT NAVIGATION.

A steamer with a loaded scow lashed to her side, while attempting to pass out of Lewis river during an unprecedented rise of water, when the current was the strongest known, struck upon some piling which had been put in for one of the piers of a bridge under construction, and suffered injury. The piles had been submerged by the rising water, but the officers of the boat had knowledge of their existence and location with reference to the other pier. The opening for the draw between the piers was 100 feet, while the combined length of the two vessels as fastened together was 175 feet, and the master testified that they approached the bridge at an angle of 45°, which would have made it impossible for them to pass without striking the standing pier or the piling. It was further shown that the steamer was coming down stern foremost, and was unmanageable, sometimes drifting broadside to the current. *Held*, that the failure of the bridge contractor to mark the position of the piling by buoys, or to place fenders thereat, did not render him liable for the injury sustained, which must be attributed solely to the negligence of the steamer in attempting to make the passage under the circumstances and in the manner shown.

In Admiralty. Suit to recover for injury to steamer and tow, caused by striking a bridge pier in course of construction by defendant.

Coovert & Stapleton, for libelants.

Hogue & Wilbur, for respondent.

BELLINGER, District Judge. On the 22d of November last the steamer Kehani, having in tow the scow Lincoln, loaded with railroad ties, in coming out of Lewis river struck on the north draw pier, or the piling therefor, of the bridge, in course of construction by the respondent, as contractor, for the Washington & Oregon Railway Company, causing damage to such boats, for which this suit is brought. The boats are the property of libelants. The bridge is being constructed under authority of, and from plans approved by, the war department. The complaint is that Wakefield, in the construction of said pier, drove a clump of about 50 fir piles in the channel of the river, so that the tops thereof were even with the surface of the water of the river; that on November 22, 1901, the river had risen about three feet, and had submerged such piling, so that the location of the same could not be ascertained with the exercise of ordinary care by a person navigating the river; that Wakefield negligently failed to mark the point of such submerged piling with any buoy or other mark, or to protect boats navigating the river from coming in contact with said piling by placing fenders thereat, and that the accident and damage was a result of this negligence. The scow is about 350 to 450 tons burden, 130 feet long, and 34 feet wide on deck. Her draught is six feet. The Kehani is about 100 feet in length. The opening between the pivot pier and the pier causing the damage is 100 feet in the clear. The difficulty of navigating the river through this draw is increased by the fact that at the site of the bridge, or just above it, the upriver channel bends to the north about 20°. As a result of heavy rains, the river began to rise in the morning of the day of the accident, and was rising when the Kehani went up through the draw, about 9 or half past 9 o'clock. She went above the bridge about two miles to the forks of the river, where the scow was being loaded. There was a delay of an hour or an hour and a half or so, when the steamer, with the scow in tow, started down the river. When the Kehani went up the river, the water was just about over the piles in question. The captain of the steamer, on the previous trip up the river, about the 18th of the month, noticed some piling at the north pier. He "paid no attention" to this pier as he went up on the morning of the accident, but went right through. He says that he did not see it, because it was submerged, and saw nothing to indicate its location. Gerspach, one of the libelants, who was on the boat at the time, says he will not be positive whether the piles for the pier were sticking above the water when they went up the river on that morning, but thinks some were under the water already, and that there was a riffle there then. The boat had made frequent trips through the bridge, and those navigating it knew of the existence of this pier. The water rose with such rapidity that the

river had an unusual current, as swift as had ever been known. Upon starting down the river, a drag chain was put out over the bow of the scow to check the vessel's speed. The Kehani was fastened to the port side of the scow, and started down stern foremost. The combined length of the tow and tug as fastened together was about 175 feet. The captain of the tug says that when they reached the bridge they were coming at an angle of about 45°. Other witnesses testify that they were nearly, if not quite, Broadway of the river. In either event, it was, of course, impossible to avoid striking either the pivot pier or the north pier. At an angle of 45°, an opening of 120 feet, at the very least, would be necessary. Preble, an engineer for the railroad, saw the boat and barge a half mile above the bridge. He testifies that the boat was coming down almost broadside, "swinging first one way and then the other," and he thinks she touched the north bank a time or two. Philip Lee, who resides on the river, saw the steamer coming down with the scow, "noticed the scow strike the bank, and the brush was cracking all along there." He says, "She just bumped." Frank S. Bedford, another witness, who lives on the bank of the river, testifies that the bow of the scow was bumping on the bank. Wright, a farmer living at Woodland, testifies that the barge's bow was raking the shore. W. J. Seaman, a workman on the bridge, testifies that: "She [the Kehani] come most everywhere you can imagine. She just come around a little ways one side, and then another side, and she was very nearly in all shapes; just like a thing would be floating on the water. The river was up very high, rising rapidly. It looked to me like the water in Lewis river had full charge of the boat and tow, and just was coming down wherever the current took her. Q. The captain didn't have much to do with it? A. I don't think he was in it. She was not quite broadside, but she was a little more than quartering when she struck." Larsen, another workman on the bridge, says, "Sometimes they were quartering, and sometimes broadside." Other witnesses testify to the same effect. The officers of the boat deny that the barge bumped the shore, or that the steamer was not under control. Capt. Fuller, at one time captain of the Kehani, testifies that it was very unusual to come down the river stern first. It is also his opinion that the chain dragging from the bow of the scow made the control of the boat more difficult "in this wise: if you want to make a turn, you can't make one short. You will slide along. The current will take effect on you, and give you a large sweep in a circle. You can't steer close." There is no doubt that the steamer and her tow were helpless in the swift current of the river on the day of the accident. That the chain dragging from the bow of the scow would make the control of the boat, under the circumstances, more difficult, and prevent close steering, as testified by Capt. Fuller, is obvious. While the chain would tend to check the drift of the boats, it also tended to keep the bow of the scow, with reference to the channel, in the position in which it was while approaching the bridge,—inshore. The bow of the scow was thus tied to the bottom of the river by this drag, and could not be swung out into the stream without overcoming the resistance which it made. So, too, of the attempt to back

downstream with such a tow in such a stream and current. Capt. Fuller says, in effect, that the boat would be unmanageable coming stern first downstream in such a current; that, in order to get steerageway, the boat must get headway, and "while you are getting this headway you have lost your control"; that "in coming down bow foremost you work backing all the time, and have constant control of your boat all the way down." It requires no experience in handling boats in swift water, and but little observation, to realize the truth of these statements. The excuse that is given for what was done is that, with the boat's stern upstream, there was danger that drift would get in the wheel. But if there was such drift in the river that the boat could not be properly handled, then the attempt to navigate it was negligence. The rise in the river was very rapid, probably six or seven feet in as many hours. The flood was a matter of a few hours only. The circumstances did not warrant the risk taken. The captain and Gerspach knew of the existence of the piling for the pier in question. They knew where the pier was located, that the water covered these piles when the boat went up the river that morning, and that the river was rising very rapidly. They knew that there were no fender piles, and they ought to have known that in backing downstream with the loaded scow there was danger of collision with one or both of these piers. On previous occasions, in moderate stages of water, the Kehani had run into the draw rest of this bridge,--according to the testimony, at least three times. At one time, shortly before this accident, she got crosswise of the current, and had to be pulled out with a pile driver. She had had other accidents at this place. If the captain of the Kehani did not sooner realize the danger of attempting to make the passage of the bridge draw, he must have done so very soon after starting down the river, when he found his boat and scow drifting downstream, at least part of the time, nearly Broadway on, and some of the time quartering across. It is immaterial whether he went bumping the shore or not. He had no control of his craft. The combined length of the scow and steamer made a total length of about 175 feet. The captain himself testifies that he was half Broadway, or at an angle of about 45°, when he struck the pier. In that position it was impossible to get through a clear opening of 100 feet, and that was the extent of this opening, and the captain knew it. The steamer struck the piling about opposite the fire box, about 20 feet from the bow of the steamer, and 90 or 95 feet from the bow of the scow. The captain did not choose this position. It was a matter beyond his control. There is no question about it. He was guilty of negligence in attempting to get out of the river under the circumstances. Whether, if there had been fender piles above the pier in question, he could have cushioned on them, and swung around through the draw, is not material. The absence of such piling, the existence of the pier, and the exact condition of the bridge and work were at all times known to the captain and the mate, one of the owners of the Kehani. The rule which requires a submerged obstruction to navigation to be buoyed does not apply. Such marking is to give notice. Here there was notice. The officers of the boat knew all that a buoy could have indicated.

The site of the bridge and the pivotal pier were plainly marked. The site of the next pier on the north was known by its relation to the other work, if not otherwise; and some of the piles at the lower end of the pier were still above water. So far as information of the location of the pier was necessary to enable the captain of the Kehani to keep off it, he had it. What he needed, according to the testimony of libelants' witnesses, was a fender upon which to cushion; but there was no duty imposed upon the respondent towards those navigating the river to provide this. Such piling would have been a reasonable precaution for the protection of the pier, while in course of construction, from injury from driftwood, or from such accidents as that in question. But there was nothing to indicate to the contractor that in the navigation of this part of the river boats must have a fender to bump against Broadway, from which they must be swung or pulled around through the draw opening; and, if there was, it does not follow that it was the duty of the contractor to provide it. And if this was a reasonable requirement, it would not be expected, at such a stage of the work, and when the piling for the pier might be reasonably expected to perform that service, that anything further was required. Such a rise and such a current in the river appear to have been unprecedented. The river rose at the rate of at least a foot each hour. A witness who particularly noted the fact testified that it rose six inches in ten minutes. Four witnesses long acquainted with the river—one of them for 30 years—testify that the current was the swiftest known. The attempt to back down with a loaded scow under such circumstances was an act of unaccountable imprudence. It is not surprising that the scow and tug went bumping along the shore, and, missing the opening by a little less than a hundred feet, crashed nearly Broadway onto the pier. The libelants were not only negligent, but recklessly so.

The libel is dismissed, without costs.

FIDELITY & CASUALTY CO. v. HUBBARD.

(Circuit Court, W. D. Virginia. October 3, 1902.)

1. UNITED STATES COURTS—REMOVAL OF CAUSE—PETITION—TIME FOR FILING.

24 Stat. 554, and 25 Stat. 435, regulating the removal of causes from state to federal courts, declares that a person may file the petition to remove in the state court at the time or at any time before the defendant is required by the laws of the state or rules of the state court to answer or plead to the declaration. Code Va. 1887, §§ 3260, 3284, provide that no plea in abatement can be filed after the defendant has demurred, pleaded in bar, or answered to the declaration or bill, nor after a decree nisi or conditional judgment has been entered at rules. *Held*, that the removal statute required the petition to be filed at or before the time when the defendant is required to file a pleading of any character, and, where the petition was not filed until after a judgment nisi had been entered at rules for want of an appearance, it was too late.

Green, Withers & Green, for complainant.
Peatross & Harris, for defendant Hubbard.

McDOWELL, District Judge. On a petition praying that R. M. Hubbard be enjoined from proceeding with an action at law against the Fidelity & Casualty Company in the corporation court of Danville, Va. It appears that on May 9, 1902, R. M. Hubbard, a citizen of Virginia, sued out from the office of the clerk of the corporation court of Danville a summons requiring the company, a citizen of New York, to appear at first June rules, 1902, and answer a declaration in trespass on the case, the damages being laid at \$4,000. The summons was served in due time. At first June rules the declaration was filed, and the common order was entered. At second June rules the common order was confirmed and writ of inquiry ordered, as the company had failed to appear. The first term of the court at which a defense on the merits could be made commenced on July 7, 1902. On that day the company filed its petition for removal to this court on the ground of diverse citizenship, which is in due form. On the ground that the petition was offered too late, the corporation court refused to accept it. The time for filing the petition and bond under the act of 1875 (18 Stat. 471) was "before or at the term at which said cause could be first tried and before the trial thereof." The language of the act of 1887 (24 Stat. 554) and of the act of 1888 (25 Stat. 435) is as follows:

"* * * may * * * file a petition in such suit in such state court at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. * * * It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit. * * *"

Under the Virginia statute (Code 1887, §§ 3287, 3288) the office judgment in common-law causes does not become final until the last (or fifteenth) day of the next following term. And prior to such day of the term the defendant can interpose a plea to the merits. The filing of such plea sets aside the office judgment. In chancery causes the decree nisi is taken on the return day of the writ, and at the next rule day the decree pro confesso is taken (Code 1887, § 3284), but by section 3275 answer may be filed at any time before final decree.

The question to be decided turns on the proper construction of the act of congress of August 13, 1888 (25 Stat. 435). Does the language of the act refer to the time when a pleading to the merits is required to be filed, or to the time when dilatory pleas are required to be filed? If this question could be treated as an open one, there are reasons, aside from the very short time given a defendant to prepare and file removal papers, which lend force to the argument that the former is the true construction of the act. The act of 1875 clearly allowed the petition for removal to be filed at the trial term. If congress, in enacting the statute of 1887, and in correcting it by the statute of 1888, had intended to make a radical change in the removal practice, it seems that it would have plainly indicated such an intent. Yet the language in the later statutes is susceptible, and easily susceptible, of being construed to mean that the time for filing the petition and bond is the time when pleadings in bar must be filed. Again, the statute requires that the petition and bond are to

be presented in the state court, not in the clerk's office, and not before the judge thereof. Under the Virginia practice (and I think this is true in many of the states) the time for filing dilatory pleas is during the vacation of the court, and the place is the clerk's office. Congress might be presumed to have known this, and, if it had been the intention that the petition for removal must be filed at the time that dilatory pleas are due, it would seem to be fairly argued that provision would have been made for offering the petition and bond to the judge of the state court in vacation, or for filing them in the clerk's office. It is not conclusive against this argument that the intent was that the federal court should be the one to pass on the validity of dilatory pleas as well as of pleas in bar. Under the construction requiring the petition and bond to be filed at or before the time when pleas in bar are due, the defendant, by filing the removal papers on the return day of the writ, could secure a hearing in the federal court on his dilatory pleas. And by failing to file his petition until term time it is difficult to find in the statute any intent that he should thereby lose the right to have the federal court try the cause on its merits. However, there are dilatory pleas that are technically known "pleas to the declaration." For instance, for variance between writ and declaration. 4 Minor, Inst. (3d Ed.) pt. 1, p. 754. Hence it is clear that the statute is capable of being construed as meaning the time when the earliest pleading of any kind is due. But the question is not, as I think, open to construction by a subordinate federal court. In *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, which went up from West Virginia, the facts were the same as in the case at bar. The defendant did not appear or plead on the return day of the writ, nor at the next rules, but at the next term of court—not having filed any pleadings—it presented its petition for removal and bond. The court held that the defendant was not a citizen of West Virginia, that its petition for removal was filed too late, and that, as no objection to the removal had been made in the lower courts, this objection had been waived. The language of the opinion is in part as follows:

"It was therefore filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ. Was this a compliance with the provision of the act of congress of 1887, which defines the time of filing a petition for removal in the state court? We are of opinion that it was not, for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court, or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on Pleading, to 'oppose or answer' the declaration or complaint which the defendant is summoned to meet. Steph. Pl. (1st Am. Ed.) 60, 62, 63, 70, 71, 239; Lawes, Pl. 36. The judiciary act of September 24, 1789 (chapter 20, § 12), required a petition for removal of a case from a state court into the circuit court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat. 79. The recent acts of congress

have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. * * * Construing the provision now in question, having regard to the natural meaning of its language and to the history of the legislation upon this subject, the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States."

In *Mahoney v. Association* (C. C.) 70 Fed. 513, Judge Simonton, holding the above opinion to be obiter, ruled that the petition and bond may be seasonably filed at the rule day next succeeding the return day of the writ. And the reasoning in the opinion covers the facts in the case at bar.

In *Wilson v. Railroad Co.* (C. C.) 82 Fed. 15, the subpoena was issued and served in October, returnable to November rules. At the November rules the bill was filed, but the decree nisi was not taken. At December rules the defendant filed its petition for removal. Judge Jackson, also holding the opinion in *Martin's Adm'r v. Railroad Co.* to be obiter, held that the petition was filed in due time; reasoning that the time intended by the removal statute is the time when pleas to the merits must be filed. This ruling was affirmed by the circuit court of appeals. 41 C. C. A. 215, 99 Fed. 642. But apparently this point was not pressed on argument before the court, and does not appear to have had the full attention of the court.

If the supreme court had left the question here, I should feel at liberty to regard the opinion in *Martin's Adm'r v. Railroad Co.* as a dictum, because not necessary to the decision of that case, and to hold that the petition for removal can be filed at the term of court when pleas in bar are first due. But the supreme court has rendered at least three subsequent opinions which cannot be disregarded. They are *Goldney v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; and *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

In *Goldney v. Morning News*, the opinion reads in part:

"It has been held by this court, upon full consideration, that the provision of this act * * * requires the petition to be there filed at or before the time when the defendant is * * * required to file any kind of plea or answer, whether * * * in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, * * * because as this court said * * * the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States." *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311."

In *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, this part of the opinion in *Martin's Adm'r v. Railroad Co.* is again quoted. And in *Powers v. Railway Co.*, 169 U. S. 98, 18 Sup. Ct. 266, 42 L. Ed. 673, it is said:

"Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense whatever in its courts."

The reason that inferior courts are not bound by obiter dicta of the superior courts is that expressions of opinion thrown off by the way are presumably not deliberate and settled conclusions, such as are intended to control in future cases. But the above-quoted opinion in *Martin's Adm'r v. Railroad Co.* cannot now be regarded as a dictum. It was rendered "upon full consideration" by an undivided court, and has ever since been treated by the supreme court as its final and conclusive construction of the removal statute of 1888. See, also, *Fidelity Trust & Safety Vault Co. v. Newport News & M. V. Co.* (C. C.) 70 Fed. 407; *First Littleton Bridge Corp. v. Connecticut River Lumber Co.* (C. C.) 71 Fed. 225; *Collins v. Stott* (C. C.) 76 Fed. 613; *Frink v. Blackinton* (C. C.) 80 Fed. 306; 18 Enc. Pl. & Prac. 288.

In this state no plea in abatement can be filed after the defendant has demurred, pleaded in bar or answered to the declaration or bill, nor after a decree nisi or conditional judgment at rules. Code 1887, § 3260; Acts 1897-98, p. 198. By section 3284 of the Code of 1887, the decree nisi or conditional judgment is taken, if the defendant has not appeared, and if the bill or declaration has been filed, on the return day of the writ, if then executed. In the case at bar the writ was duly executed and returned to first June rules, and at that time the declaration was filed. The defendant did not then enter an appearance. Consequently the time when a plea in abatement was due was the first June rules. At this time the petition for removal and bond must have been filed. It follows that this cause is properly pending in the corporation court of Danville, and that the injunction must be refused.

In this case no bond was filed at the time the petition was offered. It is, of course, unnecessary to consider the bearing this fact may have, or the reasons alleged in excuse for the failure to comply with this provision of the removal act. Nor have I considered the propriety of issuing an injunction where the removal papers have been properly filed.

In re MINER.

(District Court, D. Oregon. September 12, 1902.)

No. 267.

1. BANKRUPTCY—FINDINGS OF REFEREE—REVIEW

The findings of fact of a referee in bankruptcy are not conclusive, and will be set aside where the court is of opinion that they are manifestly erroneous.

2. SAME—EXCEPTIONS.

Where the specific question of the correctness of a referee's findings is certified to the district court for decision on petition of a party, no formal exceptions to such findings are required to render them reviewable.

¶ 1. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

3. SAME—DISCHARGE—EVIDENCE TO DEFEAT.

Evidence considered, and held insufficient to sustain specifications of objection to the discharge of a bankrupt on the ground that he had made false oath with respect to a claim against him which he scheduled.

4. SAME—ASSIGNMENT OF CLAIM.

The form by which a claim against a bankrupt was transferred is immaterial, and cannot affect the right of the transferee to prove the claim, where it is sufficient to estop the original holder from asserting a right to it.

5. SAME—PROOF OF CLAIM BY MARRIED WOMAN.

The failure of a married woman to register a claim against her husband as her separate property under the law of Oregon does not affect her right to prove the same against his estate in bankruptcy.

In Bankruptcy. On petition for rehearing. For former opinion, see 114 Fed. 998.

BELLINGER, District Judge. The petition for rehearing is in effect a reargument of the questions heretofore considered and decided by the court, and a review of the court's opinion in the case. A single new question is presented. It is now contended that the finding and decision of the referee are conclusive. The jurisdiction of this court in bankruptcy proceedings, like that in equity, extends to the examination of all findings made in the case. If the findings of the referee appear to be erroneous, they will be set aside. It is not to be supposed that there is such sacredness in the findings of the referee that the district court will not examine the testimony in support of them, and, becoming satisfied that the referee has erred, will not correct the error. It is quite needless to argue that the district court will not reverse the findings of fact of the referee unless the same are manifestly erroneous. This goes without saying. In this case the order made is upon a conclusion that the findings of the referee are manifestly erroneous. But it is contended that such findings are conclusive on review where no exceptions are filed to the report, and *In re Carver*, 113 Fed. 138, 7 Am. Bankr. R. 539, is cited to that effect. That was a case presented on certificate of the referee. I doubt whether in that case, as in this, the specific question as to the correctness of the findings involved was certified to the district court for its decision. Where such a question is certified, I am of the opinion that an exception is not necessary. An exception is a form of objection, and the certifying of the question for review involves specific legal objection by the party aggrieved. As a matter of fact, the questions presented were certified upon the petition of the complaining party, in which she formally excepts to the orders in question. "This, your petitioner, hereby excepts to said orders," etc., is the language of the petition, which concludes with a prayer that such order be certified to the district court for review, which was accordingly done.

In addition to the several matters which the petition for a rehearing alleges the court did not consider, it is alleged that the court "in its opinion says nothing of the charge made by the creditors of the false claim presented by the bankrupt in favor of H. E. Smith." In his petition of bankruptcy, Miner made the following statement as to this claim:

"The amount of this claim is not known to the petitioner. The indebtedness was contracted at Merrill, Oregon, and Klamath Falls, ever since 1897. No statement has been furnished, no settlement had. It is for merchandise sold to petitioner."

The objecting creditors say that the bankrupt, by leaving out the amount of the debt due H. E. Smith, "and failing to state the truth about said claim, unlawfully and fraudulently permitted the said H. E. Smith to file and present for allowance against his, the said Miner's, estate, a claim in the sum of \$524.29; that Miner well knew, but fraudulently withheld such knowledge, with intent to mislead these, his creditors, now objecting, that there was no greater or further amount of said claim upon or for which he was in any wise liable to the said Smith than the sum of \$66.22, notwithstanding he, the said Miner, suffered and permitted said claim to be filed in the said sum of \$524.29; that Miner withheld the fact that he and Smith had, about July, and afterwards in August, 1897, a settlement and accounting, and that there was only then to come to the said Smith the sum of \$55.39," etc. The petitioning creditors seem to think that the fact of an accounting between the bankrupt and Smith in 1897 is proof that the former committed perjury when he stated in 1900 that he did not know the amount of his debt to Smith. The bankrupt stated that this debt was for merchandise sold since 1897, and it is not denied that there were such dealings between the parties between 1897, the date of the accounting, and 1900, when the petition in bankruptcy was filed. It is true that the court did not specifically consider or particularly mention, in the opinion heretofore rendered, several of the charges of fraudulent and criminal conduct alleged against the bankrupt to prevent his discharge. The court did examine these charges with some minuteness, and it discussed in the opinion what it thought were the more serious ones. It suggested, in effect, that the character of the remaining charges was shown in what was said of those that were discussed. The objections of the creditors included some 24 or more charges of perjury against the bankrupt, of which, as already stated, only the more serious ones, as they appeared to the court, were gone into specifically in the opinion. The court did not feel called upon to discuss all of these charges, or more of them than was necessary to show the character of the complaint as a whole. It did not, for instance, think it necessary to say of the charge above referred to (what is obvious enough) that the mere statement by the creditors that the bankrupt committed perjury in saying that he did not know the amount of his debt to Smith was not to be taken as true in the absence of proof of facts and circumstances affording ground for a presumption of falsehood by the bankrupt, or that the fact of an accounting in 1897 warranted an inference of knowledge by the bankrupt of the state of the account three years later, the parties having dealings together in the meantime; nor did it seem necessary to write an opinion as to the bankrupt's conduct in "suffering" and "permitting" his creditor to file a claim for a larger amount than was actually due. It is said that this was "permitted" in order to give Smith a larger vote in electing a trustee than he was in fact entitled to have. It does not appear that the bankrupt's interests were

affected by the selection of the trustee, or that his permission was necessary to enable Smith to file his claim, or that it could have made the slightest difference in the election of the trustee, or to any interest of the bankrupt, whether he left the amount of Smith's debt blank with the explanation made by him, or inserted the amount finally ascertained to be due.

The question of the assignment by Smith, the petitioner's father, to her, is reargued. The question is a mere technicality, and does not deserve serious consideration. Smith's certificate is in the record, certifying that he has heretofore assigned the claim in question to his daughter. This certificate is as effective as an estoppel against Smith as any formally executed assignment could be. The form of the transfer to the daughter is of no consequence. The statute of frauds is invoked upon the assumption that there can be no transfer between parties of a right or interest, except the formalities required, where an agreement for a future sale is relied upon, are complied with. The section of the statute which requires every assignment of an existing trust in lands, goods, etc., to be in writing, etc., is appealed to. It is stated in the petition for rehearing that this court has not considered the failure of the wife to register the amount of her claim as her separate property, as though a wife is incapable of ownership without registry. A married woman may register her property, and such register is *prima facie* evidence of her ownership. But the registry of such property is not conclusive either way as to the wife's right. It is said that Mrs. Miner allowed the amount of the assigned claim to remain in her husband's business, and that she took the chances of that investment, etc.; that the court has not considered the point made that the legal effect of the husband's use of the wife's property under the circumstances of this case barred her from any claim. But is it not clear that this is not a case of putting money or property into the bankrupt's business, or allowing him the use of property? The petitioner, as to this, is a creditor, like all other creditors. If her claim is an investment, then the demands of the other creditors represent investments. But there is no investment in the premises, nor is it a case of property used by the bankrupt. The petitioner is a creditor standing on the same footing with other creditors, and having equal rights with them. The only pertinent question in the case is that of the *bona fides* of her claim, and as to that no question is made, nor is there room for question.

The petition is denied.

SMITH v. DAY et al.

(Circuit Court, D. Oregon. September 12, 1902.)

No. 2,307.

I. APPEAL—REVERSAL—EFFECT OF REMAND FOR NEW TRIAL.

Where the opinion of the appellate court determined every issue upon which plaintiff based his right of recovery adversely to his contention, it cannot be inferred from the fact that a judgment against him was reversed because of errors on the trial, and the cause remanded for a new trial, that such court intended to hold that the evidence was sufficient to sustain a verdict in his favor.

2. NEGLIGENCE—FAILURE TO GIVE NOTICE OF FIRING BLAST—IMMATERIALITY.

A plaintiff who was injured by a rock thrown by a blast made by defendants after he had gone on board a boat lying at a nearby wharf, as a passenger, cannot recover for the injury on the sole ground that defendants were negligent in failing to give notice of the intended firing of the blast, where it appears from his own testimony that he heard blasting, and understood that it was being carried on, when he went on board, some half an hour or more before the accident.

At Law. On motion for new trial.

A. S. Bennett and G. W. Allen, for plaintiff.

John M. Gearin and W. L. Boise, for defendants.

BELLINGER, District Judge. The plaintiff was a passenger on board the boat of The Dalles, Portland & Astoria Navigation Company, lying at a wharf on premises reserved by the government for the locks then in course of construction at the Cascades of the Columbia river. With other passengers en route for Portland, he went upon such boat shortly before or about the time the contractors in charge of said work began firing blasts in the rock excavations that were being made, and was struck on the head by a rock from one of the blasts, which crashed through the top of the boat into the forward cabin, where he was. The case has been heretofore twice tried, and the facts in greater detail will be found in the opinion of this court in 86 Fed. 62, and in the opinion of the circuit court of appeals in 40 C. C. A. 366, 100 Fed. 244, 49 L. R. A. 108. On this trial the jury found for the plaintiff, and assessed his damages at \$2,000. The defendants move for a new trial because of alleged errors of the court in giving and refusing certain instructions, and of the insufficiency of the evidence to sustain a verdict.

The negligence relied on consists in the alleged failure of the defendants to give plaintiff notice that blasts were about to be fired, in their failure to cover such blasts, and in firing them at said time within such close proximity to the boat and its passengers. In its decision of the case, the circuit court of appeals says that the instructions of this court in submitting to the jury the question as to whether the defendants were in duty bound to cover their blasts, or to await the departure of the boat before firing them, were perhaps more favorable to the plaintiff than they should have been, and the court agreed with the statement of this court on the motion for a new trial that:

"The plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in which they were engaged. These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care,—such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care."

In view of this intimation and holding by the appellate court, the only ground of negligence insisted upon on the last trial was the alleged failure of the defendants to give notice that blasts were about to be fired, and the case for the plaintiff was submitted to the jury upon that single question. The plaintiff testified on the first trial

that when he got to the boat he heard blasting, and understood that it was being carried on, and this is a fact conceded in the case. With this information, he went upon the boat and played a game of cards, after which he talked with the steward for a few minutes, and then sat down in the forward cabin and went to sleep. While sitting in that position, he was injured. This admission of knowledge disposed of the question of notice, and left nothing to be submitted to the jury.

It is argued for the plaintiff that the court of appeals must have concluded, from the fact that the case was remanded for a new trial, that there was evidence sufficient to sustain a verdict. But there can be no such implication contrary to the finding and conclusions stated in the opinion. If the defendants were not required to cover their blasts, and if they were not required to delay firing them while the boat remained in proximity to the blasting, and if the plaintiff heard blasting when he went on the boat, and understood that it was being carried on for such a length of time before the accident as enabled him to play cards for about 15 minutes, and afterwards talk with the steward for a few minutes, and then go to sleep, what was there for the jury to find? The case has been twice tried, out of deference to the order remanding it for a new trial, and contrary to the opinion expressed by this court on the first motion for a new trial that there was and is nothing to try. It is not legally possible that this case was sent back for retrial to determine whether the defendants gave the plaintiff notice of what he himself says, and the appellate court says, he heard and understood. If the matter seemed in the least doubtful, I should feel disposed to deny this motion in order that it might be speedily determined in the court of appeals. There is the further fact that, on the trial preceding the last, the plaintiff's attorneys, in arguing the question of contributory negligence to the jury, stated, in effect, that the plaintiff was in as safe a place as he could get at the time of the accident; that it was not reasonable to expect that he should seek safety on the shore; and that there was no more safe place on the boat than the place he was in. And I am of the opinion that such is the fact. It is in evidence that the other passengers on the boat went into the forward cabin, where the plaintiff was, to get out of danger from flying débris. It does not appear that any other place was at any time resorted to for such purpose, and if the question of prudence is to be decided by the standard of the average conduct of those similarly situated, as it should be, it must be presumed that the plaintiff, unless the fact that he went to sleep tends to prove the contrary, was in the exercise of reasonable care, and that, if the defendants had exercised the active diligence in his behalf which plaintiff claims was due him, it is not reasonable to suppose that his situation would have been altered.

The motion for a new trial is allowed.

UNITED STATES v. BALTIC MILLS CO.

(District Court, D. Connecticut. September 30, 1902.)

No. 1,350.

1. ALIENS—CONTRACT LABOR LAW—ADVERTISEMENT PROMISING EMPLOYMENT.

Defendant published in an English newspaper the following advertisement: "Wanted. First-class weavers, on fine combed work, in one of the most beautiful villages in Connecticut, U. S. A. First-class weavers can earn per week 35s. to £2. Families preferred. Reasonable rents in 6-room cottages. * * * None but first-class weavers and respectable people need apply." Held, that such advertisement did not "promise employment," within the meaning of the amendment of March 3, 1891, to the alien contract labor law, and would not support an action to recover the penalty imposed by such law for encouraging the immigration of aliens into the United States.

Action to Recover Penalty. On demurrer to complaint.

F. H. Parker, U. S. Atty.

W. A. Briscoe, for defendant.

PLATT, District Judge. This is an action to recover penalties under Act Cong. Feb. 26, 1885, and especially under section 3 of the amendment of March 3, 1891, relating to the importation of alien labor. The first count of the complaint is all that need be quoted to set forth the plaintiff's claim as it now stands on the record. It is as follows:

"First Count.

"(1) That on the 4th day of October, A. D. 1901, the defendant printed and published and caused to be printed and published in a newspaper called the 'Cotton Factory Times,' printed and published in a foreign country, to wit, in the city of Manchester, in England, in the kingdom of Great Britain, an advertisement in the words, figures, letters, and characters following, to wit:

" 'Wanted—first-class Weavers, on fine combed work, in one of the most beautiful villages in Connecticut, U. S. A. First-class weavers can earn per week 35s. to £2. Families preferred. Reasonable rents in 6-room cottages. On line of railroad and electric cars. This is a new mill starting up. None but first-class weavers and respectable people need apply. Baltic Mills Co., H. Lawton Manager, Baltic, Conn., U. S. A.' "

"(2) That on or about said 4th day of October, A. D. 1901, one Harold Hargraves, then residing in said foreign country in or near said city of Manchester, read the said advertisement so printed and published in said foreign country by the defendant as aforesaid, and became acquainted with the defendant's promise of employment therein contained.

"(3) That said Harold Hargraves on said date was, and ever since has been, an alien owing allegiance to the king of Great Britain and Ireland.

"(4) That said alien, in consequence of said advertisement containing said promise of employment, thereafter, to wit, in the month of December, A. D. 1901, migrated to and came into the United States, and to the village of Baltic, in the town of Sprague, in said state and district of Connecticut, and since then has performed labor and service for the defendant as a weaver in defendant's cotton mills in said Baltic.

"(5) The coming of said alien to this country in consequence of the defendant's said advertisement so printed and published in said foreign country as aforesaid was and is in violation of the statutes of the United States approved February 26, 1885, and March 3, 1891 (1 Supp. Rev. St. 479, 934, respectively), and the acts in amendment thereof.

"(6) That the said defendant knowingly, and in violation of the statutes aforesaid, assisted and encouraged the said alien to migrate to this country,

in violation of said statutes, by the promise of employment held out to said alien through said advertisement, so printed and published by said defendant in said foreign country as aforesaid.

"(7) That the defendant, by reason of the facts aforesaid and in pursuance of the provisions of the statutes aforesaid, has forfeited to and become liable to pay to the plaintiff the sum of one thousand dollars as a penalty in respect to said alien.

"(8) The defendant has not paid said penalty."

To this the defendant demurs as follows:

"(1) It does not allege that the defendant prepaid the transportation, or in any way assisted or encouraged the importation or migration, of any alien or aliens, foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia.

"(2) It does not allege that the defendant assisted or encouraged the importation or migration of any alien by promise of employment contained in any advertisement printed and published in any foreign country.

"(3) It does not allege that the advertisement set forth in paragraph 1 of said complaint contained any promise of employment.

"(4) It does not appear that the advertisement set forth in paragraph 1 of said complaint, and alleged to have been printed and published, or caused to be printed and published, by the defendant, contains any promise of employment, or is in violation of the provisions of said act.

"(5) The advertisement set forth in paragraph 1 of said complaint, and alleged to have been printed and published, or caused to be printed and published, by the defendant, does not contain any promise of employment, and is not in violation of the provisions of said statutes of the United States.

"(6) Said complaint does not allege that said aliens alleged to have migrated were not skilled workmen brought to the United States to perform labor in or upon a new industry not then established in the United States, nor that skilled labor for that purpose could be otherwise obtained."

This opinion shall be confined to an examination of paragraph 4 of the demurrer:

"(4) It does not appear that the advertisement set forth in paragraph 1 of said complaint and alleged to have been printed and published, or caused to be printed and published, by the defendant, contains any promise of employment, or is in violation of the provisions of said act."

The other questions raised by the demurrer are quite technical, and, if sustained, might be obviated by amendment. Let us examine this phase of the contention with some care. The title to the original act (23 Stat. 332) indicates with admirable brevity and clearness the mischief which was aimed at when the act was passed. It was called by its makers "An act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories and the District of Columbia"; but the law failed in some measure to destroy the alleged mischief which it sought to remedy. In one way and another the federal courts stripped it of much of its anticipated efficacy, and so further efforts were indulged in by our law-making body to lessen the imagined iniquity; but still both the administrative and legislative branches of our government, as well as the public at large, unite in terming it the "Alien Contract Labor Law." Hoping to further facilitate the enforcement of this law, the amendment of March 3, 1891, was passed, and under section 3 of that amendment this action

was brought. Here is an attempt to suppress advertisements in foreign newspapers which promise employment, and it is provided that any alien who comes into this country in consequence of such an advertisement shall be considered to have come under the contract which the original act endeavored to prevent. But it still remains true that the advertisement which encourages him to come must "promise employment," and so, to my mind, the case turns upon the construction which the courts shall give to those words. The statute is highly penal, and should be strictly construed. I do not understand that there is any contention here over that proposition, but, in any event, I should so hold. To give the words the sense which the district attorney suggested would compel us to abandon not alone the strict and narrow construction which any legal definition entails, but, going beyond that, to forsake even a moderately broad view of their meaning, and would bring us directly into the realm of unsubstantial hope and rainbow chasing with a vengeance. It is not conceivable that any sane man of full age, after studying the picture which the advertisement presents, alluring though it may be, could force himself to the point of tearing up his household lares and penates, however humble, and transplanting them, with his family and himself, to the attractive hills of Baltic, notwithstanding, its "6-room cottages" and "electric cars." Any vestige of prudence would not only suggest, but demand, that a letter of inquiry should be sent to "H. Lawton, Manager," and a far more definite promise exacted than any which is even hinted at in the advertisement itself. It is probable that the government has no more definite knowledge than that which it has spread upon the record. If it has not, then, in my opinion, it has no case.

The demurrer is sustained. If the plaintiff can amend its pleadings so as to sustain its case in the light of my views as herein expressed, it may do so within 15 days. If not, let the bill be dismissed.

IN RE SMITH.

(District Court, D. Connecticut. September 29, 1902.)

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—WAIVER OF OBJECTIONS TO JURISDICTION.

An alleged bankrupt, who files a motion to dismiss the petition against him, and appears in court to testify in support of allegations made therein, thereby waives any merely technical objection to the jurisdiction of the court over his person and estate.

In Bankruptcy. On motion for rule to set aside and dismiss involuntary petition.

Hotchkiss & Asher and D. Strouse, for petitioners.
Chas. B. Matthewman, for respondent.

PLATT, District Judge. This is a petition in involuntary bankruptcy, which, in most respects, is free from criticism. The respondent appeared, and on the 14th day of August, 1902, filed his motion asking to have the petition dismissed for the following reasons:

"(1) That the petition is not signed and verified in the manner prescribed by law.

"(2) That the petition was not filed in duplicate, as required by the bankruptcy act.

"(3) That no order to show cause upon the creditors' petition has been served on the respondent.

"(4) That said petition was not served on the respondent five days before the return day thereof, to wit, said petition was not otherwise served upon the respondent than by the marshal's leaving with the respondent a paper purporting to be a copy of said petition for the alleged bankrupt on the 31st day of July, A. D. 1902."

The petitioning creditors, on September 6, 1902, filed the following reply:

"(1) Paragraphs 1, 2, 3, of said motion are denied. (2) In answer to paragraph 4 the petitioning creditors say: (a) The subpoena dated July 25, 1902, summoning the alleged bankrupt to appear before said district court at Hartford on August 4, 1902, was duly served upon the alleged bankrupt on July 26, 1902, and at the same time a copy of said creditors' petition was placed in the hands of said alleged bankrupt by the officer serving said subpoena. (b) On July 31st, the officer who made the service described in paragraph 'a' of this answer made further service upon the alleged bankrupt by leaving in his hands a duplicate of said creditors' petition."

On the 22d of September, 1902, the respondent filed the following paper:

"In the District Court of the United States for the District of Connecticut.

"In the Matter of Herman E. Smith, Alleged Bankrupt.

"Subsequent to the filing of a motion to set aside and dismiss the petition on the 14th day of August, 1902, respondent alleges the following facts as having occurred, and as additional grounds for the dismissal of said petition:

"(5) On the 2d day of September, 1902, the said Stoddard, Gilbert & Company returned an action to the court of common pleas for New Haven county against J. F. Clouse and respondent for the same promissory note and claim as alleged in said petition as due them from respondent, and said action is now pending in said court. A copy of said action is hereto annexed, and marked 'Exhibit A.'

"(6) On and before the 27th day of May, 1902, John H. Kearney was proprietor of a grocery store situated on Edgwood avenue, in said New Haven, and is the same Kearney mentioned in creditors' petition.

"(7) On said 27th day of May, 1902, the said John H. Kearney was duly adjudged a bankrupt upon a petition filed by him in this court, and the matter was referred to Henry G. Newton, Esq., one of the referees in bankruptcy of this court.

"(8) On and before the 15th day of August, 1902, the said petitioner the F. C. Bushnell & Company made proof of claim against the said estate of John H. Kearney in bankruptcy, as aforesaid, to the amount of \$228.48, and is the same claim as alleged in said creditors' petition as due the said the F. C. Bushnell & Company from the respondent.

"(9) That on the 15th day of August, 1902, the said petitioner the L. C. Bates Company made proof of claim against the said estate of John H. Kearney in bankruptcy, as aforesaid, to the amount of \$142.60, and being same claim as alleged in said creditors' petition as due the said the L. C. Bates Company from respondent.

"(10) On said 15th day of August, 1902, the said referee did order a dividend of twenty-seven per cent. (27%) to be paid upon the claims of the F. C. Bushnell & Company and the L. C. Bates Company.

"Herman E. Smith.

"Subscribed and sworn to before me this 22nd day of September, A. D. 1902.

"Omar W. Platt,

"Commissioner of the Superior Court for New Haven County."

On the 26th day of September counsel for all parties were before the court, and were fully heard. Counsel for respondent produced the alleged bankrupt in person, who, after being duly sworn, took the witness stand, and was interrogated as to the jurisdictional questions in dispute, and was further offered in support of the facts alleged in the paper filed September 22d. The court, being of the opinion that such facts, if of any value, should be presented in answer to the allegations of the petition, declined to receive the testimony of the witness at that time, but gave, both at the hearing and since, patient attention to the points presented by counsel for the respondent in support of his application to dismiss the petition for lack of jurisdiction.

It seems unnecessary to enter into an elaborate review of the points made and the reasoning advanced pro and con relating to those points. When counsel for respondent filed the paper of September 22d, and supplemented that action by bringing the alleged bankrupt into the presence of the court for the purpose of strengthening, by his oath, certain allegations, which are valueless, unless they go to the merit of the controversy, it seems very clear that any fact which goes simply to the question of whether the court had acquired jurisdiction of the person and estate of the alleged bankrupt was waived by the alleged bankrupt himself.

Let an order be entered denying the motion, with costs.

UNITED STATES v. McINTOSH et al.

(District Court, D. Oregon. September 12, 1902.)

No. 4,538.

1. **CONTRACTS—CONSTRUCTION—STIPULATION FOR LOAN OF ARTICLES FOR USE.**
Under a stipulation by the United States in a contract to lend the contractor certain articles for use in performing the contract, the same to be returned in good condition, or replaced if lost or damaged, the contractor cannot be required to replace articles because of the ordinary wear incident to the use contemplated, but only such as are damaged in excess of such wear, since any other construction of the agreement would make it one of sale, and not of loan.

John H. Hall, for the United States.
James Gleason, for defendants.

BELLINGER, District Judge. This is an action to recover for the value of certain articles supplied to Robert McIntosh, contractor, to launch the Columbia river light vessel No. 50, that had stranded near Mackenzie Head, in Washington state, and not returned by him, and for damages, for other articles so furnished which were returned in a damaged condition. It was stipulated in the contract between McIntosh and the government that the latter should loan to the former such moorings, chains, and other appurtenances as said McIntosh might think would be available for the launching of said vessel, but upon the express condition that said appurtenances were to be returned to plaintiff in good condition, and that such articles as

were lost or damaged should be replaced. In pursuance of this agreement McIntosh received 3,277 pounds of Manilla rope which was not returned, and 4,372 pounds which was returned in a damaged condition. The damaged rope is unfit for the purposes of the government. Nothing but first-class rope is ever issued, and it is changed as often as once every three months, and sometimes oftener. Nothing but new rope is ever issued. The claim on account of damage to the rope is the invoice price, 9.55 cents per pound. The testimony on behalf of the government is to the effect that the damage to the rope is probably not more than the wear and tear for that sort of work. Such being the case, the question arises, what is meant by the agreement to loan appliances to the contractor to be returned in good condition, and replaced when damaged? If the ordinary wear of the rope for that work renders it valueless, and renders the borrower liable for the purchase price, then the loan was not a loan in effect, but a sale of the rope. My conclusion is that by the agreement to loan for a particular use the borrower, under the contract, did not become liable for the ordinary wear incident to that use,—a thing necessarily within the contemplation of the parties when the agreement was entered into,—but became liable only for such damage as is in excess of the use stipulated for. The rope becomes secondhand and of no value to the government by any use, but the agreement to loan was for use. If it necessarily involved payment for the use, it was not a loan; and, if the use necessarily involved the entire value of the thing used, the transaction amounted to a sale of the loaned articles. The government is therefore not entitled to anything on account of wear and tear resulting from the use of the rope returned, and for the rope not returned it is entitled to its value as secondhand rope. This value in the market is from one to five cents per pound,—say three cents per pound. The amount for which recovery is allowed on account of 3,277 pounds of rope not returned is \$98.31. The defendants are charged with 45 fathoms of 1½-inch chain, \$234.63, and two mushroom anchors, \$225. McIntosh testifies that when he gave up the ship it was anchored to the sands with this chain and one of the mushroom anchors, and that Capt. Seabee, who was acting for the government, requested that these articles be left where they were, which was done. They were left for the safety of the ship. The other anchor is not accounted for. Among the other articles with which the defendants are charged are one fourth-class mushroom anchor, of the value of \$29.86; one third-class nun buoy, worth \$29.41; one second-class concrete sinker, worth \$10. It is admitted that these items were received, and they have not been accounted for. Their aggregate value is \$69.27. The remaining articles with which McIntosh is charged are: 50 pounds of lambroline, valued at \$5.15; 7 first-class key shackles, valued at \$11.69; 21½-inch connecting shackles, valued at \$1.98; 4 hand lanterns, valued at \$5.92; 1 awning, valued at \$40; 50 feet 1½-inch rubber hose, valued at \$10.50; 50 feet 2½-inch rubber hose, valued at \$16.50; 13 tons Newcastle coal, valued at \$66.95. The lambroline, rubber hose, and coal were not issued to McIntosh. As to the coal, McIntosh testifies as follows:

"That coal was given to me directly by Captain Taussig. He says: 'You can make any use of it you like. Throw it over, if you want to.' I saved it, and used some for cooking, used some up at the barracks, and gave some of it to the lighthouse keeper at Cape Disappointment. I might have thrown that overboard. There is no mention made of 17 tons of pig iron I saved for the government."

The lambroline, awning, and rubber hose were probably on the ship when McIntosh began the work of attempting to launch it. McIntosh testifies that he knows nothing about them. As stated, these articles are not mentioned in the receipt taken by the government. There is some testimony to the effect that an awning was burned up. There were some articles left on the ship when Wolff took charge. The latter says there was very little left on board, except part of the hawser chain. What this little property remaining was is not stated. The ship went out of McIntosh's possession just as it came in, with certain articles of property thereon of which no account was taken. Under such circumstances McIntosh should be required to account only for what he receipted for under his contract. The articles remaining to be accounted for are 7 first-class key shackles, worth \$11.69; 21 5/8-inch connecting shackles, worth \$1.98; 4 hand lanterns, worth \$5.92,—total, \$19.59; to which must be added value of rope lost, \$98.31; one mushroom anchor lost, \$112.50; and other items as above, \$69.27,—making a total of \$299.67, for which the government is entitled to judgment.

GAINES & CO. v. SROUFE et al.

(Circuit Court, N. D. California. December 23, 1901.)

No. 12,960.

1. TRADE-MARKS—SUIT FOR INFRINGEMENT—PLEADING.

In a suit for an injunction to restrain infringement of a trade-mark, the facts which are essential to complainant's right to relief, such as the existence of the trade-mark, the fact of an imitation by defendant, either actual or colorable, without complainant's license or acquiescence, and the fact of registration, where that is essential, must be alleged positively, and not merely on information and belief; and, in general, all the facts which are necessarily within complainant's knowledge should be so alleged.

In Equity. Suit for infringement of trade-mark. On demurrer to bill.

Scrivner & Hopkins, for complainant.

J. M. Whitworth and Charles A. Shurtleff, for respondents.

MORROW, Circuit Judge. This is a suit in equity brought by the complainant, a Kentucky corporation, against the respondents, citizens of the state of California, for the alleged infringement of a trade-mark. The bill alleges, upon information and belief, that the business of distilling and selling whisky now operated by the complainant corporation was conducted in the year 1867 and thereafter by the firm or partnership of W. A. Gaines & Co., who acquired the business, property, trade-marks, good will, and distillery of the pre-

ceding firm of Gaines, Berry & Co.; that among the trade-marks originated and devised by the said firm of W. A. Gaines & Co., and used by them, was the certain trade-mark for whisky, known as and consisting of the arbitrary word "Hermitage," which was attached to the packages, barrels, and bottles containing the genuine Hermitage whisky distilled by the said firm of W. A. Gaines & Co., which said brand of whisky commanded and still commands a large and ready sale on the market in the United States and elsewhere; that in the year 1887 the complainant corporation was formed, and succeeded to and acquired the business of the aforesaid firm of W. A. Gaines & Co., and all its property, including the Hermitage trade-mark; that complainant has continued to manufacture the said Hermitage whisky at its distillery in the state of Kentucky, pursuing the same methods and exercising the same care as had theretofore been given to it by the predecessors of complainant, and has expended large sums of money in advertising said trade-mark, and the goods to which it is applied, throughout the world. It is further alleged, upon information and belief, that the said Hermitage trade-mark has been duly registered by the said firm of W. A. Gaines & Co. in the office of the United States commissioner of patents at Washington, and that said trade-mark is now of the value of \$500,000 and upwards. The bill charges, also, upon information and belief, that the respondents, with the wicked and fraudulent intent of deceiving and misleading the purchasing public and consumers of whisky in the United States, and with the wrongful and inequitable intent of enjoying the benefits of the great reputation of complainant's said trade-mark, have for a long time, in the state of California, offered for sale, and caused to be packed and sold, and do now cause to be packed and sold, a cheap imitation and inferior grade of whisky, in barrels which are labeled with false and misleading labels, having printed thereon the title "Hermitage Whisky," in imitation of complainant's trade-mark, thereby inducing the purchasing public to believe that said imitation whisky is the genuine Hermitage whisky distilled by the complainant. Complainant prays for damages for the injury to the reputation of its goods and trade-mark, for an accounting of the income and profits derived by respondents from the said violation of complainant's rights, and for an injunction restraining respondents from the future use of said trade-mark. The respondents demur to the bill on the general ground of insufficiency, and the special grounds that (1) the allegations as to the registration of the trade-mark in controversy, and the continuous use of the same by the complainant and its predecessors, should be made positively, and not on information and belief; and (2) that the bill is so vague and uncertain in regard to the time when the said trade-mark was originated or first used by complainant or its predecessors, or since when it has been used continuously by them, or when it was registered, that no cause can be made out from it entitling complainant to the discovery or relief prayed for.

The allegations of the bill upon information and belief are insufficient. Whatever is essential to the rights of the complainant, and is necessarily within its knowledge, ought to be alleged positively. It is well settled that, to warrant the equitable relief of injunction in

restraint of the infringement of trade-marks, there must be shown—First, the existence of a trade-mark; secondly, the fact of an imitation, either actual or colorable; and, thirdly, the fact that such imitation is made without the license or acquiescence of the owner. And courts of equity, in granting relief by injunction in this class of cases, proceed upon the ground of fraud; that equity will not permit one, aside from any question of trade-mark, to palm off his goods as the goods of another, and so deceive the public and injure that other. Where the ground for relief by injunction is fraud, it is necessary that the fraud should be made to appear by positive averments, founded on complainant's own knowledge, or that of some person cognizant of the facts. It is a general rule that whatever is essential to the rights of the complainant, and is necessarily within his knowledge, ought to be alleged positively and with precision. The date of registration of the trade-mark in controversy is important, as, from the statements contained in the bill, the possibility exists that the trade-mark is not now under the protection of the statute. Without definite allegations that complainant's title to the trade-mark is still effective, and that it has been effective at all the times of the alleged infringements, the court could not safely grant the relief prayed for by complainant.

The demurrer upon the special grounds that the bill of complaint is lacking in positive allegations and for uncertainty will therefore be sustained.

PETTUS v. SMITH.

(Circuit Court, D. Connecticut. October 1, 1902.)

No. 518.

1. FEDERAL PRACTICE—PLEADING—JOINDER OF LEGAL AND EQUITABLE DEFENSES.

Legal and equitable defenses may not be joined in a suit transferred to a federal court, where the practice in law and equity is not the same.

2. SAME—BILLS AND NOTES—DEFENSES—PLEADING.

Where, in an action on a note for legal services, the answer set up facts showing that the payees were entitled to recover something for services rendered, and the only defense alleged was that the services were not worth the price charged, but there was no allegation of misrepresentation of any material fact on which defendant was entitled to rely in making the note or settlement, the answer was demurrable.

Action at Law upon Promissory Note.

Pettus & O'Neill (John J. O'Neill, of counsel), for plaintiff.

Newton, Church & Hewitt, for defendant.

PLATT, District Judge. The answer filed May 31, 1902, is as follows:

"Answer.

"First Defense. Plaintiff and Susan C. O'Neill, of Waterbury, Connecticut, attorneys at law, in the years 1900 and 1901 jointly rendered legal services for the defendant under a joint agreement that they should be paid jointly a reasonable sum for their services.

"(2) It was further agreed in reference to said services, before the rendering thereof, that whenever the plaintiff and said O'Neill should be called away from the places of their residence, in order to render such services, they should only charge their traveling expenses in addition to the ordinary charges or reasonable value of such services if rendered by a Connecticut lawyer at the place of his residence.

"(3) About the close of the year 1901, plaintiff and said O'Neill presented to the defendant bills for said services aggregating more than fifteen thousand (\$15,000) dollars, and represented to the defendant that said services were reasonably worth more than \$15,000, and that more than that sum would ordinarily be charged therefor by lawyers in fair standing, and that more than \$15,000 was justly due from the defendant to plaintiff and said O'Neill.

"(4) Said services were not reasonably worth more than two thousand (\$2,000) dollars, and not more than that sum would ordinarily be charged for similar services by lawyers in fair standing, and all traveling and incidental expenses in connection therewith did not exceed five hundred (\$500) dollars, and not more than \$2,500 was justly due from the defendant to the plaintiff and said O'Neill.

"(5) Defendant not having been accustomed to employ lawyers, and relying upon the correctness of said bills so sent her, and of said representations, and induced thereto by the further representations of plaintiff and said O'Neill that attempts might be made to place her in an insane asylum, and that in such case it would be for her benefit to have given the notes herein-after mentioned, and by threats that plaintiff and said O'Neill would proceed at once to take possession of property of the plaintiff the title to which was held by them as collateral, and believing that the amount of \$15,000 was justly due from her to the plaintiff and said O'Neill, executed and delivered to each of them a promissory note for seventy-five hundred (\$7,500) dollars, one of which notes is that alleged in the complaint.

"(6) Said O'Neill has brought suit upon her said note to the superior court for New Haven county, state of Connecticut, held at Waterbury, Connecticut, and has obtained judgment by default in said suit for the sum of \$7,500, with interest and costs, and has filed a judgment lien upon the property of the plaintiff, and is proceeding to collect said note.

"(7) The amount for which said O'Neill has thus obtained judgment, and which she is proceeding to collect, far exceeds the whole amount which was ever due the plaintiff and said O'Neill, taken together.

"Second and Partial Defense. Paragraphs 1, 2, 3, 4, and 5 are made paragraphs 1, 2, 3, 4, and 5 of this defense.

"(6) Not more than twelve hundred and fifty (\$1,250) dollars was justly due from the defendant to the plaintiff at the time of the giving of said note.

"By Way of Counterclaim.

"All the paragraphs of the first defense are made a part of this counterclaim.

"Defendant claims five thousand (\$5,000) dollars damages.

"Mary E. Wright Smith, Defendant,

By Newton, Church & Hewitt, Her Attorneys."

To this answer the plaintiff demurs on several grounds: (1) That it is not denied, and is admitted, that some benefit accrued to the defendant from the services rendered by the plaintiff, and that the plaintiff was put to some loss, all of which raised a consideration for the note sued upon. (2) That the answer fails to disclose any fraud, mistake of law or fact, or misrepresentation, or any facts from which any of them can be inferred, relying upon which the defendant was induced to execute the note.

The demurrer attacks the first defense, which is practically a plea in bar, and also the second defense, which is partial and rather in the nature of a plea in mitigation of damages, asking for a reduction of

the amount demanded, and also the counterclaim, which really asks for more damages than are admitted to be due under the second defense.

Under the United States practice, the line of demarcation between law and equity has always been clearly defined and distinct. Whatever reasons could be advanced for the propriety of this mode of pleading under our state practice, which permits the joinder of legal and equitable defenses, lose their potency when transferred to this jurisdiction.

The cause of action is plain and simple. A promissory note was duly signed, executed, and delivered, and has not been paid, in whole or in part, and the plaintiff naturally wishes her money. This she ought to have, unless she has indulged in such practices as in law will work to vitiate the plain contract which the note represents. The demurrer searches the record, and compels her to admit all facts in the answer which constitute a legal defense to the action. I cannot find in the answer any statement that the plaintiff misrepresented a single material fact in such a way that the defendant was entitled to rely solely upon her statement, and was thereby misled into doing a thing which she would not otherwise have done.

The demurrer to the answer is sustained, with costs. Let the answer be stricken out, with leave to the defendant to answer further within 15 days.

FIRST NAT. BANK v. BRIDGEPORT TRUST CO. et al.

(Circuit Court, D. Connecticut. October 2, 1902.)

No. 1,069.

1. REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES.

Under Act Aug. 13, 1888 (1 Supp. Rev. St. U. S. p. 612, § 2), providing for the removal from state courts to federal courts of civil suits when the controversy is "wholly between citizens of different states, and which can be fully determined as between them," a suit by a bank, for the purpose of determining to whom a deposit should be paid, against the administrator of the deceased depositor, a citizen of the state, who claims the deposit as a part of the estate of the deceased, and against a third person, a citizen of another state, who claims the deposit, is properly removed from the state court to the federal court, for the suit is wholly between citizens of different states, and can be fully determined as between them.

2. SAME—TRANSPOSING PARTIES.

It is the duty of the court to transpose the parties by placing the administrator and third person on opposite sides, and thus retain jurisdiction.

3. SAME—PETITION FOR REMOVAL—JOINDER OF HUSBAND IN WIFE'S PETITION.

The failure of the husband of the third person to join in the petition for removal is immaterial.

Motion to Remand.

¶ 1. Citizenship as affecting jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 253.

Beers & Foster, for plaintiff.

Paige & Carroll and Beardsley & Beardsley, for defendant Bridgeport Trust Co.

Daniel Davenport, for defendant H. P. Hall.

PLATT, District Judge. In Act Aug. 13, 1888 (1 Supp. Rev. St. U. S., on page 612, in section 2), is found this language:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The italics are mine. A careful examination of the statutory law and the decisions bearing thereon, assisted, as I have been, by the very able and exhaustive oral arguments and written briefs of counsel, leads me to a conclusion in respect of which I file, very briefly stated, some of my reasons. I trust that the press of affairs will be a sufficient excuse for my refraining from an analysis of the cases cited pro and con, and my reasons for distinguishing those which at first blush might seem to militate against the conclusion which I have reached. In such a situation as this it is the duty of the court to look with great care into the position which the parties to the controversy occupy, and, if it can discover what the real contention is, and between whom it will take place, and finds that the actual participants are all citizens of different states, then it is its duty to rearrange them in such a manner that they can fight out the question between themselves fairly and fully. The First National Bank is nothing but a stakeholder. It brought its action to save annoyance and vexation, to prevent a multiplicity of suits, and to close up the entire controversy in one proceeding. It leaves the parties to fight their own battles. It can, with perfect propriety, lodge its stake in court, and await events. I presume it can be compelled to do so by order of court. It avers its willingness so to do in paragraph 6 of its bill filed in the Fairfield county superior court. Assuming, for the sake of the argument, that the court shall take the parties as they are found on the record prior to the petition for removal, what was the situation? The action is one of interpleader, and sets up the following salient facts: (1) Plaintiff, on January 4, 1901, owed the late George F. Gilman \$10,000. (2) The Bridgeport Trust Company was appointed administrator of his estate. (3) Helen Potts Hall, of New York, claimed to own the deposit, and sued for it on March 18th by writ returnable to the first Tuesday of April, 1901, in the superior court for Fairfield county. (4) The Bridgeport Trust Company has demanded the money, and has threatened to sue for it. (5) Plaintiff is "ignorant of the respective rights of said claimants," and does not know which ought to have the deposit. (6) Plaintiff is willing to pay the money as directed by the court. The parties are required to interplead. Blakeley Hall is made codefendant for no other reason than that he is the husband of Helen Potts Hall. Can there be any question but that, upon those facts alone, the controversy was "wholly" between the Bridgeport Trust Company, a Connecticut corporation, the administrator of the late George F. Gil-

man, who claimed the deposit as part of the Gilman estate, and Helen Potts Hall, of New York, who claimed to own the money, and had brought suit for it? No one had, up to that time, nor in fact has any one since then, laid claim to this fund; and between the parties named the controversy over it is capable of full determination. It is without doubt the duty of the court to transpose the parties, placing the trust company and Helen Potts Hall on opposite sides of the controversy, thus retaining jurisdiction of the subject-matter. This the court does. In the face of the language of the act, the fact that Blakeley Hall was not joined in the petition for removal has no weight. So far as the court can see, Mrs. Hall was and is fully able to take care of her own interests from every point of view.

Motion to remand is denied, with costs.

THE OCEAN SPRAY.

(District Court, N. D. California. August 21, 1902.)

No. 12,109.

1. SHIPPING—LIMITATION OF LIABILITY—CONDITIONS IMPOSED FOR LACHES.

A shipowner is not debarred from instituting proceedings in a court of admiralty for the limitation of his liability on account of an alleged maritime tort by the fact that he has permitted an action for damages for such tort to be prosecuted to judgment against him in a state court, which has been reversed on appeal, and the cause remanded for a new trial; but in such case his laches in invoking the admiralty jurisdiction warrants the court in requiring him, as a condition to the granting of the relief sought, to pay the costs incurred by the plaintiff in the state court.

In Admiralty. Suit by the owners of the schooner *Ocean Spray* for limitation of liability.

H. W. Hutton, for petitioners.

F. J. Castlehun, for claimant.

DE HAVEN, District Judge. This proceeding was commenced by certain owners of the schooner *Ocean Spray*, in which they ask for a limitation of their liability upon the claim of William Silveira for damages in the event that the court shall find that they are liable on account of such claim; and which liability they deny. The claim of Silveira is based upon the alleged negligence of the owners of the *Ocean Spray* in failing to provide her with safe and sound reefing tackle, by reason of which he alleges he sustained injuries while in the performance of his duties as a seaman upon that schooner. It is undisputed that Silveira commenced an action against the petitioners in one of the superior courts of the state April 27, 1896, upon the claim referred to in the petition herein; that said action was tried by a jury, resulting in a verdict and judgment in his favor for \$2,000 and costs; that this judgment was afterwards reversed by the supreme court (60 Pac. 687), and the cause remanded for a new trial; and that such

¶ 1. Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

action was pending in the state court at the date the present proceeding was commenced, May 12, 1900.

Upon consideration of all the evidence, I find that the petitioners exercised due diligence to provide the schooner with a sound reef pendant, and are therefore not liable for the injuries sustained by the claimant, *Silveira*; but, in view of the laches of petitioners in invoking the jurisdiction of this court, they are not entitled to a decree establishing their nonliability unless they pay the costs incurred by the claimant in the action in the state court. This was the rule which, upon a similar state of facts, was followed by the court in the case of *The S. A. McCaulley* (D. C.) 99 Fed. 302, and is in accordance with the suggestion made by the supreme court in the case of *The Benefactor*, 103 U. S. 247, 26 L. Ed. 466. See, also, *Gleason v. Duffy* (C. C. A.) 116 Fed. 298.

The evidence shows that the costs incurred by the claimant in the action for damages in the superior court, and in the supreme court, upon the appeal from the judgment, amount to \$215.20. It is therefore ordered that unless petitioners, within 20 days from this date, pay to the said *William Silveira* the sum of \$215.20, this proceeding shall be dismissed, and that, upon such payment, petitioners take a decree that they are not liable on account of the matters alleged in the claim of *Silveira*.

AMERICAN LOCOMOTIVE CO. v. DICKSON MFG. CO.

(Circuit Court, N. D. New York. September 9, 1902.)

1. FOREIGN CORPORATIONS—SERVICE OF SUMMONS.

A Pennsylvania corporation whose plant and principal place of business were in that state also maintained an office in New York while engaged in active business. It sold its plant and business and gave up its New York office, but the business of settling up its affairs was principally conducted thereafter at the office of a banking firm in New York, of which its president and vice president were members, and where its bank account was kept. *Held*, that service of summons in an action against the corporation in New York, made on such officers at their New York office, was valid, under Code Civ. Proc. N. Y. § 432.

On motion by defendant to set aside service of summons made in the supreme court of the state of New York, pursuant to section 432 of the New York Code, the defendant having removed the action to this court.

Julius P. Workum, for plaintiff.

George Coggill, for defendant.

COXE, Circuit Judge. The plaintiff is a New York corporation and the defendant is a Pennsylvania corporation. This action was commenced April 15, 1902, to recover \$8,754, alleged to have been overpaid to the defendant under a certain contract entered into between the parties in June, 1901, by the terms of which the defendant sold its manufacturing plant and business to the plaintiff.

¶ 1. Service of process on foreign corporations, see note to *Eldred v. Palace-Car Co.*, 45 C. C. A. 3.

This contract was negotiated and signed in New York and payments were made there to the defendant. Prior to the sale of its business to the plaintiff the defendant's manufactory and principal office was at Scranton, Pa., but it maintained a New York office at No. 40 Wall street, until sometime in July, 1901. After the sale the business of settling up the affairs of the defendant was largely conducted in the city of New York by the secretary and treasurer, Mr. Cox, who is a member of the firm of Winthrop & Co., bankers, at No. 40 Wall street, where the defendant's bank account was kept. The president of the defendant, during the time in controversy, had an office in New York, as did its vice president, who was also a member of the firm of Winthrop & Co. In short, it is clearly established that the principal business of the defendant, after it went into liquidation, was transacted in the city of New York. It was, of course, unnecessary for the defendant to maintain an office in New York. After it ceased to do an active business its office at No. 40 Wall street was, therefore, given up and its headquarters were transferred to the office of Winthrop & Co., in the same building. There it kept its funds, there its officers were to be found, there it received its correspondence and there it transacted the important part of what little business remained. There can be no pretense that the defendant has not had ample notice of the plaintiff's cause of action. When the suit was commenced the defendant was engaged in active business nowhere. What business it did transact, incident to closing up its affairs, was done, principally, in the city of New York. Service of the summons upon one of defendant's local agents at Scranton would probably have resulted in the forwarding of the papers to one of the defendant's officers in New York. To the extent of this delay, at least, it would have been less effectual and less satisfactory to the defendant than the notice which was actually given. It is thought that the service is valid within the authority of *Lumber Co. v. Doyle*, 38 C. C. A. 34, 97 Fed. 22, and cases cited.

The motion is denied.

THORNE v. AMERICAN DISTRIBUTING CO.

(Circuit Court, D. Massachusetts. August 13, 1902.)

No. 1,187.

1. NEW TRIAL—QUESTIONS REVIEWABLE ON MOTION—INSTRUCTIONS.

On a motion for a new trial the court cannot properly reconsider the instructions which it gave the jury on propositions of law unless it appears that an error was committed through inadvertence.

At Law. On motion for new trial by defendant.

Lord & Hunneman and Robert Walcott, for plaintiff.
Matthews & Thompson, for defendant.

PUTNAM, Circuit Judge. Of course, on this motion for a new trial the court cannot properly reconsider the instructions which it

gave the jury on propositions of law. To do so might, on the one hand, deprive the defendant of its just exceptions, and, on the other hand, merely bring about a new trial, with the result that no progress would be made towards the determination of the questions of law involved by the only tribunal which can finally dispose of them. Occasionally the court finds that in charging a jury it has made a mere slip, which requires it to revise its own rulings on a motion of this character, but nothing of this nature is now before us.

Having in view the propositions stated, every question which is now brought up for revision on this motion for a new trial was deliberately submitted to the jury for its determination, and carefully explained to it. There is now no complaint that the jury did not properly understand the rulings of the court in these particulars. When the case went to the jury the court was of the opinion that the issues which it had to pass on were of such a character, and the facts in reference thereto were either so obscure or so doubtful, that the conclusion of the jury in reference thereto would necessarily be final, and could not be revised by us. As, however, at the trial to the jury, in accordance with our practice, we endeavored to guard our mind against any conclusions of so decided a character that they would prevent us from giving due weight to whatever might be submitted to us on a motion for a new trial, and therefore were not eager to follow the evidence so closely as we otherwise might have done, we have listened attentively to whatever counsel had to submit with reference to the pending motion, and have since given it careful examination. The result has been to confirm the impressions which we formed during the trial of the case, that the conclusions of the jury on all the propositions now in issue cannot be revised by us.

We have no question whatever about this, except with reference to the proposition which we submitted to the jury, to the substantial effect that if with regard to the defendant's elevator, whose alleged defective condition, it is claimed, caused the injuries to which this suit relates, the defendant had put the matter of repairs into the hands of a reputable, standard concern, under instructions to make them thorough, complete, and full, the jury would be justified in finding that the defendant had thus performed the duty of causing reasonable care to be used with reference to its condition. We added, however, the following instruction:

"If, however, the examination and repairs were not of a thorough and careful character, such as you may deem, under the rules which I give you, work of that sort should be, and was done by men employed incidentally for the purpose of doing it, then it would not be excused for anything which the orders to repair did not cover, or which the men employed by him incidentally might omit to do."

On a careful re-examination of those parts of the record which have been called to our attention by counsel on this motion, we are entirely unable to say that the jury was not justified in finding that the terms of these instructions were not complied with. On the other hand, we are of the opinion that the verdict of the jury in that respect was correct. As this involves a pure question of fact, and the result of com-

parison of various portions of the record, nothing could be gained by pursuing the matter further.

In this case there will be an order:

The motion for new trial filed by the defendant on June 14, 1902, is denied.

In re BAERNCOFF.

(District Court, E. D. Pennsylvania. October 7, 1902.)

No. 862.

1. **BANKRUPTCY—DISCHARGE—SPECIFICATIONS OF OBJECTION—VERIFICATION.**
Specifications of objection to the discharge of a bankrupt are pleadings, and should be verified as required by section 18c of the bankruptcy act.
2. **SAME—SIGNATURES BY COUNSEL.**
If counsel sign and swear to them, the reason of such signature should be stated.
3. **SAME—EXCEPTIONS—WAIVER.**
Specifications of objection to the discharge of a bankrupt were signed by counsel, and not sworn to. No exceptions were taken to the signature or lack of affidavit until after the testimony had all been taken and argument commenced. *Held*, that the failure to object in proper time waived the defects.
4. **SAME—FRAUDULENT CONCEALMENT OF ASSETS.**
Evidence considered, and, in view of the burden of proof being upon the objecting creditors, *held* to justify the referee's finding that there was no fraudulent concealment of assets by the bankrupt.

In Bankruptcy.

Julius C. Levi, for bankrupt.

George W. Carr, for creditors.

J. B. McPHERSON, District Judge. Specifications of objection to the discharge of a bankrupt are pleadings, and should be verified as required by section 18c of the act: In re Brown, 50 C. C. A. 118, 112 Fed. 49. As a rule, they should be signed by the objecting creditors, and the verification should be made by some person who has sufficient knowledge of the facts averred to make affidavit thereto. If counsel sign and swear to them, the reason for this unusual practice should be stated, so that the court may be enabled to decide whether the reason is sufficient. If the bankrupt believes the specifications to be insufficient, he should take seasonable exception thereto; otherwise he will run the risk of waiving his rights in this respect.

In the present case the specifications were signed by counsel, and were not sworn to. The bankrupt took no exception to the signature, or to the lack of an affidavit, however, until after the testimony had all been taken, and argument thereon before the referee had begun. This failure to except in proper time waived the defects, and the specifications are therefore properly before the court for consideration. Upon the merits, however, I feel obliged, although with considerable hesitation, to agree with the findings of the referee. The burden of proof was undoubtedly upon the objecting creditors to establish fraudulent concealment of assets; and, as the evidence was oral, the opinion of the referee concerning the truthfulness and ac-

curacy of the witnesses is entitled to much weight. I am not satisfied that he was mistaken in his findings, but there is no doubt that the testimony as a whole would have readily supported a different conclusion. Of course, I am not considering whether the transaction was an unlawful preference, but merely whether fraudulent concealment has been proved, so as to prevent the bankrupt from being discharged. Accepting the facts found by the referee, the discharge should be granted.

UNITED STATES v. FRENCH.

(District Court, D. Oregon. September 12, 1902.)

No. 4,553.

1. CRIMINAL LAW—RIGHT OF ACCUSED TO CONFRONT WITNESS—DEPOSITION.

The deposition of a witness since deceased, taken on notice to an accused, but without his consent or presence, is not admissible against him on his trial.

Prosecution for Sending Obscene Matter through the Mails. On motion for new trial.

John H. Hall, for United States.

Waldemar Seton, for defendant.

BELLINGER, District Judge. This is a motion for a new trial upon an indictment for sending obscene matter through the mails, and it is based upon errors of the court on the trial in admitting the testimony of a witness taken before a commissioner on the preliminary hearing, and in admitting the deposition of the same witness taken before a commissioner thereafter, the witness having died before the trial. The deposition of the deceased witness was taken upon notice to the defendant, but without his presence, or that of any one in his behalf. It has been decided by the supreme court of this state that a defendant who had consented in open court, in order to secure a postponement of the trial, to the taking of the deposition of a sick witness, and who was present at the taking of the deposition and cross-examined the witness, could not complain that he had not been given the right to meet the witness face to face; that he might waive the right to be confronted with the witnesses against him. *State v. Bowker*, 26 Or. 313, 38 Pac. 124. Here the deposition was taken in a distant part of the state from where the court was held and the defendant's attorney resided, without the defendant's consent or presence, and was not admissible. The testimony taken on the preliminary examination, when the defendant was present, if admitted, fails to establish the material fact sought to be proved,—that the letters in evidence were the letters proved to have been mailed by the defendant, as to which, without the deposition in question, there was no evidence.

The motion for a new trial is allowed.

THE E. LUCKENBACH.

(District Court, E. D. New York. August 5, 1902.)

1. TOWAGE—LOSS OF TOW—NEGLIGENCE OF TUG.

The passage of Hell Gate by a large tug having two barges on each side is so perilous as to require both skill and favorable opportunity, and the choice by the master of making it in a dense fog, when there was opportunity to lay up in a safe place after the fog came on, was not justified by ordinary prudence, and renders the tug liable for the loss of one of the barges by striking on the rocks, caused by the failure to catch the proper tide.

In Admiralty. Suits against tug to recover for loss of a tow and her cargo.

Carpenter & Park, for libelants.

James J. Macklin, for claimant.

THOMAS, District Judge. On the 17th day of May, 1900, the tug Luckenbach, a powerful vessel, with four barges, two on either side, left a point in New Jersey, at about 5 o'clock p. m., bound through the Gate in the East river. The day had been overcast, but the captain of the tug testified that it was not until he reached Fifty-Second street, passing on the northerly side of Blackwell's Island, that the fog, concededly heavy, came; that thereupon the tug was put at half speed; that at Seventy-Sixth street the fog lifted or lightened to such an extent that he could see the east light of Blackwell's Island, as well as the light on Hallett's Point, and that thereupon he continued his course through the Gate, but missed the true tide, was carried to leeward, so that the starboard quarter of the outer starboard barge struck on Steep Rocks, and received such damage that she was shortly afterwards cut loose and sunk. The first entitled action is for loss of cargo, and the second action is for the loss of the barge and loss of her master's personal effects.

The contention of the captain of the tug is that, although the fog shut in so that he could not see more than 300 feet ahead, yet that the fog lightened up when he was at Seventy-Sixth street, so that he could see Hallett's Point light, and he concluded that it was prudent to make a passage through the Gate, and that it was not necessary for him at that time to attempt to make a landing either around the Hook on the New York shore, or, perchance, on the Astoria shore, and that it was when he was about abeam of the Blackwell's Island light that the fog shut in so heavily again that he was unable to catch the proper tide to carry him through the Gate. By his direction the mate took his station on the forward part of the port barge, attempting to find the rift that comes down from the Harlem river, but the fleet was not kept far enough towards Ward's Island to discover it. Even after the tug had passed Blackwell's Island lights, he could have laid up at the power house, where there was an eddy tide. When the fog shut in, the tug should have attempted to make a landing on the northerly side of the East river, or gone into the Harlem river, or, if it continued until the fog became dense after

passing Blackwell's Island, it should have attempted to lay up at the power house.

The careful argument of the claimant, that the master was a skilled navigator, that he was the best judge of the prevailing conditions, and that his discretion should not be reviewed, is not without force, but if applied in every instance would excuse the master at all times. The passage of Hell Gate is so perilous as to require skill and favorable opportunity, and the choice of making it in a dense fog, when the alternative was lying up in a safe place, does not seem justified by ordinary prudence. To attempt unnecessarily a passage, where the failure to discover a particular tide invites destruction, demands peculiar criticism.

The libelants should have decrees for damages and costs.

DINET v. CITY OF DELAVAN.

(Circuit Court, E. D. Wisconsin. August 11, 1902.)

1. REMOVAL OF CAUSES—PETITION—CITIZENSHIP.

In a petition for the removal of a cause to the federal court, an allegation of residence, or a description of one as of a certain place, is not the equivalent of an allegation of citizenship, on which the right of removal depends.

2. SAME—AMENDMENT.

A petition for the removal of a cause to a federal court cannot be amended in the federal court, where it or the record does not show sufficient ground for removal.

On Motion to Remand.

Ryan, Merton & Newbury, for plaintiff.

D. B. Barnes and E. Von Suessmilch, for defendant.

SEAMAN, District Judge. This case is certified from the circuit court of Walworth county on petition of Henry G. Dinet for removal to this court under the removal act, and the petitioner is the respondent in condemnation proceedings instituted by the city of Delavan to take certain real estate owned by him for public use, though named as plaintiff under the procedure applicable in such cases. It is conceded, on the one side, that the cause is removable if the petition therefor states the requisite diverse citizenship, and on the other that the petition is defective in that particular; but an amendment is tendered to cure such defect, and confer jurisdiction. The only allegation of the petition to that end is that the petitioner was and is "a resident of the city of Chicago, state of Illinois," with no averment of his citizenship there or elsewhere, nor of diverse citizenship, and it is plain, under the authorities, that the allegation of residence is not the equivalent of an allegation of citizenship, upon which the right of removal depends. Consequently, the petition is insufficient to confer jurisdiction (*Neel v. Pennsylvania Co.*, 157 U.

¶ 1. Averments of citizenship to show jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

S. 153, 15 Sup. Ct. 589, 39 L. Ed. 654, and cases cited), and the only question for solution is this: Can an amendment be allowed in this court to supply the omission? It is contended on behalf of the petitioner (1) that the record, as certified by the state court, discloses the fact that he was a citizen of Illinois, while the city of Delavan is a Wisconsin municipality; and (2) that in such event the defective petition may be cured by amendment, under authorities which are cited. But the last mentioned proposition is without force, if assumed to be otherwise tenable, for the reason that the first mentioned, on which it rests, is unsupported by the record. The only reference which appears in the condemnation proceedings is this: that the owners named, including Henry G. Dinet, "are not residents of this county;" and in the bond for appeal the petitioner's name is followed by the description "of Chicago, Illinois," and the bond for removal contains like description. Neither of these references is sufficient, in any view, to allege or necessarily imply citizenship, and thus supply the defect in the petition for removal. The jurisdiction of the state court can be ousted only by allegations there presented which confer federal jurisdiction, and the well-considered case of *Martin v. Railroad*, 151 U. S. 673, 691, 14 Sup. Ct. 533, 38 L. Ed. 311, citing the authorities, states the doctrine applicable to amendments of the petition, that the jurisdictional facts must be substantially stated in the petition on which removal was obtained, and that "amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal." Whether the circuit court decisions cited by counsel are consistent with this view is a question not arising here, as the case presented is not within either of such rulings. I am of opinion that sufficient ground for removal does not appear in the record, and that the amendment tendered must be disallowed. The case is remanded accordingly to the circuit court of Walworth county, with costs against the petitioner, Henry G. Dinet.

KAHANER v. INTERNATIONAL NAV. CO.

(Circuit Court, E. D. Pennsylvania. October 1, 1902.)

No. 12.

1. IMMIGRATION — DEPORTATION — CONTRACT WITH NAVIGATION COMPANY — BREACH.

Where, after a family of immigrants had been excluded by the government for a contagious disease, the steamship company agreed to become responsible for them on proper security being furnished, in accordance with a modified order by the government, but thereafter deported them without giving a reasonable time to furnish such security, the steamship company could not defend an action for damages so caused, on the ground that the deportation was an act of the law.

2. SAME—EVIDENCE—QUESTION FOR JURY.

Where a steamship company wrongfully deported a family of immigrants, for which it had agreed to become responsible on being furnished sufficient security, without giving the family a reasonable time to furnish the security, proof of such facts established a prima facie cause of action against the steamship company for the damages sustained.

Rule to take off nonsuit.

Isaac Hassler, for plaintiff.

N. Dubois Miller, for defendant.

ARCHBALD, District Judge.* In granting the nonsuit it was assumed that the deportation of the plaintiff's wife and children was the act of the law, for which the steamship company was in no sense liable, their responsibility being merely for the breach of the alleged contract which they had made. But that is not altogether the case. The contagious cutaneous disease which was discovered on the youngest child no doubt warranted the officers of the government in excluding the family from a permanent landing, and requiring them to return to the ship which had brought them into port. But on application to the treasury department permission was given them to stay if the steamship company would be responsible for them, the disease being of a mild and curable character, and the disunion of the family which would otherwise result being recognized as a serious hardship. The matter was thus put in the direct control of the steamship company, and left open for the operation of the private arrangement which had been made already with the father. By it, according to the evidence produced by the plaintiff, it had been agreed that, if proper security was offered the company for the care and the maintenance of the family during the time required to cure the child, the company would in turn become responsible to the government, providing a stay of deportation on that condition was granted.

Without stopping to discuss the question whether there was a consideration which would support such an agreement, which it seems to me it would not be difficult to find, the plaintiff in pursuance of it was entitled to a reasonable opportunity to comply, and if it was not given him the company would be liable. In granting the nonsuit it was held that this liability would merely be for the breach of the contract involved, but on further consideration I think this was a mistake. The whole matter, as I have pointed out, having been left in the hands of the parties to arrange, the company was answerable for that which subsequently happened, in violation of what it had agreed to, and, although the putting of the immigrants back on to the steamship may have been the act of the officers of the law, the subsequent taking them out of port, and across the ocean, was the act of the company, and was a wrong for which they are liable, unless it was justified. The rigor of the law had been relieved by the clemency of the representatives of the government, and in the face of the agreement with the father, with which he was ready and anxious to comply if sufficient opportunity was given him, it cannot be said, so far as the company was concerned, that the deportation was a lawful one. While the steamship may have been scheduled to leave that afternoon, its departure was entirely within the control of the company, and the inconvenience of delaying the necessary interval to allow proper security to be given was no greater to it

* Specially assigned.

than the hardship to this father and his family of the three-months separation which followed. Of course, I am only speaking of the case as it is now presented. When the defendants have been heard, it may appear very differently; but, taking it as it stands, it was a mistake to withdraw it from the jury, and it must therefore be tried anew.

The rule to take off the nonsuit is made absolute, and a new trial is awarded.

NEW RIVER MINERAL CO. v. SEELEY.

(Circuit Court, W. D. Virginia. September 22, 1902.)

1. APPEAL—SUPERSEDEAS—ORDER—CONSTRUCTION.

Where an order granted an appeal from an order dissolving an injunction, and recited that supersedeas was granted to the order appealed from on the plaintiff entering into a bond with approved security, etc., on such bond having been duly given the supersedeas continued the injunction in force during appeal.

J. F. Bullitt and A. A. Campbell, for Seeley.

M. M. Caldwell and John C. Blair, for New River Mineral Company.

McDOWELL, District Judge. In May, 1898, George M. Seeley, on the law side of the United States circuit court for this district, recovered a judgment for \$12,069.37, with interest and costs, against the New River Mineral Company. In June, 1900, the company filed its bill on the equity side of said court, praying that Seeley be restrained from collecting said judgment; and on the same day a temporary injunction was granted. On May 28, 1902, on final hearing, a decree was entered dissolving the injunction, dismissing the bill, awarding Seeley his costs, and providing further: "This decree shall not take effect until June 30th, 1902." It may be here stated that in adding this last clause my purpose was to prevent a dissolution of the injunction during the period that would probably elapse while counsel for the company were consulting their client as to the advisability of taking an appeal, and in the preparation of the petition for appeal and assignment of errors. On June 21, 1902, a petition for appeal and assignment of errors were presented to me, and on that date I signed the following order:

"And now, to wit, on the 21st day of June, 1902, It is ordered that the appeal be allowed as prayed for in the above petition, and a supersedeas is granted to the order of this court entered on the 28th day of May, 1902, upon the New River Mineral Company, or some one for it, entering into bond, with security to be approved by one of the judges of this court, in the penalty of \$500, conditioned according to law. But this order is not to take effect until citation has been signed and the said bond has been approved."

The citation was signed and the bond was approved July 3, 1902. The condition of the bond is that the appellant "do prosecute said appeal to effect, and answer of damages and costs if it fail to make said appeal good."

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 2207, 2253, 2277, 2778.

On August 30, 1902, after the transcript of the record had been made, counsel for Seeley requested of the clerk of this court that he issue execution on the judgment at law. The clerk, being in doubt as to what he should do, has applied to me for instructions. Having had the benefit of the views of counsel for Seeley, and being of opinion that the execution should not be issued, it is perhaps proper for me to so advise the clerk, without requiring the question to be more formally presented. In addition to advising the clerk not to issue the writ, I reduce to writing my reasons therefor, as they may, if accepted as sound, prevent unnecessary and expensive litigation pending the settlement of the case by the appellate court.

In the ordinary chancery cause, not involving action as to an injunction, an appeal, if the supersedeas bond be given in due time, operates as a supersedeas. *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810; *Town of Danville v. Brown*, 128 U. S. 503, 9 Sup. Ct. 149, 32 L. Ed. 507; Rev. St. §§ 1000, 1007, 1012; 2 Fost. Fed. Prac. (3d Ed.) p. 1239 et seq., § 510. Where the decree appealed from, however, grants, or continues in force, or dissolves, an injunction, the rule is different. In such cases the mere granting of an appeal, although the bond given is in the form of a supersedeas bond, does not nullify or set aside the decree appealed from. For instance, if the decree dissolved an injunction, a mere order allowing an appeal therefrom (even though a supersedeas bond be given in due time) does not continue the injunction in force. 2 Fost. Fed. Prac. (3d Ed.) p. 1214, § 510; *Slaughter House Cases*, 10 Wall. 273, 19 L. Ed. 915; *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; *Knox Co. v. Harshman*, 132 U. S. 14, 10 Sup. Ct. 8, 33 L. Ed. 249; *Land Co. v. Leonard (C. C.)* 24 Fed. 658; *Leonard v. Land Co.*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. Ed. 445; *Interstate Commerce Commission v. Louisville & N. R. Co. (C. C.)* 101 Fed. 146. But in such cases it is permissible for the court or judge granting the appeal to provide that the injunction shall continue in force pending the appeal. In the case at bar the contention of counsel for Seeley is that the order allowing the appeal does not distinctly and unequivocally keep in force the injunction pending the appeal. In this I cannot agree with them. The order not only grants an appeal, but "a supersedeas is granted to the order" which dissolved the injunction. To supersede is to set aside, to annul. An order which sets aside or annuls a decree dissolving an injunction must ipso facto reinstate the injunction. In *Staffords v. King*, 32 C. C. A. 536, 90 Fed. 136, the circuit court of appeals of this circuit held that an order granting an appeal from a decree dissolving an injunction left the injunction in force, where the order granting the appeal read: "* * * Pending such appeal, the said decree of June 18, 1896, so far as the same dissolves said injunction, be wholly superseded and suspended." The language here quoted does not seem to me to differ from the language used in the order in the case at bar in any essential particular. The latter is lacking in elegance, but it can mean nothing else than that the order of May 25th is superseded and set aside, pending the appeal.

LOWNSDALE et al. v. GRAY'S HARBOR BOOM CO.

(Circuit Court, D. Washington, W. D. September 27, 1902.)

1. FEDERAL COURTS—PLEADING JURISDICTIONAL FACTS.

The facts essential to give a federal court jurisdiction must be positively alleged, and not left to inference. An allegation in a bill that defendant "claims to be" a corporation organized under the laws of a state as a boom company, coupled with a denial that it has the rights of such a company, is not a sufficient allegation that defendant is a citizen of such state for jurisdictional purposes.

2. EQUITY JURISDICTION—PROTECTION OF RIGHTS IN LANDS—DISPUTED TITLE.

A federal court of equity is without jurisdiction of a suit to enjoin a boom company from obstructing a navigable stream by maintaining a log boom therein, and from continuing to occupy the boom site which plaintiff claims to own as an appurtenance to lands lying on the stream, where defendant denies plaintiff's title to the lands, and also that the boom site is an appurtenance thereto, and claims ownership of the same through purchase of the bed of the stream from the state as tide lands, and the right to maintain the boom by virtue of its franchise under the laws of the state. In such case plaintiff's right to relief depends upon his title, which, being disputed, must be established by an action at law before a court of equity will grant an injunction to protect his rights, or to interfere with the use by defendant of property of which it is in possession.

3. SAME—ABATEMENT OF PUBLIC NUISANCE.

A court of equity will not entertain a suit by a private individual to abate a public nuisance consisting of an alleged unlawful obstruction of a navigable stream, where the only special injury claimed by plaintiff is incidental to his ownership of land on the stream, which he does not occupy, and his title to which is disputed.

In Equity. Suit to enjoin the maintenance of a boom in a navigable river by defendant, and to recover damages.

J. W. Robinson and J. C. Cross, for plaintiffs.

Bush & Fox and I. B. Bridges (W. L. Sahse, of counsel), for defendant.

HANFORD, District Judge. Pursuant to a stipulation signed by the attorneys on behalf of the parties, this cause was submitted to the court without oral argument, and on each side able and elaborate written arguments have been filed, in which all technical points which might avoid a true determination according to the merits have been waived so far as the parties have a right to waive them; and I have spent considerable time in reading and considering the arguments and authorities cited, as well as the pleadings and the evidence, with the purpose of rendering a decision upon the questions argued. The parties cannot, however, by consenting to the submission of a cause, confer jurisdiction, if the case is not one which meets the prescribed conditions essential to make it cognizable in the court in which the parties have brought it. It is useless to proceed without jurisdiction. The court must consider whether it has jurisdiction, even when the parties have assumed and taken for granted that jurisdiction exists. I have therefore given attention to this important question, and have

¶ 1. Averments of citizenship to show jurisdiction in federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

¶ 2. See *Injunction*, vol. 27, Cent. Dig. §§ 83, 84.

reached the conclusion that the case must be dismissed for want of jurisdiction.

It was manifestly the intention of the complainants to invoke federal jurisdiction, on the ground that the case involves a controversy between citizens of different states; but the allegations of the bill of complaint are not sufficient to satisfy the rule, which requires that the jurisdictional facts must be clearly shown by positive averments, and not be left to be inferred or guessed at. The complainants do state positively that they are citizens of the state of Oregon, and the defendant is described in the following words:

"The defendant, the Gray's Harbor Boom Company, claims to be a corporation organized and existing under the laws of the state of Washington as a boom company, and that at all the times hereinafter mentioned it has made claim, and does now make claim, that it was and is a corporation organized and existing as a boom company, under the statutes of the state of Washington, in possession of the powers belonging to boom companies; but in making this allegation these plaintiffs do not concede or intend to allege that the Gray's Harbor Boom Company ever complied with the laws of the state of Washington with reference to boom companies, so far as it relates to the occupation or use of the premises, banks, shore lands, shore lines, or shore rights hereinafter described, but allege the facts to be that it has not now, and never had, any rights as a boom company with reference to the premises, shore lands, shore lines, and shore rights hereinafter described as belonging to these plaintiffs."

This is not a positive allegation of any fact. Instead of the essential averment that the defendant was at the time of the commencement of the suit a corporation organized and existing under the laws of the state of Washington, and a citizen of said state, the bill avers that the defendant claims to be such corporation, and in the same connection denies that it has certain rights which it claims as a boom company, thereby raising a question whether any real defendant has been sued. If individuals are falsely claiming to be organized as a corporation, they should be sued as individuals. The jurisdiction of this court cannot be supported upon any such straddling and uncertain pleading. If the complainants should elect to do so, the bill of complaint might be amended in this particular, provided the facts warrant an amendment; and, if there were no other impediment to the proceeding in this court, an application to amend, if made, would be granted, and so the labor and expense of the litigation would not necessarily be lost.

There is, in my opinion, however, an incurable fault, in this: that the subject-matter is not within the equitable jurisdiction of a United States circuit court. The written argument filed in behalf of the defendant contains the following recital of the material facts of the case, which has not been controverted by the complainants, and is sufficiently accurate to be adopted as the basis of this decision:

"Some years ago, and before the organization of the defendant, the plaintiffs claim to have purchased the lands described in the complaint, by contract with the state of Washington. Contract number 383, to a part of the land, was between the state and J. P. O. Lowndale. Contracts numbers 380 and 381 were between the state and one John Backus. This land is at the mouth of the Humpulips river, and borders on Gray's Harbor. Through at least a part of this land runs the aforesaid river, which empties into Gray's Harbor; its mouth being near or within the land in question. This river is for many miles inland navigable for floating saw logs and at its mouth and for a short distance up the river is navigable to small craft. Just about the

beginning of said lands a large slough makes off from the river to the westward. The river on this land, by its bends, makes an 'S.' Commencing just below the big slough, defendant has constructed its boom works, extending to where the river leaves this land. The construction of the boom works is as such works are usually constructed; being near the middle of the river from the mouth of the big slough, up to where it strikes the sand island: thence around the island. At a convenient place below the island is a gap or gate, through which boats may go. Unless the boom is entirely filled with logs above the gap, there is no obstruction to navigation. If the river is filled with logs above the gap, there is for a time some obstruction to navigation. At mean high tide the big slough is from twelve to twenty feet deep, and at its mouth about three hundred feet wide, and gradually decreases in size and width, but is navigable for saw logs until after it leaves the land in question. Where the big slough moves off from the river, it (the river) is about three hundred and fifty feet wide. When the tide sets in, logs coming down the river will naturally go up the large slough. There are no boom works along a part of the westerly bank of the river. There are many millions of timber which will come to market down this river. The river is a very important highway for floatage of saw logs, being the only way of getting the timber which is tributary to this river to market. Last year about ten million feet came into the boom; the previous year, about seven million. This year a much larger number of logs will come into the boom. The defendant's boom is at or near the mouth of the Humptulips river. There is no other boom on the river below that of the defendant. The defendant was incorporated in 1893 under the Laws of 1890, State of Washington. The logs put into the river above come down the river in large quantities when there is a freshet in the river. At some such times the boom and the river above the island are completely filled with logs and rubbish, and by the rush of the waters the logs are piled several high above the water, and several feet deep below the surface of the water. It is the effort of the defendant at such times to clean the river by filling the big slough, but at times enough logs will come down to fill both the slough and the boom and river up to the island or above. The river is a swift one, and particularly so when in freshet. The soil of the banks is soft. Plaintiffs' land is not under fence or cultivated. The land has but little value, unless it be for a boom site. Extreme high water or extreme high tides flood most of the lands. That defendant has all tide lands adjoining said lands under contract of purchase."

The bill of complaint avers that complainants are owners of the land therein described, that the same is specially valuable as a site for a log boom, and charges that the defendant wrongfully entered thereon in the year 1893, and has ever since occupied and used a portion thereof, including the river and the slough, and the banks thereof, and certain buildings thereon; and in the argument for the plaintiffs the object of the suit and the material issues are stated as follows:

Object of the suit: "This is an action to recover certain portions of lots 1, 2, and 3 in section 16, township 18 north, range 11 west, in Chehalis county, Washington, abutting on the Humptulips river and a large slough leading out of the river near its mouth, and to recover damages for the unlawful detention of and injury to the said lands and premises, and to recover the rental value of the said lands and premises, and to enjoin the defendant from further use of and injury to the said lands and premises."

Issues: "(1) As to the ownership of the property embraced in plaintiffs' complaint, and consequently plaintiffs' right to maintain this action. (2) Plaintiffs' right to injunctive relief against defendant, prohibiting and restraining it from further occupancy and use of and damage to plaintiffs' property, as well as prohibiting it from obstructing the water way in front of plaintiffs' property. (3) The value of the use of plaintiffs' property, as made by the defendant in building, maintaining, and operating its boom. (4) The question of damage to plaintiffs' property resulting from the construction and operation of plaintiffs' boom, by way of erosions, changes of channels, formation of sand bars, etc."

The complainants contend that the principal part of the relief demanded is an injunction, and that the case is one of equitable cognizance; the recovery of damages being an incidental and minor consideration. The prayer for an injunction contained in the bill of complaint is as follows:

"That the Gray's Harbor Boom Company, upon the final hearing herein, be perpetually enjoined from in any manner interfering with or trespassing upon the premises of the plaintiffs in this complaint described, and from obstructing the said river or said slough."

This prayer follows a prayer for the restitution of the premises, for damages, and for general relief and costs.

From the foregoing it is apparent that the real controversy between the parties is with respect to the right of the defendant to continue the maintenance and use of the boom located at the mouth of the Hump-tulips river, which it constructed, and now has possession of. The conditions are such that a boom is needed at that location for saving the logs, which must be brought to market by floating down the river. The site, therefore, is valuable for that purpose, and the complainants claim title to it as being appurtenant to the land which they claim to own. The defendant denies their title to the land, and also disputes the right of the owner of the land to claim the boom site as being appurtenant thereto, and claims title to the boom by virtue of a franchise acquired by compliance with the laws of the state of Washington, and claims ownership of the boom site by virtue of contracts for the purchase of the bed of the river and slough, as tide lands, from the state of Washington. By tendering an issue as to their ownership of the land and of the boom site, the complainants require the court to decide a disputed question of title to real estate in the possession of the defendant, and by its process to dispossess the defendant and award damages. With respect to these matters the complainants certainly have a plain, adequate, and complete remedy at law, and both parties have a constitutional right to have these issues determined by the verdict of a jury. Discussion of this branch of the case is unnecessary, because the subject is exhaustively treated in the opinion of the supreme court, by Mr. Justice Field, in the case of *Whitehead v. Shattuck*, 138 U. S. 146-156, 11 Sup. Ct. 276, 34 L. Ed. 873.

The question of jurisdiction, however, must be considered with reference to the prayer for an injunction. An analysis of the prayer, which is quoted above, shows that it is divisible into two parts; that is to say, it has two objects or purposes. One is an injunction to prevent continuing trespasses upon and interference with real estate by a defendant in possession thereof; and the other is an injunction against the maintenance of obstructions to navigation in public navigable waters, which the defendant has constructed to serve a useful purpose, claiming a right to do so under the laws of the state. These objects or purposes will be considered separately, in the order stated.

With respect to the first, it is contrary to a general rule of equity practice to grant an injunction, in favor of a complainant whose title is disputed, to restrain trespasses upon land in the possession of the defendant. A modification of this rule is admitted when the defendant is committing waste or irreparable injury, as by destroying val-

uable trees upon the land, or extracting and removing minerals therefrom. *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116. The purpose for which injunctions are granted under this modification of the general rule is to prevent irreparable mischief and maintain the status quo during the pendency of litigation to obtain an adjudication of disputed questions as to the ownership of the property. This is impracticable in this case, for the reason that the only threatened injury to the land in controversy is by obstructing the river so as to cause the water to cut into the banks and wash the soil away. Such injury cannot be prevented by an injunction, otherwise than by a mandatory injunction, requiring the boom to be destroyed, and entire removal of the dolphins and piles set into the bed of the river to hold the boom sticks in place. That form of injunction would change the status quo, instead of preserving it, and destroy property before an adjudication of the defendant's rights respecting the same by a court of competent jurisdiction can be obtained.

Passing now to consideration of the proposed injunction against the alleged obstruction to navigation: If the boom is an obstruction not authorized by law, it is a public nuisance, which may be abated by proper proceedings instituted in behalf of the state or the United States government. It is essential to the maintenance of a suit by any individual to abate a public nuisance for the complainant to show that he is peculiarly affected and especially injured by it. In this case the complainants do not claim to be peculiarly affected or specially injured by the obstruction of navigation, except as owners of the land described in their complaint. They aver that the boom and the logs which it holds constitute a barrier to free ingress and egress to and from the land. Their right, therefore, to complain of the obstruction of navigation and travel upon the river and slough, depends upon their ownership of the land, which is disputed, and until their title to the land shall have been established they cannot prove any special injury. It is true, they claim that their title is fully established by uncontradicted evidence which they have submitted in this case, but the defendant questions the sufficiency of their evidence, and, if I were authorized to decide the questions affecting their title, I would consider the evidence insufficient to establish their claim to the boom site as a valid claim adverse to the state of Washington or its grantee of the tide lands. But the questions as to the validity of their claim and extent of their proprietary rights is not for this court to decide, because a court of equity will not assume jurisdiction to adjudicate disputed questions of title in order to exert its power to protect a right which is a mere incident of ownership. Deprivation of a right to ingress and egress to and from premises not actually occupied and used by the owner is not an irreparable injury similar to the cutting down of valuable trees, but is such an injury as may be taken into account and compensated in assessing damages by a court which may take cognizance of the main controversy.

For the reasons above given, it is my opinion that the case as made by the pleadings and evidence is not one in which the complainants are entitled to relief in a court of equity. Let a decree be entered dismissing the suit for want of jurisdiction.

THE BUENA VENTURA.

THE MERCEDES.

(District Court, S. D. New York. September 23, 1902.)

1. COLLISION—VESSELS CROSSING—INLAND RULES 19, 21, AND 22.

A collision occurred in New York Bay between the steamship Buena Ventura, coming up the channel from the sea, and a barge on the side of the tug Mercedes, which was on a crossing course, going toward the Brooklyn shore. *Held*, under the evidence, that the tug gave timely and proper signal of her intention to cross under the stern of the steamship, as required by articles 19 and 22 of the inland rules, and followed the same by reducing speed, and changing her course to starboard for that purpose; that the steamship, after answering the signal, instead of keeping her course and speed, as required by article 21, changed her course, or sheered to port, striking and sinking the barge, and that she was solely in fault for the collision.

2. SAME—INJURY OF SEAMAN—CONTRIBUTORY NEGLIGENCE.

A seaman injured in a collision was not chargeable with contributory negligence because he went below for his coat after the danger of collision became imminent.

In Admiralty. Suits for collision.

See 108 Fed. 588.

Wheeler & Cortis, for libelant Derby.

James J. Macklin, for libelants Osborn & McCreery.

Peter S. Carter, for the Buena Ventura.

Black & Kneeland, for Sea Ins. Co.

ADAMS, District Judge. These actions arose out of a collision which occurred about 8 o'clock in the morning of the 6th day of April, 1901, between the steamship Buena Ventura and the barge Sampson, which was in tow of the tug Mercedes. The latter with her barge on her starboard side, was proceeding from the landing known as pier 4, Black Tom, on the New Jersey side of the harbor of New York to 41st Street, South Brooklyn. The steamship was bound in from sea, with a cargo of coal. The collision occurred in the vicinity of the Statue of Liberty, near the eastern line of the anchorage ground. The steamship struck the barge on her port bow with her stem, inflicting a wound which caused the barge to sink. Nearly all of her cargo of flour was lost or greatly damaged. The libellant Osborn, who was mate on board of the barge, had his leg broken. Derby, the master of the tug, brought the action against the steamship as bailee to recover the damages to the barge and cargo. Osborn filed a libel against the steamship and the tug on his own behalf. McCreery filed a libel against the steamship and the tug to recover his damages as owner of the barge. The Luckenbachs as owners of the steamship filed a petition to bring the tug in to that action. The Sea Insurance Company filed a petition as insurer of the cargo on the barge to intervene for its interest in the action against the steamship and the tug. The libels and petitions

¶ 1. Collision rules, see notes to *The Niagara*, 28 C. C. A. 232; *The Mount Hope*, 29 C. C. A. 368.

were duly answered. There is no allegation of fault on the part of the barge and liability for the damages rests between the tug and the steamship.

The tug alleges that when she had nearly reached the line of the anchorage ground, the steamship was seen on her starboard bow about a quarter of a mile away bound up the river on the westward side of the channel and had been before concealed from the tug by vessels lying on the anchorage ground; that immediately upon seeing the steamship the tug slowed, stopped her engines and blew to her a signal of one whistle, which signal was answered promptly by a signal of one whistle from the steamship; that the tug thereupon ported her helm in order to pass astern of the steamship and proceeded on the changed course and would have passed astern of the steamship had not the latter changed her course and sheered in towards the tug, which thereupon stopped and reversed, giving alarm whistles but without being able to avoid the collision. The tug's allegations of fault against the steamship are: (1) That the steamship did not keep to the side of the channel or mid channel which lay on her starboard side, although it was safe and practicable for her to do so but ran over close to the port side of the channel and to the line of the anchorage ground; (2) that she did not keep her course, but changed to the port; (3) that after exchanging the signals mentioned, she did not comply therewith but changed to the port; and (4) that she did not stop and reverse in time to avoid the collision.

The steamship alleges that when she was proceeding on a proper course up the channel, her attention was called to the tug and barge, then heading on a line across the course of the steamship; that the steamship proceeded on her course when suddenly the tug blew a signal of one whistle and afterwards ported her helm; that the steamship answered the signal with a similar one and ported her helm, with the effect of changing her course to the starboard; that without any further notice or warning the tug brought the port bow of the barge in contact with the fluke of an anchor which was hanging over the starboard bow of the steamship close to the stern; that the steamship's engines were reversing full speed at the time of the collision and her headway stopped; that the tug after changing her course to the starboard under her port helm, let go the bow line of the barge which caused the barge to sheer across the bow of the steamship and brought about the collision. The steamship's allegations of fault against the tug are (1) in having the steamship upon her starboard side and not keeping clear; (2) in suddenly attempting to cross the course of the steamship; (3) in not stopping and reversing in time; and (4) in letting go the bow line as otherwise the barge would have gone clear.

The other parties in interest allege practically the same faults against the respective vessels and in addition that neither had a proper lookout and did not blow alarm signals.

The main disputes upon the facts are whether the tug having the steamship on her starboard hand improperly attempted to cross the bow of the steamship, in violation of articles 19 and 22 of the Inland Rules, and whether the steamship kept her course under article 21.

There is the usual conflict of testimony in the case, the crew of each vessel sustaining the respective contentions. Those on the steamship say generally that the tug and tow kept on across the bow of the steamship and having crossed and reached a position where, if their course had been maintained, they would have been on the starboard side of the steamship and out of her way, while those on the tug say generally that the tug having stopped to let the steamship pass across her bow and ported her wheel to pass under the steamship's stern in conformity with the obligation of the rules and the signals, the steamship then instead of keeping on her course up the channel or porting to give the tug more room, changed her course to the port and made it impossible for the tug to avoid her.

Apart from the bearing of such of the witnesses as I heard, there is some testimony in addition to that of those on the tug and some circumstances which determine the controversy with respect to the steamship's change of course against her. One of the circumstances is the place of the collision, which is an important factor in the determination, because it tends to show what was done by the vessels. In this connection, the tug says that she stopped her engines before leaving the anchorage ground in the expectation of the steamship keeping up the channel and did not get much if any beyond the anchorage limit forming the western side of the channel, when the collision happened. The steamship says the tug proceeded across the channel from a position four points on the steamship's port bow and had reached a point to the eastward of mid channel, at least a quarter of a mile from the western side of the channel, where she was in a position to let the steamship pass under her stern, when she turned around to the southward and westward bringing about the collision. Important testimony is produced by the tug from the steamship *Mora* which was anchored at the time of the collision to the westward of the anchorage line and a little above the Black Tom Channel. The mate of that vessel was on watch and testified that the place of collision was in the immediate vicinity of his vessel and that the *Buena Ventura* changed her course to the westward prior to the contact. The master of the steamer *Navigator*, who was in a favorable position in the vicinity to see the collision and what preceded it, was called on behalf of the *Buena Ventura*. He said that she starboarded her wheel and sheered to the westward to avoid the tug and tow. Another witness called on behalf of the steamship, the master of the steamer *Hollenbeck*, also in the vicinity, said that at the time the tug blew her signal of one whistle, she was on the southeast side or outer edge of the anchorage ground. Other testimony satisfies me that after the whistle was blown, the tug did not proceed any substantial distance further out but immediately swung around to the southward and westward, as she was able to do without going further to the eastward. It seems to be established that the collision took place in the immediate vicinity of the anchorage ground and that the steamship changed to the westward from her regular course up the channel to reach this place. The master of the steamship said he stopped to permit the tug and tow to cross ahead when she was on his port hand and it is manifest that he

also changed his course to the westward. It was the duty of the steamship to keep her course and speed and the tug was entitled to rely upon her doing so in directing her own navigation.

I regard the fault of the steamship as the proximate cause of the collision. No point is made that the signal of the tug, indicating her intention to pass under the stern of the steamship, was not timely or that the steamship was in any way misled by its absence at an earlier time than it was given, and I do not find fault on the tug's part in any of the particulars alleged.

The libellant Osborn had his left leg broken above the ankle by being jammed in the collision. There does not appear to have been any fault on his part. It is urged for the steamship if he had not gone below to get his coat just before the collision, and with knowledge of the probability of its happening, that he could not have been hurt but such action can scarcely be deemed a contributing fault. Of course, he was bound to avoid the danger, if he could, but he could not be expected to anticipate that if he endeavored to save a necessary garment, it would result in his injury. He was caught in some wreckage and thrown overboard, suffering much pain therefrom, which necessarily continued to some extent, but he seems to have sustained no permanent injury. He had been earning about \$13 per week and lost time from the date of the accident till nearly the first of the following December, a period of about thirty-two weeks. He is entitled to recover for such time the sum of \$416 and in view of the suffering he has undergone and some that he will probably have to endure occasionally for a time, I allow him an additional sum of \$300.

Decree against the steamship and an order of reference to ascertain the other damages. Libels and petitions dismissed as to the tug.

BONANNO et al. v. TWEEDIE TRADING CO.

(District Court, S. D. New York. October 1, 1902.)

1. SHIPPING—CHARTER PARTY—ACTION OF CHARTERER IN PREVENTING ENTRY OF VESSEL AT CUSTOM HOUSE.

A charterer who by obstructive tactics prevents the owner from entering the vessel at the custom house before the time she was required by the charter to be tendered for loading will not be permitted to avail himself of the fact that she was not so entered as a ground for cancelling the charter.

2. SAME—TENDER OF VESSEL FOR LOADING—CUSTOM OF PORT.

To establish a custom of a port requiring vessels to be entered at the customhouse before they can be tendered for loading, to save a cancellation date, it must be shown to be so general and notorious that all persons dealing in the market are presumed to have knowledge of it. Evidence held insufficient to establish such a custom at the port of Baltimore.

3. SAME—CONSTRUCTION OF CHARTER—NOTICE OF READINESS TO LOAD.

A charter provided that loading should commence when written notice was given of the steamer being ready to load, "such notice to be given

¶ 3. Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

between business hours of 9 a. m. and 5 p. m., or 1 p. m. on Saturdays." It was also provided in another clause that, if the ship should not be ready in loading dock before 9 a. m. on April 15th, the charterer should have the option of canceling the charter, to be declared on notice of readiness being given. The vessel arrived at the designated dock on Sunday, April 14th, and gave notice of readiness to load, and a second notice before 9 a. m. Monday. The charterer refused to recognize these notices, claiming that notice could not legally be given, under the terms of the contract, later than 1 p. m. on Saturday, and, on notice being again given after 9 o'clock, it declared its intention to cancel the charter; the purpose being to force a lower rate, freights having declined after the charter was made. *Held*, that the only purpose of the requirement that notice should be given in business hours was to prevent the running of demurrage at a time when the charterer could not load, and that, the vessel being ready to load within the stipulated time, the charter was not subject to cancellation, but she might still give the notice within a reasonable time, any delay being at the expense of the owner.

In Admiralty. Action for breach of charter party.

Ullo & Ruebsamen, for libellants.

Wheeler & Cortis, for respondent.

ADAMS, District Judge. This is an action brought by the owners of the steamship "Vincenzo Bonanno" against the respondent to recover damages alleged to have been sustained through the breach of a charter party made in New York on the 8th day of November, 1900. The main features of the case have been agreed upon and may be briefly stated as follows:

The charter party described the vessel to be "now trading and expected to be ready to load in March, 1901," and provided that she should with all possible despatch proceed to Baltimore, Maryland, or Newport News, Virginia, and there load * * * from the charterer on such dock as might be ordered by it "on or before arrival in New York" a cargo of coal and therewith proceed to certain Mediterranean ports. The charter party further provided:

"2. A sailing telegram to be sent to the Charterers on Steamer leaving her last port, or in default twenty-four hours more to be allowed for loading."

"3. The cargo to be loaded at the rate of 1,000 tons per day (* * *) commencing when written notice is given of Steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours of 9 a. m. and 5 p. m., or 1 p. m. on Saturdays * * *."

"12. Loading hours not to commence before 9 a. m. on ——— if Ship be not ready in loading dock as ordered before 9 a. m. on April 15th * * * Charterers to have the option of cancelling this Charter, such option to be declared on notice of readiness being given."

The proper notice under paragraph 2 of the charter party was duly given on the 5th day of April to the charterer in New York. On the following day the charterer declared Baltimore to be its option as the place of loading, whereupon the ship's agents called attention to the clause which required the vessel to be in her loading berth before 9 o'clock a. m. of April 15th, and asked, as the ship would have a narrow margin in her cancellation date, that orders be given on or before arrival in New York as to the berth. This request was repeated on the 9th day of April on which day the vessel arrived in New York. On the 10th day of April, the charterer promised to name the berth before

the vessel should be ready to sail from New York. On the 12th of April the owners' agents notified the charterer that the steamer would sail for Baltimore at noon on that day and asked that the berth be named before the sailing and on the same day the charterer ordered that she be sent to the wharf of Shaw Brothers, in Baltimore, and be tendered when ready at the office of Barker & McCall, Baltimore. On the same day the ship's agents notified the charterer that the ship was completely discharged of inward cargo and ballast in all the holds, and was proceeding to Baltimore ready to load as ordered. On the same day, the charterer notified the ship's agents that if duly tendered in Baltimore, it would load the ship, but if not tendered within what it considered charter time, it would decide whether it would cancel or not. Later in the day, the charterer notified the ship's agents that its appointment of a berth in Baltimore was based upon a misapprehension of the position taken by them with respect to the time the ship should be ready and tendered in Baltimore, the charterer supposing that the ship's agents conceded the correctness of the charterer's position that the ship must be tendered ready in her loading berth before 1 o'clock p. m. Saturday April 13th, but learning that the ship's agents contested that point, the charterer protested and reserved its rights. Subject however to the protest and reservation, the designation of the wharf mentioned was allowed to stand.

The scene now shifted to Baltimore. The vessel arrived there on Sunday, the 14th day of April, and was duly berthed at the wharf in question and was then in readiness for loading Monday, except so far as the readiness was affected by the obtainment of requisite papers from the Custom House.

The owners sought assiduously to have all the Custom House requirements supplied before 9 o'clock Monday, so that the vessel would then have her papers and be, without question, in legal readiness to perform her contract before that hour, and would have succeeded if the charterer had not interposed obstacles to prevent. Arrangements were made to have the vessel entered at 8:30 o'clock Monday, a half hour before the usual business hours at the Custom House, so as to obviate any possible difficulty with respect to necessary formalities before 9 o'clock. The vessel had been entered in New York from her foreign voyage and was, for the time being, simply in a condition to require action upon a vessel in water ballast. Under the circumstances, it was usual, and not in contravention of statutory law or any regulation of the Treasury Department, for the Custom House officials in Baltimore to facilitate vessels in getting to work. With this view the Custom House was opened before the usual hour of 9 o'clock Monday morning, but the charterer attended there and protested that any action before 9 o'clock would be irregular on the part of the Custom House officials and they would be held responsible for any damages that should occur therefrom. The officials naturally refrained from acting, with the result that the formalities were not completed until after 9 o'clock. There is a very grave doubt whether in view of the vessel's arrival and readiness on Sunday, it was necessary for her to be so entered to save the cancelling date (The Harbinger [D. C.]

50 Fed. 941; *Gill v. Browne*, 3 C. C. A. 573, 53 Fed. 394; *Disney v. Furness* [D. C.] 79 Fed. 810), but if such doubt should be resolved in favor of the charterer, on account of the particular wording of this contract, it would still leave the charterer in the position of having prevented a compliance by obstructive tactics, which the court could not permit it to take advantage of (*Mining Co. v. Humble*, 153 U. S. 540, 552, 14 Sup. Ct. 876, 38 L. Ed. 814).

There was an attempt on the part of the charterer to show that there was a custom in the port of Baltimore requiring vessels to be entered at the Custom House before they could be tendered as ready to save a cancelling date. This charter was under what is known as a Welsh form of coal charter, which had only been used in Baltimore for a short time and was little known. In order that such a custom could have any effect, it would not only have to be consistent with the contract—or at least not inconsistent with it—but shown to be so general and notorious that persons dealing in the market could easily ascertain it and should be presumed to have been aware of it. *Carv. Car. by Sea*, § 185. The evidence failed to establish the existence of such a custom in Baltimore.

The point which presents the most difficulty is that with reference to the notice of readiness. If the owners failed to give the notice according to the terms of the contract, they must abide by the consequences. It is not a question *de minimis* but of contract. The owners gave notice Sunday, the 14th, and repeated it Monday before 9 o'clock. The charterer refused to recognize these notices. Notice was given again, shortly after 9 o'clock Monday, and then the charterer announced its intention of cancelling. Assuming that the vessel was in readiness to load at 9 o'clock Monday, was it still open for the owner to give the required notice of the readiness? The contention of the charterer is that it was impossible for the owners to give notice under the contract unless the vessel arrived in Baltimore before 1 o'clock Saturday, because the time of notice being confined to loading hours between 9 a. m. and 5 p. m. there could be no opportunity for legal notice Monday. According to this contention, though it should become impossible for the owners to fulfill their contract through the vessel sailing from New York too late to arrive in time Saturday morning to berth and give notice, it could still insist upon the vessel being sent to Baltimore before the exercise of its option could be called for and could wait until a notice should be given, which could not be legally given, before declining to load the vessel, even though she was actually ready to begin loading at the stipulated hour Monday at 9 a. m. The contention has little to recommend it. It is urged in extenuation of the position assumed that the vessel under the contract was required to sail from abroad before she did and took the risk of a late arrival. This is possibly true, though the facts in that connection have not been developed in the absence of an issue upon the point. No doubt the owner took the risk of being subjected to a claim for damages, if a late arrival of the vessel should cause any, but the late arrival did not subject them to a forfeiture of the contract, unless it frustrated the adventure, of which there is no claim. The

exaction must depend for sustainment upon the letter of the bond and there is a grave question whether the charterer is in a situation to have its claim allowed in a court of equity. It is said in *Carv. Car. by Sea*, treating of conditions precedent, (section 177):

"And if the charterer, knowing that a condition of the contract is not satisfied, still allows the owner to act upon the charter party, e. g., by sending his ship to the loading port, he cannot afterwards rely upon the breach of that condition as an excuse for not loading her."

In the case of *Dimech v. Corlett*, 12 Moore, P. C., cited in support of the test, there was a question of the breach of a condition precedent in a charter party, through the failure of the owners of the vessel building at Malta to complete her in time, for a voyage to Alexandria. Upon arrival at Alexandria the breach was insisted upon. In delivering the judgment, it was said by Sir John T. Coleridge (page 227):

"It is to be presumed that the Respondent, residing at Malta, knew of the delay in the completion of the vessel, and of the time when it was ultimately in a condition to sail; if so, and he had intended to insist that the charter-party was no longer binding, nothing would have been more easy or just than to give notice to the Appellant that he so regarded it."

And see *Behn v. Burness*, 32 L. J. Q. B. 204, 208.

In the case at bar it appears that the vessel could not reach Baltimore in time to fulfil the conditions of readiness and notice for which the charterer contended, and the charterer must have been aware of that fact, yet not only did it allow the vessel to proceed to Baltimore, upon what it deemed a fruitless voyage, so far as she was concerned, but insisted upon her going, all the time intending to take advantage of the situation to compel the owner to consent to a reduction in the rate of freight, the market having declined before the time of performance was reached.

It is not necessary, however, to rest the decision upon the doctrine of estoppel stated, unless the charterer has made out a sufficiently clear case to establish such a construction of the charter party as would justify the allowance of a cancellation apart from it. In *Dimech v. Corlett*, supra, it was said (page 224):

"It is important not to give to mercantile instruments, such as this, an unnecessarily strict construction, but such a one as, with reference to the context, and the object of the contract, will best effectuate the obvious and expressed intent of the parties."

The intent of the parties here was to provide for the transportation of a cargo of coal at an agreed rate. The vessel was on hand and in readiness to commence loading at the stipulated time. The cargo was ready and there was nothing to prevent the completion of the contract but a question of technical notice claimed by the charterer, which, if allowed, would result in the owners being compelled to take a lower rate of freight than that agreed upon. All considerations of justice are adverse to permitting a cancellation of the contract to effectuate such purpose, in the absence of an unequivocal expression of intent that the right should exist. To sustain its contention, the charterer insists that clauses 3 and 12 of the charter party must be read together so that, as stated above, there could not possibly be a notice of readi-

ness given until after 9 o'clock Monday and that then it was too late for it to be given. Clause 3 related to the loading and payment for loss of time in case of detention. Under that clause, the evident purpose of the provision for the giving of notice of readiness in business hours was to prevent the running of demurrage at a time when the charterer would have no opportunity of loading. There is no necessary connection between the two clauses, as I read them, which would import into the contract, an obligation upon the owners to give the notice within those hours under pain of cancellation of the charter if they failed. A failure would result merely in loss of time, which the owners would have to suffer. Every second of time up to 9 o'clock belonged to the owners to get the vessel in readiness, and when, practically, was the notice to be given if not after 9 o'clock in order to carry out the contract? The answer of the charterer would be that notice could not, practically, be given after 1 o'clock Saturday, but as that would cut off the owners' time to get ready up to 9 o'clock Monday, it cannot be sustained. It seems to me that the intention was to compel the owners to give notice within a reasonable time, after the vessel should be ready within the contract limits, any delay being at the owners' expense, and that the charterer should then have a reasonable time to declare its option. I hold that notice to the charterer was duly given.

It is claimed by the charterer that if the libel is sustained, the damages should be assessed at one shilling per ton, as the charterer offered to load the vessel, reserving all rights, upon a precisely similar charter, at that much less than the rate provided for in the charter which is the subject of the dispute. The libellants on the other hand claim that the offer was only conditional and that they actually suffered damages in a much larger sum, which they can show upon a reference. The reference is allowed but if it should turn out that the measure of damages is governed by the offer, the expense will have to be borne by the libellants.

Decree for libellants with order of reference.

KIDDER v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court, D. Indiana. October 17, 1902.)

No. 10,109.

1. UNITED STATES COURTS—REMOVAL OF CAUSES—RIGHT OF INTERVENERS.

Where, in an action to recover the proceeds of a check, petitioners attempted to intervene and claim the proceeds after the original defendant had lost the right to remove the cause to the federal courts by filing an answer and submitting itself to the jurisdiction of the state court, such interveners were not entitled to removal for the reason that they were not defendants, and, having connected themselves with the suit at the time it was not removable by the original defendant, they had no right of removal.

SAME—DECISION OF STATE COURT—EFFECT ON FEDERAL COURT.

The circuit court of the United States has no power to review a decision of the state court denying intervention on a petition by the interveners to remove the cause; such decision, however erroneous, being binding on the federal court.

At Law.

McNutt & McNutt, for plaintiff.

Lucius B. Swift and Samuel R. Hamill, for defendant.

BAKER, District Judge. This suit was commenced in the circuit court of Vigo county, Ind., on February 12, 1902. It was an action at law to recover the contents of a check for \$10,000 drawn by the defendant on the Wisconsin National Bank in favor of the plaintiff, which check had been dishonored by the bank refusing to accept or pay the same. Pursuant to the statute of this state, the plaintiff, by indorsement on her complaint, fixed February 24, 1902, as the day upon which the defendant was required to appear and plead. On February 25, 1902, the defendant entered its appearance, and filed its answer. The answer admitted its liability upon the check, and then proceeded to set up at length that the First National Bank of Providence, the Mechanics' National Bank of Providence, the International Trust Company of Boston, the First National Bank of Hartford, the Girard National Bank of Philadelphia, the Union National Bank of Woonsocket, the Old National Bank of Providence, and the Merchants' National Bank of Providence had served notice upon it that they were the real equitable owners of the contents of the check, and that, if it permitted the check to be paid, it would do so at its peril. In consequence of this notice the defendant stopped the payment of the check. The answer is in the nature of an interplea, offering to bring the amount of the check, with interest and costs, into court, and asking that the above-named corporations be substituted as defendants, and that it be dismissed out of the suit. It was such an answer and interplea as entitled the defendant to the relief prayed for, but the state court denied it. On March 27, 1902, the above-named banks and trust company filed their joint petition of intervention to be made parties defendant, setting up their interest in the

contents of the check. Their petition of intervention presented a state of facts entitling them to be made parties defendant. The state court, however, denied their petition, and refused to permit them to become defendants. At the time of the filing of their petition of intervention, they filed a petition and bond for the removal of the cause into this court. The petition and bond are formal, setting up every fact necessary to a removal. The court overruled the petition, and refused to surrender jurisdiction of the cause. The interveners, however, procured a transcript of the proceedings and papers in the state court, and have docketed the cause here as one properly removed. The plaintiff now moves the court to remand on the ground that the cause is not a removable one.

The complaint avers that the plaintiff is a citizen and resident of the state of Indiana, and that the defendant is an insurance company organized and carrying on business under the laws of the state of Wisconsin, and that the amount in controversy is the contents of a \$10,000 check. The cause was, therefore, removable if the defendant had seasonably chosen to exercise its right. It did not do so, but answered, and submitted itself to the jurisdiction of the state court; and on March 27, 1902, when the interveners filed their petition of intervention, the defendant, the Northwestern Mutual Life Insurance Company, had ceased to have any right of removal. In this posture of the case the interveners had no right of removal.

1. They were not parties defendant. The statute does not authorize the removal of a suit by any one except "the defendant or defendants therein." It makes no provision for removal at the instance of persons who may be pecuniarily interested in the subject-matter in controversy. It makes no provision for compelling or allowing other parties to be impleaded or substituted as defendants, and thereby make a removable cause out of one which was previously not removable. The interveners, however, contend, on the authority of *Snow v. Railroad Co.* (C. C.) 16 Fed. 1, *Hack v. Railway Co.* (C. C.) 23 Fed. 356, and *American Nat. Bank v. National Benefit & Casualty Co.* (C. C.) 70 Fed. 420, that, the state court having wrongfully denied their right to intervene and become defendants, they should, for the purposes of removal, be deemed to be defendants. These cases, in so far as they tend to sustain this contention, are, in my opinion, erroneous, and ought not to be regarded as controlling. The state court had jurisdiction of the petition of intervention and of the parties, and its decision denying the right of intervention, however erroneous, is binding and conclusive on this court. It cannot, for the purpose of giving the interveners a standing as defendants, be treated as a nullity by a court of co-ordinate jurisdiction. The circuit courts of the United States are not, by the removal act, constituted courts of review, with authority to reverse or hold for naught the decisions of the state courts on questions of who are entitled to intervene in suits pending therein. It cannot be successfully maintained, when a state court has refused to permit a person to become a defendant, that he is a defendant because he ought to have been made one. These cases are in sharp conflict with the doc-

trine announced by the supreme court in *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49, and *Guion v. Insurance Co.*, 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895. These cases hold that, where a petition of intervention has been filed, but not granted, the interveners are not parties to the suit, and have no right of appeal. In the first of these cases the supreme court, speaking through Chief Justice Waite, after reviewing a number of decisions, say:

"From this it is apparent that, if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; and, while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted, or has been treated, as a party."

In the last case above cited, *Guion's* petition of intervention had been denied, and an appeal had been allowed him by the lower court. In sustaining a motion to dismiss the appeal, the supreme court said:

"We decided in *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49, that such an appeal could not be taken. He had applied for leave to become a party, but this leave was not given. So he is not a party to the decree."

The interveners are not parties to the suit, and so they cannot remove it.

2. But, if the interveners are to be deemed parties defendant for the purposes of a removal because the court wrongfully denied their petition of intervention, the cause would still have to be remanded. When the petition of intervention was filed, the defendant, the Northwestern Mutual Life Insurance Company, had ceased to have any right to a removal. By connecting themselves voluntarily with a suit at the time not removable, the interveners subjected themselves to the disability of the Northwestern Mutual Life Insurance Company in respect to a removal. Where the defendant in an action pending in a court of the state has no right of removal, interveners, by voluntarily coming in as defendants, cannot make the cause a removable one. *Jefferson v. Driver*, 117 U. S. 272, 274, 275, 6 Sup. Ct. 729, 29 L. Ed. 897; *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. 85, 28 L. Ed. 186; *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. Ed. 455; *Speckart v. Bank*, 38 C. C. A. 682, 98 Fed. 151; *Bank v. Schuster*, 29 C. C. A. 649, 86 Fed. 161, 52 U. S. App. 612; *Wagon Works v. Benedict*, 14 C. C. A. 285, 67 Fed. 1, 32 U. S. App. 116; *Commutation Co. v. U. S.*, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782.

For these reasons the cause must be remanded. So ordered.

O'BRIEN et al. v. MILLER et al.

(Circuit Court, D. Connecticut. September 16, 1902.)

No. 491.

1. COMPLAINT—SUFFICIENCY OF ALLEGATIONS.

Where a mortgage gave the mortgagee the right of possession in case of default continuing for two months after demand, an allegation by the mortgagee in a complaint against a third person for injuring the property that demand had been made by plaintiff more than two months before the acts complained of, but without giving the date, is sufficient against a demurrer.

2. MORTGAGE—INJURY TO MORTGAGED PROPERTY—RIGHT OF ACTION BY MORTGAGEE.

Under the law of Connecticut, a mortgagee having the right of possession, although not in fact in possession, may maintain an action against a third person for an injury to or removal of a part of the mortgaged property, where it is alleged that the act of defendant deprived plaintiff of his sole security, and that the mortgagor is insolvent.

3. CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION.

A description of property in a chattel mortgage which is good as between the parties is prima facie sufficient as between the mortgagee and a trespasser who injures or converts the property after default in payment of the mortgage.

At Law. On demurrer to substituted complaint.

John C. Chamberlain, for plaintiffs.

Stoddard & Bishop, for defendants.

TOWNSEND, Circuit Judge. Demurrer to substituted complaint. The complaint alleges that complainants on July 27, 1899, were the owners, by virtue of a certain mortgage for \$100,000, of certain real and personal property situated at Bridgeport, said mortgage having been immediately recorded in the land records at Bridgeport; that on said day said mortgage was in default; and that:

"(7) On said day the said defendants unlawfully and without color of right, as against these plaintiffs, took possession of said property, converted it to their own use, sold, broke up, and destroyed the same; but the plaintiffs have no knowledge as to what portion was sold, and what was converted to their own use. Said property was valued at over \$100,000, as the plaintiffs are informed and believe.

"(8) The said value of said mortgaged property and premises consisted entirely of the property taken and destroyed by the defendants, and constituted the sole security for said mortgage debt, and by its conversion and destruction the defendants took from the plaintiffs their sole security for said debt, and utterly destroyed said security to them.

"(9) Said corporation, the Connecticut Reduction Company, the maker of said mortgage, is insolvent, and without ability to pay any portion of said bonds or the interest due thereon, and, unless the plaintiffs can recover the same from these defendants in this action, no money can be collected from any source to pay any part of the indebtedness represented by said bonds."

The real estate is described as all of the buildings, fences, and structures placed on the tract of land described, together with tanks, vessels, boilers, and much other apparatus claimed to be fixtures. Apparently

the land on which this property is situated was leased. Defendants have not questioned that such property situated on leased land is real estate. The personal property consists of sets of tools, and implements, materials, and fertilizers. Defendants demur upon the ground that there is no allegation that complainants were in possession, or had the right of possession, of the real estate and fixtures, nor that the acts of the defendants rendered, or were intended to render, complainants' mortgage security inadequate, or would so impair the value of the property as to injure their interests therein. Defendants also demur to the complaint so far as it relates to the personal property, on the ground that there is no allegation that complainants had either possession or right of possession of the personal property described in the complaint as required by the statute. Said mortgage does not in fact contain such particular description. The defendants' claim that there is no allegation showing the right of possession in the complaint is made upon the ground that it does not appear that there was a default in the condition of the mortgage. The mortgage contains the provision that the mortgagor was to have full possession until default in payment of principal and interest, or some part thereof, but, in case default in the payment of any interest should continue for a period of two months after demand made for payment at the financial agency of the reduction company at the city of New York, the mortgagees should take possession. The allegation upon this point is:

"(4) Upon said mortgage upon said 27th day of July, 1899, there was due, by virtue of the bonds secured thereby, the sum of \$100,000, together with unpaid interest to be added thereto, and said mortgage was in default by virtue of the fact that long prior thereto the interest on all of the aforesaid bonds issued and secured by said mortgage was in default, and after said default a demand had regularly and duly been made upon said company, at the financial agency of the reduction company in the city of New York, for the payment of said interest, and said default had continued for a period of more than two months after said demand, and said period of two months had expired long prior to the conversion hereinafter set up."

Defendants claim that the time of the demand should be specifically alleged. While it would have been proper to have alleged the specific date of the demand, and this would, of course, have been necessary for the purpose of charging an indorser, yet, as no authority has been cited by defendants in support of their contention, I am inclined to think that the defect should have been remedied by motion to make the statement more specific, rather than by demurrer, and that the demurrer on this ground should not be sustained.

The defendants rely upon *Cooper v. Davis*, 15 Conn. 560, and *McKelvey v. Creevey*, 72 Conn. 464, 45 Atl. 4, 77 Am. St. Rep. 321, in contending that no action by a mortgagee out of possession lies for injury to or removal of a part of mortgaged property. In both cases the article actually removed was not of great value, and could not have seriously affected the security of the mortgage. In the present case it is admitted by the demurrer that the sole value of the mortgaged property and premises consisted of the property taken and destroyed by the defendants, and that, by its conversion and destruction, defendants took away from complainants their sole security. If the

allegations of this complaint are true, and there is no justification for the acts of the defendants, complainants ought, in justice, to have some remedy.

The description of the personal property is not sufficient to make the mortgage valid as against a bona fide purchaser without notice, or an attaching creditor or trustee in insolvency. The mortgage was, however, good as to this property, between the parties, after default. It sufficiently appears that the property was not taken in the ordinary course of business, and, if the defendants were actually ignorant of the mortgage, or have other justification for taking the property, they can set it up by way of defense.

An order may be entered overruling the demurrer.

SEABOARD NAT. BANK v. SLATER.

(Circuit Court, D. Connecticut. September 16, 1902.)

No. 1,024.

1. CORPORATIONS—LIABILITY OF STOCKHOLDERS TO CREDITORS—UNPAID SUBSCRIPTIONS.

Const. Neb. art. 11b, § 4, which provides that the original subscribers to the stock of a corporation shall be individually liable to creditors, after the property of the corporation shall have been exhausted, "to the extent of their unpaid subscriptions, and the liability for unpaid subscriptions shall follow the stock," does not impose liability upon a holder of stock which was never subscribed for, but was delivered to him as a bonus for making a loan to the corporation, without any agreement or expectation that it should be paid for.

In Equity. On demurrer to amended bill.

Charles A. Clark and Bristol, Stoddard & Bristol, for complainant.
Brandeis, Dunbar & Hutter and Frank T. Brown, for respondent.

TOWNSEND, Circuit Judge. Since the sustaining of the demurrer in this case (105 Fed. 179), complainant has amended its bill, and the defendant demurs to the bill as finally amended. The facts are set out more in detail. The principal new allegations necessary to be considered are to the effect that 6,046 shares of the 6,246 shares of the capital stock of the Lincoln Street Railway Company, held by defendant, were transferred to him upon a written agreement, which recited that the corporation was in an embarrassed condition; that, to enable it to proceed and to carry on its necessary and legitimate business and affairs, sums of money were required from time to time, amounting in the aggregate to \$100,000; that the corporation agreed to repay said sums with interest, and to procure and transfer to the defendant 6,046 shares of its common stock to and for his absolute

¶ 1. Stockholders' liability to creditors in equity, see notes to *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.

See *Corporations*, vol. 12, Cent. Dig. § 952.

use free from all liens, claims, and trusts, as a bona fide consideration for making such loan, and guarantied that all of said stock should be full-paid and nonassessable; that defendant afterward loaned between \$15,000 and \$20,000, and then repudiated the contract, and refused to make any further loans or advances. Upon these allegations there was never any agreement on Slater's part to pay for this stock. It was never subscribed for. Even if he could be held liable, upon proper allegations, for breach of contract in not loaning the full amount promised by him, the facts did not place him under any obligation to pay for the stock thus transferred. There is nothing in the complaint which shows that the complainant or any creditors of the company have suffered from the transfer of stock to defendant, or calls for any change in the ruling made on the former demurrer.

It is unnecessary to pass upon the other questions raised by the pleadings.

The demurrer is sustained.

SCHLICHT HEAT, LIGHT & POWER CO. v. ÆOLIPYLE CO.

(Circuit Court, S. D. New York. October 20, 1902.)

Motion to Modify Injunction Order. Denied.

For original opinion, see 117 Fed. 299.

COXE, Circuit Judge. The motion is denied for the reason that in my opinion it is not necessary. The opinion and the decree filed herein explicitly state what the defendant may and may not do. If it uses the Æolipyle at the smoke collar of a stove or furnace or within six inches of such smoke collar it does not infringe. If, on the other hand, it uses the Æolipyle at a greater distance than this it does infringe. It is not possible that the defendant or the public can be misled as to the respective rights of the parties.

MEMORANDUM DECISIONS.

ALFRANK v. MINNESOTA DOCK CO. (Circuit Court of Appeals, Sixth Circuit. June 11, 1902.) No. 1,067. In Error to the Circuit Court of the United States for the Northern District of Ohio. J. H. McGiffert, for plaintiff in error. Ford, Snyder, Henry & McGraw, for defendant in error. Before LURTON, DAY, and SEVERENS, Circuit Judges. No opinion. Affirmed, with costs, by consent of the parties.

AMERICAN COLORTYPE CO. v. CONTINENTAL COLORTYPE CO. et al. (Circuit Court of Appeals, Sixth Circuit. August 28, 1902.) No. 923. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Francis Lackner, Otto C. Butz, and Amos C. Miller, for appellant. Simeon P. Shope, John C. Mathis, and John M. Zane, for appellees. No opinion. Dismissed on motion of appellant.

BALTIMORE & O. R. CO. v. WHERRY. (Circuit Court of Appeals, Second Circuit. June 16, 1902.) No. 95. In Error to the Circuit Court of the United States for the Eastern District of New York. This cause comes here upon writ of error to review a judgment of the circuit court, Eastern district of New York, upon a verdict in favor of defendant in error, who was plaintiff below. The action was for personal injuries sustained by plaintiff while employed as a postal clerk in a car which was being transferred in Philadelphia from a train which had arrived from Washington to a train which was about to leave for Jersey City. A. B. Boardman, for plaintiff in error. Geo. A. Voss, for defendant in error. Before LACOMBE and TOWNSEND, Circuit Judges, and ADAMS, District Judge.

PER CURIAM. The propositions advanced by both sides upon the argument in this court are not secundum allegata. The defendant contends that its road carried the plaintiff from Washington to Philadelphia, while his journey from Philadelphia to Jersey City was to be made upon another road. But the answer, as the trial judge pointed out, admitted that the Philadelphia-Jersey City train was a "train of the defendant." The plaintiff seeks to avoid the operation of a statute of Pennsylvania by insisting that the defendant had specifically contracted to transport him as a passenger the whole distance from Washington to Jersey City. But his complaint alleged no such contract. His cause of action is presented as one sounding in tort, for a breach of duty owed to him, not for a failure to perform a contract. It is ordinarily an unsatisfactory disposition of an appeal to send a cause back for a new trial because of some question of pleading; the better way being to amend the pleadings to conform to the proof. But the difficulty with this cause seems to be that the "contract theory" was an afterthought, not suggested till the case was given to the jury. In consequence, neither side directed its proof to showing, upon the theory that there was some contract, precisely what the contract was. The action was tried as an action of tort, and in consequence the record does not satisfactorily present the facts by which the soundness of the propositions now advanced in argument can be tested. The judgment, therefore, is reversed, and a new trial ordered. Before it is had the parties may move the circuit court for leave to amend their pleadings, so as to allege the cause of action or defense to which their respective proofs are to be directed. Costs to abide event of new trial.

BROWN et al. v. MITCHELL. (Circuit Court of Appeals, Third Circuit. September 8, 1902.) No. 43. Appeal from the Circuit Court of the United States for the District of New Jersey. Agreement of counsel to docket and dismiss appeal under rule 20 (31 C. C. A. clix, 90 Fed. clix).

DAYTON COAL & IRON CO. v. NORRIS. (Circuit Court of Appeals, Sixth Circuit. May 6, 1902.) No. 985. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. Burkett, Miller & Mansfield, for plaintiff in error. Williams & Lancaster, Thomas & Thomas, and A. P. Haggard, for defendant in error. Before LURTON and DAY, Circuit Judges, and WANTY, District Judge. No opinion. Affirmed, with costs.

In re FIRST NAT. BANK OF YOUNGSTOWN. (Circuit Court of Appeals, Sixth Circuit. May 15, 1902.) No. 1,042. Petition to Review an Order of the District Court of the United States for the Northern District of Ohio. Arrel McVey & Robinson, for petitioner. Frank L. Baldwin, for bankrupt. Before LURTON, DAY, and SEVERENS, Circuit Judges. No opinion. Affirmed, with costs.

GAFFNEY v. PRUETT. (Circuit Court of Appeals, Fifth Circuit. October 13, 1902.) No. 1,133. In Error to the Circuit Court of the United States for the Eastern District of Texas. J. F. Lanier (George C. Greer and H. B. Short, on the brief), for plaintiff in error. Presly K. Ewing and S. R. Perryman (Perryman & Kottwitz and Ewing & Ring, on the brief), for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court is affirmed.

LANYON ZINC CO. et al. v. BROWN et al. (Circuit Court of Appeals, Eighth Circuit. September 5, 1902.) No. 1,786. Appeal from the Circuit Court of the United States for the District of Kansas. Albert H. Walker, John H. Atwood, and William W. Hooper, for appellants. Philip C. Dyrenforth, for appellees. No opinion. Affirmed, with costs.

LOEB v. TRUSTEES OF COLUMBIA TP., HAMILTON COUNTY. (Circuit Court of Appeals, Sixth Circuit. May 14, 1902.) No. 738. In Error to the Circuit Court of the United States for the Southern District of Ohio. O. Hammond Avery, H. D. Peck, and John W. Warrington, for plaintiff in error. Louis A. Ireton and Burch & Johnson, for defendant in error. Before LURTON, DAY, and SEVERENS, Circuit Judges. No opinion. Dismissed on stipulation of counsel.

LOUISVILLE & N. R. CO. v. CROSSLEY. (Circuit Court of Appeals, Fifth Circuit. October 21, 1902.) No. 1,194. In Error to the Circuit Court of the United States for the Northern District of Georgia. Jos. B. Cumming, Bryan Cumming, and Sanders McDaniel, for plaintiff in error. Hoke Smith, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court is affirmed.

MCDOWELL v. FRATERNAL UNION OF AMERICA. (Circuit Court of Appeals, Fifth Circuit. October 7, 1902.) No. 1,124. In Error to the Circuit Court of the United States for the Northern District of Georgia. Grigsby E. Thomas, Jr., and B. H. Hill, for plaintiff in error. Shepard Bryan, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court is affirmed. See Bigelow v. Insurance Co., 93 U. S. 284, 23 L. Ed. 918.

MADDOX v. CORNELL et al. (Circuit Court of Appeals, Fifth Circuit. October 21, 1902.) No. 1,158. Appeal from the District Court of the United States for the Northern District of Georgia. P. H. Brewster, Arthur Heyman, and R. T. Dorsey, for appellant. John M. Slaton, Benj. Z. Phillips, and J. D. Kilpatrick, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As the record shows that the appellant, H. E. Maddox, denies that he is, or was at the time bankruptcy proceedings were instituted, a partner in the firm of W. E. Small & Co., and as said H. E. Maddox was not adjudicated a bankrupt, and the judgment adjudicating W. E. Small & Co. and W. E. Small and J. S. Jones individually, was made without prejudice in any way whatever to the rights of H. E. Maddox to be heard hereafter upon any question involving his responsibilities as an alleged member of the firm of W. E. Small & Co., the said H. E. Maddox has no appealable interest therein, and this appeal is dismissed.

MADDOX v. CORNELL et al. (Circuit Court of Appeals, Fifth Circuit. October 21, 1902.) No. 1,159. Petition to Review Proceedings in the District Court of the United States for the Northern District of Georgia. P. H. Brewster, Arthur Heyman, and R. T. Dorsey, for petitioner. Jno. M. Slaton, Benj. Z. Phillips, and J. D. Kilpatrick, for respondents. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The petition to review is denied.

OTTO v. GRAEFF. (Circuit Court of Appeals, Third Circuit. September 6, 1902.) No. 44. Appeal from the District Court of the United States for the District of New Jersey. No opinion. Cause docketed and dismissed by appellee, under rule 16 (31 C. C. A. clix, 90 Fed. clix).

PEARCE et al. v. OLD COLONY STEAMBOAT CO. (Circuit Court of Appeals, First Circuit. April 24, 1900.) On Rehearing.

PER CURIAM. Judgment vacated, decree reversed, and case remanded to the district court. See 38 C. C. A. 668, 670, 98 Fed. 131, 133.

BUCKER v. COCO-COLA CO. (Circuit Court of Appeals, Fifth Circuit. October 21, 1902.) No. 1,161. In Error to the Circuit Court of the United States for the Northern District of Georgia. E. A. Angler and Geo. L. Bell, for plaintiff in error. Reuben R. Arnold, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court is affirmed.

SHEPARD et al. v. BARRON. (Circuit Court of Appeals, Sixth Circuit. May 6, 1902.) No. 993. Appeal from the Circuit Court of the United States for the Southern District of Ohio. Pugh & Pugh, for appellants. Dyer, Williams & Stouffer, for appellee. Before LURTON, DAY, and SEVERENS, Circuit Judges. No opinion. Dismissed, with costs, for want of jurisdiction.

THE STARTLE. (Circuit Court of Appeals, Third Circuit. September 24, 1902.) No. 31. Appeal from the District Court of the United States for the District of Delaware.

PER CURIAM. This cause being called in its regular order, and on motion of George A. Elliott, Esq., of counsel for appellant, it is ordered, adjudged, and decreed by this court that the appeal in this cause be, and the same is hereby, dismissed at the costs of appellant.

TAYLOR v. DECATUR MINERAL & LAND CO. (Circuit Court of Appeals, Fifth Circuit. October 17, 1902.) No. 1,115. Appeal from the Circuit Court of the United States for the Northern District of Alabama. See 112 Fed. 449, and 115 Fed. 1022. Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The petition for hearing herein is granted, and this case is ordered set down for hearing on regular assignment, to be heard by a full bench.

UNITED STATES v. BRAY et al. (Circuit Court of Appeals, Eighth Circuit. September 1, 1902.) No. 1,756. In Error to the District Court of the United States for the District of Colorado. Earl M. Cranston and Ernest Knaebel for the United States. Milton J. Stair and John H. Leiper, for defendants in error. No opinion. Affirmed, without costs to either party in this court.

WILKINS v. MUTUAL GOLD & COPPER MIN. CO. (Circuit Court of Appeals, Eighth Circuit. August 18, 1902.) No. 1,779. In Error to the Circuit Court of the United States for the District of Wyoming. Henry C. Hall, K. R. Babbitt, R. C. Thayer, and Charles H. Bryce, for plaintiff in error. Charles F. Fishback and John S. Williams, for defendant in error. No opinion. Dismissed, pursuant to stipulation; each party to pay his own costs.

WRIGHT, Comptroller General, v. LOUISVILLE & N. R. CO. (Circuit Court of Appeals, Fifth Circuit. October 13, 1902.) No. 1,156. Appeal from the Circuit Court of the United States for the Northern District of Georgia. For opinion below, see 116 Fed. 669. Boykin Wright and J. M. Terrell, for appellant. Jos. B. & Bryan Cumming and King & Spalding, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The decree of the circuit court is affirmed.

HARTFORD RUBBER WORKS CO. v. CONSOLIDATED RUBBER TIRE CO. (Circuit Court, D. New Jersey. May 8, 1902.) J. Lafin Kellogg, for the motion. Joseph Kling, opposed.

KIRKPATRICK, District Judge. The bill of complaint in this cause is substantially the same as that of *India Rubber Co. v. Same Defendant*, 117 Fed. 354, and the relief sought of the same character, being money damages for contracts broken. The cases were heard together. For reasons given in the case above referred to, judgment must be for the defendant on demurrer, and the bill dismissed.

END OF CASES IN VOL. 117.